

63787-8

63787-8

NO. 63787-8-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I
(King County Superior Court Cause No. 07-2-29545-3 SEA)

SUSAN CAMICIA

Appellant,

vs.

CITY OF MERCER ISLAND

Respondent.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Laura Inveen, Judge

REPLY BRIEF OF APPELLANT

John Budlong, WSBA #12594
Faye J. Wong, WSBA #30172

LAW OFFICES OF JOHN BUDLONG
100 Second Avenue South
Edmonds, Washington
(425) 673-1944

Attorneys for Appellant Susan Camicia

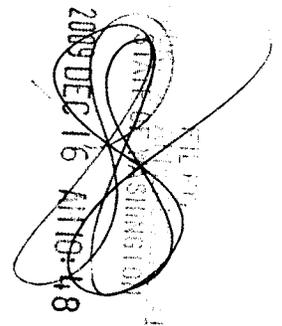


TABLE OF CONTENTS

I. ARGUMENT 1

A. RCW 4.24.210 Does Not Immunize Landowners Who Maintain Unsafe Conditions on Public Transportation Routes 1

B. Recreational Use Immunity Does Not Apply When a Landowner Lacks Authority to “Allow” Land to Be Used for Outdoor Recreation Purposes 12

C. Recreational Use Immunity Is Not Available to Landowners Who Charge Fees to Maintain Lands for Outdoor Recreation 15

D. The City’s Recreational Use Immunity Defense Should Be Dismissed for Lack of Evidence 18

E. The City’s Declarations Do Not Raise Issues of Material Fact that Preclude Summary Judgment 20

F. Failures of Proof and Credibility Issues Require Reversal of the City’s Summary Judgment 23

II. CONCLUSION 25

TABLE OF AUTHORITIES

Washington Cases:

Chamberlain v. Department of Transportation,
79 Wn. App. 212, 901 P.2d 344 (1995). 3, 7-10

Cultee v. City of Tacoma
95 Wn. App. 505, 977 P.2d 15 (1999) 8

Faust v. Albertson,
166 Wn.2d 653, 211 P.3d 400 (2009) 24

Gaeta v. Seattle City Light,
54 Wn. App. 603, 774 P.2d 1255 (1989) 2-5, 8

Impecoven v. Department of Revenue,
120 Wn.2d 357, 841 P.2d 752 (1992) 19-20

Jones v. Stebbins,
122 Wn. 2d 471, 860 P.2d 1009 (1993) 16

Keller v. City of Spokane,
146 Wn.2d 237, P.3d 845 (2002) 2, 3, 9, 23

Kucher v. Pierce County,
47 Wn. App. 506, 736 P.2d 275 (1987) 9

McCarver v. Manson Park & Recreation Dist.,
92 Wn.2d 370, 597 P.2d 1362 (1979) 11

New Meadows Holding Co. v. Washington Water Power Co.,
102 Wn.2d 495, 687 P.2d 212 (1984) 16

Nielsen v. Port of Bellingham,
107 Wn. App. 662, 27 P.3d 1242 (2001) 2, 5-9, 14, 18, 22

<i>Plano v. City of Renton</i> , 103 Wn. App. 910, 14 P.3d 871 (2000)	8, 14, 18, 22
<i>Riksem v. City of Seattle</i> , 47 Wn. App. 506, 736 P.2d 275 (1987)	6, 9-12
<i>Ruff v. King County</i> , 125 Wn.2d 697, 887 P.2d 886 (1995)	2
<i>Ruffer v. St. Francis Cabrini Hosp.</i> , 56 Wn. App. 625, 784 P.2d 1288 (1990)	23
<i>Stewart v. State</i> , 92 Wn.2d 285, 597 P.2d 101 (1979)	2
<i>Tennyson v. Plum Creek Timber Co.</i> , 73 Wn. App. 550, 872 P.2d 524 (1994)	12, 21
<i>Widman v. Johnson</i> 81 Wn. App. 110, 912 P.2d 1095 (1996)	3, 10
 <u>Constitution, Statutes, and Court Rules:</u>	
RCW 4.24.210	2, 5-9, 11-15, 18, 20, 22
RCW 4.24.210(1)	9
WAC 308-330-555	15
 <u>Other Jurisdictions:</u>	
<i>Smith v. Southern Pac. Transp. Co., Inc.</i> , 467 So.2d 70 (La.Ct.App.1985)	2, 4, 5, 16

I. ARGUMENT

A. RCW 4.24.210 Does Not Immunize Public Landowners Who Maintain Unsafe Conditions on Public Transportation Routes.

The City of Mercer Island contends that public entities are immune from liability for injuries that result from unsafe conditions on any public transportation routes that can be used for outdoor recreation:

[T]he I-90 Trail is, by definition, land used for “bicycling”—and thus, explicitly protected by the recreational use immunity statute...

Because the legislature included “bicycling” within the ambit of recreational immunity, the analysis should end there.¹

Under RCW 4.24.210, the term “outdoor recreation... includes, but is not limited to” the following activities, all of which occur on public transportation routes:

hiking, bicycling, skateboarding or other nonmotorized wheel-based activities, ...the riding of horses or other animals, ... pleasure driving of off-road vehicles, snowmobiles, and other vehicles, ... nature study,... viewing or enjoying historical, archaeological, scenic, or scientific sites.”

The City’s sweeping thesis that RCW 4.24.210 bars the claims of any person injured on public transportation routes while engaging in any of these recreational activities is contrary to the rule in *Keller v. City of*

¹Respondent’s Brief, pp. 1, 16.

Spokane that “a municipality owes a duty to all persons, whether negligent or fault-free, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel.”² It also is contrary to *Nielsen v. Port of Bellingham*,³ and *Gaeta v. Seattle City Light*,⁴ which adopted the analysis in *Smith v. Southern Pac. Transp. Co.*⁵ that recreational use immunity does not bar claims against a city for injuries arising from dangerous conditions on a public thoroughfare in a city park that the city agreed to maintain.

The Washington Legislature has never declared that RCW 4.24.210 abrogates a municipality’s duty to maintain safe public transportation routes any time a member of the public uses them to hike,

²146 Wn.2d 237, 249, 44 P.3d 845 (2002). The State and its other political subdivisions have the same duty to exercise reasonable care to maintain their public transportation routes in a reasonably safe condition for ordinary travel. See *Stewart v. State*, 92 Wn.2d 285, 295, 597 P.2d 101 (1979) (“the State was obligated to use due care to make certain that the freeway met the standard of reasonable safety for the traveling public.”); and *Ruff v. King County*, 125 Wn.2d 697, 704, 887 P.2d 886 (1995) (“A county has a duty to maintain its roadways in a reasonably safe condition for ordinary travel....”)

³107 Wn. App. 662, 666-67, 27 P.3d 1242 (2001).

⁴54 Wn. App. 603, 774 P.2d 1255 (1989).

⁵467 So.2d 70 (La.Ct.App. 1985).

bicycle, drive for pleasure, or view scenic sites. The City's brief does discuss a municipality's duty under *Keller v. Spokane* to maintain its public transportation routes in a reasonably safe condition for ordinary travel, regardless of whether they are being used for transportation, commerce or outdoor recreation.

The City argues that "the statute has been repeatedly applied to accidents on roads and bridges"⁶, referring to *Gaeta v. Seattle City Light*⁷, *Chamberlain v. Department of Transp.*⁸, and *Widman v. Johnson*.⁹ But those cases do not confer immunity on a public landowner that fails to maintain its public transportation routes in a reasonably safe condition for persons like Susan Camicia, who were accidentally injured while using them for transportation or commerce.

In *Gaeta*, the plaintiff was injured in a motorcycle accident on the roadway over Diablo Dam while looking for a place to buy gas. The United States government had required Seattle City Light to keep the

⁶Respondent's Brief, p. 17.

⁷54 Wn. App. 603, 774 P.2d 1255 (1989).

⁸79 Wn. App. 212, 221, 901 P.2d 344 (1995).

⁹81 Wn. App. 110, 912 P.2d 1095 (1996).

roadway over Diablo Dam open to public recreational use as a condition of its federal power license. Division I held that recreational use immunity applied to the roadway over the dam because City Light “brought itself under the protection of the immunity statute... by opening up the [adjacent] lands for recreational use without a fee...”¹⁰

In *Gaeta*, Division I approved the decision in *Smith v. Southern Transp. Co.*¹¹ that recreational use immunity did *not* bar a plaintiff’s injury claims against the City of New Orleans for maintaining an unsafe overpass on a public transportation route in a city park. The *Gaeta* court said immunity did not apply in *Smith* because the plaintiff was a professional truck driver, and the roadway where he was injured was a “thoroughfare... built and maintained primarily for commercial use, as opposed to recreational” use.¹² It ruled, however, that *Gaeta*’s claims were barred by recreational use immunity because he was riding for pleasure rather than business and because he “turned off the main highway onto the Diablo Dam roadway [which] is not a thoroughfare, but leads only to the reservoir

¹⁰54 Wn. App. at 609.

¹¹467 So.2d 70 (La. Ct. App.1985).

¹²54 Wn. App. at 608.

and abutting lands left open by Seattle City Light to the public for recreational use.”¹³

Like the roadway in *Smith*, the I-90 Trail is a public thoroughfare which WSDOT describes as “the only means for non-motorized access to Mercer Island and across Lake Washington.” CP 749. It was built exclusively with state and federal highway funds without recreation funds and is used primarily for transportation rather than recreation. CP 749. Both New Orleans and Mercer Island assumed contractual duties to maintain the transportation routes where the plaintiffs were injured. Like the professional truck driver in *Smith*, Susan Camicia was a professional legal assistant who was using the I-90 Trail as transportation to get from work in Seattle to her home on Mercer Island, as she did daily, weather permitting. As Division 1 stated in *Nielsen v. Port of Bellingham*, RCW 4.24.210 does not apply here because “[t]he facts of this case are more like *Smith* than *Gaeta*.”¹⁴

The City argues that RCW 4.24.210 should apply because Camicia was cycling home from her job with her boyfriend when she was injured.

¹³*Id.*

¹⁴107 Wn. App. 662, 668, 27 P.3d 1242 (2001).

But recreational use immunity is not affected by whether a person is using land alone or with a companion, or is taking the shortest way home. In *Nielsen*, Division I held that a woman who was injured on an outdoor boat ramp after visiting a friend who moored his boat at a dock in Squaticum Harbor “was not a ‘recreational user’ within the meaning of the recreational use statute at the time of her injury....”¹⁵ Nor was Susan Camicia a “recreational user” under RCW 4.24.210 just because she was injured while commuting from work to home with a friend.

The City cites the following dicta in *Riksem v. Seattle* to argue that RCW 4.24.210 should apply because Camicia was getting secondary benefits of outdoor recreation while commuting:

If an individual is commuting from one point to another, by either walking, running, or bicycling, said individual is at least secondarily gaining the benefits of recreation even though his primary goal maybe the actual act of commuting.¹⁶

But the Court of Appeals in *Riksem* was responding to an equal protection argument, not saying that RCW 4.24.210 applies any time a person is getting secondary benefits of outdoor recreation. If recreational use immunity depended on secondary benefits of outdoor recreation,

¹⁵*Id.* at 666.

¹⁶47 Wn. App. 506, 512, 736 P.2d 275 (1987).

commercial truck drivers or ordinary citizens would never be allowed to recover for injuries caused by defective road construction or maintenance because “viewing or enjoying historical, archaeological or scenic sites” inevitably are secondary benefits of their jobs or travels.

In *Chamberlain v. Dept. of Transp.*, Kekoa Chamberlain died after being hit by a car on the highway bridge over Deception Pass.¹⁷ His parents sued the State of Washington, alleging that unsafe conditions on the bridge’s highway or sidewalk caused the fatal injury. Division I ruled that the highway and sidewalks over the Deception Pass bridge were “land areas” to which RCW 4.24.210 applied.¹⁸ It held that RCW 4.24.210 barred the plaintiffs’ unsafe roadway claims because the child and his family were sightseeing when he was injured, and the State did not charge a fee to use the bridge. But Division I limited its ruling to members of the public who were using the bridge for outdoor recreation purposes:

We wish to make clear, however, that we express no opinion about the application of the statute to others who may pass over the bridge for purposes other than outdoor recreation.¹⁹

¹⁷79 Wn. App. 212, 901 P.2d 344 (1995).

¹⁸See RCW 46.04.431 and RCW 46.04.540 respectively for the definitions of “highway” and “sidewalk.”

¹⁹79 Wn. App. at 221.

Chamberlain is distinguishable. Unlike the State, which did not charge a fee of any kind to maintain the Deception Pass bridge, the City of Mercer Island charged a fee to maintain the I-90 Trail. Unlike *Kekoa Chamberlain*, Susan Camicia was injured while using a the I-90 Trail for commuter transportation, not outdoor recreation.

Chamberlain should not be followed for two other reasons. First, its suggestion that RCW 4.24.210 applies if the user's purpose is outdoor recreation, but not if it is transportation, conflicts with the rulings in *Gaeta*²⁰, *Nielsen*²¹, *Cultee v. City of Tacoma*²² and *Plano v. City of Renton*²³ that the applicability of RCW 4.24.210 is determined from the reasonably objective standpoint of the landowner, which may have nothing to do with the purpose of the user. Moreover, "from any reasonably objective measure"²⁴, a city expects that it has to maintain its public

²⁰54 Wn. App. at 608.

²¹107 Wn. App. at 668.

²²95 Wn. App. 505, 514, 977 P.2d 15 (1999).

²³103 Wn. App. 910, 913, 14 P.2d 871 (2000) ("the application of the statutory immunity depends on the perspective of the landowner as to the use of the land, not on the purpose of the user.")

²⁴*Nielsen v. Port of Bellingham*, 107 Wn. App. 662, 668, 27 P.3d 1242 (2001).

transportation routes in a reasonably safe condition for ordinary travel, regardless of whether they are being used for transportation, commerce or outdoor recreation, because that is what *Keller v. Spokane* requires.

Chamberlain's statement that whether RCW 4.24.210 applies may depend on whether a plaintiff was engaged in transportation or outdoor recreation also conflicts with *Riksem v. City of Seattle*, which says that "[t]he statute applies equally to everyone who enters a recreational area."²⁵

Second, *Chamberlain* broadly construes RCW 4.24.210 to conclude that a highway and sidewalks on a bridge is a "land area" to which recreational use immunity applied. This conflicts with Division I's later decision in *Nielsen* that "statutes such as RCW 4.24.210(1) are in derogation of common law rules of liability of landowners [and] are to be strictly construed."²⁶ *Chamberlain* also conflicts with *Kucher v. Pierce County*, where Division I used strict statutory construction in ruling that a "steeply sloped wooded area" in a park did not come within a definition of "forest land" under a previous version of RCW 4.24.210."²⁷

²⁵47 Wn. App. 506, 736 P.2d 275 (1987).

²⁶107 Wn. App. 662, 666-67, 27 P.3d 1242 (2001).

²⁷24 Wn. App. 281, 283, 286, 288, 600 P.2d 683 (1979).

In *Widman v. Johnson*, the plaintiff was injured in an auto accident after exiting a private forest road.²⁸ The landowner had posted signs allowing the public to use the road and adjacent forest land for outdoor recreation without charging a fee. The landowner had authority to close off the road and adjacent forest to the public. Moreover, as in *Riksem v. Seattle*²⁹ and arguably in *Chamberlain*, there was nothing the landowner in *Widman* did that caused the plaintiff's injuries.

Widman is distinguishable because the City of Mercer Island charged a fee to maintain the I-90 Trail, lacked authority to close it off to public use, and for summary judgment purposes proximately caused Susan Camicia's injuries by failing to maintain adequate lateral clearances, or stripe the I-90 Trail up to the middle bollard, or contrast paint and reflectorize the bollards as required by AASHTO and MUTCD standards.

Riksem v. Seattle is distinguishable because unlike the I-90 Trail, the Burke-Gilman Trail was "land which was primarily used for recreational purposes", not transportation.³⁰ Unlike the City of Mercer

²⁸81 Wn. App. 110, 111-12, 912 P.2d 1095 (1996).

²⁹47 Wn. App. 506, 736 P.2d 275 (1987).

³⁰*Id.* at 512.

Island, the City of Seattle in *Riksem* did not cause the plaintiff's injuries, did not charge a fee to maintain the Burke-Gilman Trail, and had continuing authority to close off the trail so it would not "otherwise be open to the public."³¹ Unlike *Camicia*, *Riksem* was "using the Burke-Gilman trail for recreational purposes on the day of the accident."³²

McCarver v. Manson Park and Recreation Dist. also is inapposite.

Unlike the City of Mercer Island, defendant Manson had "the exclusive right of possession and control" of the park area where the plaintiff was injured, and the parties stipulated that it "allow[ed] the public to use the area for outdoor recreation without charging a direct fee."³³ The Supreme Court in *McCarver* merely declined the plaintiff's request to limit the scope of RCW 4.24.210 to "land primarily used for other purposes but with incidental recreational uses", an issue is not germane here.³⁴ It did not hold that RCW 4.24.210 applies to lands that are primarily used for commerce or transportation, but also can be used for recreation.

³¹*Id.* at 511.

³²*Id.* at 512.

³³92 Wn.2d 370, 371, 372, 597 P.2d 1362 (1979).

³⁴*Id.* at 377.

B. Recreational Use Immunity Does Not Apply When a Landowner Lacks Authority to “Allow” Land to Be Used for Outdoor Recreation Purposes.

In *Tennyson v. Plum Creek Timber Co.*, which the City also does not cite or discuss, Division I held that recreational use immunity is not available to a landowner who does not have “continuing authority to determine whether the land should be open to the public....”³⁵ The City lacks continuing authority to determine whether the I-90 Trail should be open to the public because it admits it could not close it off to public use: “it is true that the City could not close off the entire I-90 trail....”³⁶ Since the I-90 Trail would be “otherwise open to the public”, RCW 4.24.210 does not apply.³⁷ Since the City cannot close the trail, it cannot “allow” the public to use it for outdoor recreation and therefore cannot bring itself within the terms of the statute.

The City argues it should have immunity because it claims it could permanently close off the portions of the I-90 Trail that it owns, including the accident location. This argument is factually incorrect because

³⁵73 Wn. App. 550, 558, 872 P.2d 524 (1994).

³⁶Respondent’s Brief, p. 7.

³⁷*Riksem v. Seattle*, 47 Wn. App. 506, 511, 736 P.2d 275 (1987).

WSDOT are “the officials having jurisdiction over the I-90 bicycle and pedestrian path...”, CP 749, and the City charged WSDOT an annual fee to keep the entire I-90 Trail open to public use. CP 508-510, 515. The City’s assumption of annual trail maintenance and operation responsibilities under its I-90 Turnback Agreement and Landscape Maintenance Agreement with WSDOT proves it could not continuously close off its own portions of the trail either.

To meet the “control” element in RCW 4.24.210, the City would have to show that it had continuing, unilateral authority to close off the I-90 Trail and thereby “allow” the public to use it. Since the City could not lawfully close either its own or WSDOT’s portions of the I-90 Trail, it cannot prove it had “*lawful... control*” of the I-90 Trail and therefore cannot bring itself within the terms of RCW 4.24.210.

At oral argument before Judge McBroom, the City conceded that recreational use immunity would *not* apply at locations where the I-90 Trail crosses city streets (“the bike path starts at the curb”, RP 8; “the only way you are protected... is to go on the public streets”, RP 15); or on the various portions of the trail owned by WSDOT, (“much of the trail on the

island in various places is owned by the Washington DOT... and those places we may not have the authority to control”, RP 50-52).

Thus, the City admits it would not be immune if a cyclist or pedestrian fell into a manhole that it left open at a street crossing or on a WSDOT-owned portion of the I-90 Trail that the City maintains. Yet the City paradoxically claims it would be immune if a bus commuter who had no recreational purpose whatever fell into a manhole that it left open at the Park & Ride bus stop, if the City owned that section of the I-90 Trail.

The City’s patchwork immunity claims based on ownership of the accident location are not recognized in law. In *Plano v. Renton* and *Nielsen v. Bellingham*, Division I held that RCW 4.24.210 did not apply to the ramps where the plaintiffs were injured because they provided necessary and integral access to the adjacent fee moorage docks: “The reason why the two ramps and the connecting gangways exist is to provide access to the floating dock, a fee-generating portion of the park”³⁸ or “to provide moorage for commercial fishing boats and one “live aboard”—the Port’s paying customers.”³⁹ Thus, if an accident location is a “necessary

³⁸103 Wn. App. 910, 915, 14 P.3d 871 (2000).

³⁹107 Wn. App. 662, 669, 27 P.3d 1242 (2001).

and integral” part of land to which RCW 4.24.210 does *not* apply, then the statute does *not* apply to the accident location either. Also, the focus is on what is “necessary and integral” to public access, not on whether a landowner owns the entire facility or transportation route.

In this case, the accident location unquestionably is “necessary and integral” to the I-90 Trail, which serves as “an important link in the regional transportation system...” and “an integral part of the local transportation system” as “the only means for non-motorized access to Mercer Island and across Lake Washington.” CP 749. Regional and local transportation would be disrupted if the City blocked off its own portions of the trail and forced the public to ride on the streets of its business district at their physical peril in violation of WAC 308-330-555. Since there is no patchwork immunity, the City cannot bring itself within the scope of RCW 4.24.210 by claiming it owned the accident location.

C. **Recreational Use Immunity Is Not Available to Landowners Who Charge Fees to Maintain Lands for Outdoor Recreation.**

The City contends that its charging WSDOT an annual fee to maintain the I-90 Trail is a new factual argument that should not be considered on appeal. That is not so. The City itself raised the fee issue

on its first motion for summary judgment (“This is not a case where there is a fee issue”, RP 3) and admitted that “if there was an issue of landscape affecting this, then we would perhaps have an issue there.” RP 9. In response, Camicia informed Judge McBroom that “Mercer Island, for \$68,000 a year, assumed maintenance responsibility” for the I-90 Trail under its I-90 Turnback and Landscape Maintenance Agreement with WSDOT. RP 39-41.⁴⁰

Even if the City’s landscape maintenance and operation fee had not been raised in the trial court, which it was by both parties, it still could be considered on appeal because “[a] party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.”⁴¹

Also, in *Jones v. Stebbins*, the Supreme Court held that the rule that

⁴⁰The City’s argument that Camicia raised a contractual liability claim for the first time on appeal also is misguided. The City’s landscape maintenance contract with WSDOT is relevant on this appeal, not to establish contractual liability, but to defeat immunity because it shows the City charged a contract fee to maintain the I-90 Trail and because recreational use immunity did not apply in *Smith v. Southern Transp. Co.* in part because the City of New Orleans contractually “assumed the maintenance of the underpass by agreement with the New Orleans Terminal Board....” 467 So.2d at 72.

⁴¹RAP 2.5(a).

“issues not presented to the trial court will not be heard for the first time on appeal....does not apply when [as in this case] the question raised affects the right to maintain the action.”⁴²

The City does not deny that it charged WSDOT a contract fee to maintain the I-90 Trail in 2006. Instead, it evasively says it is “unlikely speculation to say that the City is still charging a fee.”⁴³ That is not so either. The I-90 Turnback Agreement says the City charges WSDOT \$68,000 a year adjusted for inflation in contract fees (not general funds) for “landscape maintenance and operation” on the I-90 Trail. CP 508-510, 515. The City employees who are responsible for maintaining the I-90 Trail and its intersecting streets testified that the I-90 Turnback Agreement continues to be in effect. City Parks Director Peter Mayer testified:

Well, there’s a series of turnback agreements, as I’m sure you’re aware, that spell out in some complexity the responsibilities for the 76 acres that make up that corridor. We receive funding from the State for a portion of those acres they contract with us to maintain.... CP 770

⁴²122 Wn. 2d 471, 479, 860 P.2d 1009 (1993), *quoting from New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984).

⁴³Respondent’s Brief, p. 39.

City Engineer Yamashita also testified that the I-90 Turnback and Landscape Maintenance Agreement is currently in effect:

Q. ...[C]ould Mercer Island shut off the I-90 trail permanently across the island without the permission of the Washington State Department of Transportation?

A. I don't know for sure. *It may be mentioned in the Turnback Agreement*, but I would assume that the answer would be no. CP 778 (emphasis supplied). CP 777-78.

The City's argument that it did not charge user fees is legally irrelevant because it charged WSDOT a contract fee for landscape maintenance and operation on the I-90 Trail. RCW 4.24.210 denies immunity to any landowner or occupier who charges "a fee of any kind therefor" to anyone, including third parties, to maintain lands that can be used for outdoor recreation.⁴⁴ *Plano* and *Nielsen* hold that immunity does not depend on whether a recreational user pays a fee. The landscape maintenance fees that the City charged WSDOT were *for* the purpose of outdoor recreation because they enhanced the enjoyment of "nature study... [and] viewing or enjoying... scenic... sites" to members of the public while walking or bicycling on the I-90 Trail. Since the City charged fees to further outdoor recreation on the I-90 Trail, RCW 4.24.210 does not apply.

⁴⁴*Plano v. Renton*, 103 Wn. App. 910, 14 P.3d 871 (2000); *Nielsen v. Bellingham*, 107 Wn. App. 662, 666-67, 27 P.3d 1242 (2001).

D. The City's Recreational Use Immunity Defense Should Be Dismissed for Lack of Evidence.

The City inaccurately says that Judge McBroom's decision denying summary judgment "was dictated by the open question of ownership."⁴⁵

Judge McBroom ruled there were three issues of fact or law which precluded summary judgment: "[1] whether or not the City has the power to close this transportation corridor, [2] whether the City is actually the owner, and [3] whether this is recreational use land at all." RP 54-55.

After Judge McBroom retired, the City developed new evidence that it owned the accident location and renewed its summary judgment motion before Judge Inveen. CP 587-603. In its renewed motion, the City also reargued Judge McBroom's other two rulings that there were issues of fact or law concerning "the [City's] power to close this transportation corridor" and whether the I-90 Trail was "recreational use land at all."

Judge Inveen reconsidered all three of Judge McBroom's rulings and reached a different result, CP 872-73, CP 875-79, then certified her dismissal order for immediate, de novo appellate review. CP 958-63. The

⁴⁵Respondent's Brief, p. 12.

City maintains there is now “a complete and factually undisputed record on ownership and recreational immunity.”⁴⁶

In *Impecoven v. Department of Revenue*, the Supreme Court held that an appellate court should issue summary judgment in favor of the non-moving party when the facts are not in dispute and the non-moving party is entitled to judgment as a matter of law:

We reverse the trial court’s grant of summary judgment and order of refund in favor of plaintiffs. Because the facts are not in dispute, we order entry of summary judgment in favor of DOR, the nonmoving party.⁴⁷

Under the statutory terms and case law discussed above, RCW 4.24.210 does not apply to an occupational commuter’s injury claims that result from unsafe conditions on a public transportation thoroughfare that a city (1) objectively knows it has to maintain in a reasonably safe condition for ordinary travel, (2) charges a contract fee to maintain, and (3) lacks authority to continually close off to public use. The City’s recreational use immunity defense must be dismissed for any or all of these reasons.

⁴⁶Respondent’s Brief, p. 14.

⁴⁷120 Wn.2d 357, 365, 841 P.2d 752 (1992).

E. The City's Declarations Do Not Raise Issues of Material Fact that Preclude Summary Judgment.

City Development Director Lancaster testified in his deposition that the City “could not unilaterally exclude public use on the I-90 trail in the City of Mercer Island”, the “Washington State Department of Transportation essentially acts as the controlling authority” over the I-90 Trail, and that the City “would have to get [WSDOT’s] permission to close the trail.” CP 844-45. Lancaster later signed a supplemental declaration stating that “I do not believe that [WSDOT] has controlling authority over City-owned portions” of the I-90 Trail. CP 577.

City Engineer Yamashita testified in his deposition that the City could *not* “shut off the I-90 trail permanently across the island without the permission of the Washington State Department of Transportation.” CP 777-78. He later signed a supplemental declaration which stated:

The City of Mercer Island has control over the accident site, and could unilaterally “shut it down” if needed. It would be within the City’s discretion to limit or fully deny access to the trail for recreational use. CP 498.

The Lancaster and Yamashita supplemental declarations cannot sustain the City’s recreational use immunity defense because they do not raise a *material* fact issue that the City had “continuing authority to

determine whether the land should be open to the public....”⁴⁸ These declarations only make a case for patchwork immunity, not for recreational use immunity, which requires a showing that the City unilaterally could close off both its own “necessary and integral” sections and the WSDOT-owned sections of the I-90 Trail to public use.

Even if the City could block off its own sections of the I-90 Trail, which it lawfully cannot, it still would not be entitled to recreational use immunity because *Plano* and *Nielsen* do not recognize patchwork immunity. Thus, Lancaster’s and Yamashita’s supplemental declarations do not bring the City within the terms of RCW 4.24.210.

Mr. Krueger testified he “do[es]n’t know” if WSDOT has “authority to keep the I-90 non-motorized trail open as a public transportation route” and “couldn’t speculate” if the City would have to obtain WSDOT’s permission to permanently block off public transportation on the I-90 Trail. CP 504. The City claims it “do[es]n’t know the answer” whether WSDOT has “authority to keep the I-90 Trail open to public use....” RP 52. Lack of knowledge and speculation do not create material fact issues sufficient to withstand summary judgment:

⁴⁸*Tennyson v. Plum Creek Timber Co.*, 73 Wn. App. 550, 558, 872 P.2d 524 (1994).

Once there has been a showing of the absence of any genuine issue of material fact, the party opposing summary judgment must respond with more than conclusory allegations, speculative statements, or argumentative assertions of the existence of unresolved factual issues.”⁴⁹

Nor can Mr. Lancaster’s opinion “that the City of Mercer Island has designated the location where Susan Camicia had her accident as a recreational facility”, CP 300, sustain a recreational use immunity defense.

Since a city knows it must maintain its public transportation routes in a reasonably safe condition for ordinary travel under *Keller v. Spokane*, Mercer Island cannot by any “reasonably objective measure” expect immunity just because it chooses to call the I-90 Trail a “recreational facility” or “bike path” rather than a “regional, non-motorized public transportation route”, or points out that the trail was made of asphalt and is wider than a sidewalk.⁵⁰

F. Failures of Proof and Credibility Issues Require Reversal of the City’s Summary Judgment.

Even if the Lancaster and Yamashita supplemental declarations created material fact issues, which they do not, the summary judgment in

⁴⁹*Ruffer v. St. Francis Cabrini Hosp.*, 56 Wn. App. 625, 628, 784 P.2d 1288 (1990).

⁵⁰Respondent’s Brief, p. 5.

favor of the City should be reversed because their post-deposition declarations do not *erase* their deposition testimony. A reasonable jury could conclude that Lancaster and Yamashita were telling the truth in their depositions before they signed their declarations of recantation. Moreover, the trial court obviously erred in accepting Lancaster's and Yamashita's supplemental declarations as proven facts on summary judgment, when it doubted that "either of those individuals has the testimonial capacity or personal knowledge to opine on this issue." CP 865.

In *Faust v. Albertson*, the Supreme Court recently reversed a summary judgment in favor of a defendant on grounds that "credibility determinations lie with the jury", which may choose to disbelieve "self-interested testimony" or testimony that can be impeached "on the grounds of faulty memory and inconsistent statements."⁵¹

Under *Faust*, a jury could disbelieve the City's claim that it always considered the accident location to be recreational land. When the City was seeking to expand the Park & Ride lot in 2004, it agreed with the FTA's §4(f) Environmental Assessment determination that the sidewalk at the accident location is "not a publicly owned public park [or] recreation

⁵¹166 Wn.2d 653, 663, 211 P.3d 400 (2009).

area....” CP 772, 774. But now that the City is seeking recreational use immunity, it contends the accident location is recreation land.

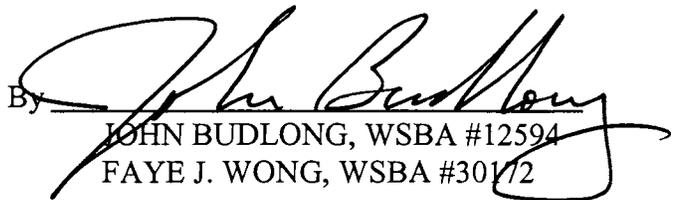
Camicia has never contended that RCW 4.24.210 is preempted by federal law or that the City’s immunity defense is governed by the FTA’s §4(f) determination. She contends that the City’s inconsistent perspectives on the nature of the land at the accident site raise issues of self-interest and credibility that also require a reversal of the summary judgment.

II. CONCLUSION

Appellant Susan Camicia respectfully requests the Court to reverse the summary judgment, to rule that RCW 4.24.210 does not apply, and to remand for a trial of her roadway maintenance claims against the City.

RESPECTFULLY OFFERED this 14th day of December 2009.

LAW OFFICES OF JOHN BUDLONG

By 
JOHN BUDLONG, WSBA #12594
FAYE J. WONG, WSBA #30172

Attorneys for Appellant Susan Camicia

NO. 63787-8-I

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I
(King County Superior Court Cause No. 07-2-29545-3 SEA)**

SUSAN CAMICIA

Appellant,

vs.

CITY OF MERCER ISLAND

Respondent.

**APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Laura Inveen, Judge**

CERTIFICATE OF SERVICE

**John Budlong, WSBA #12594
Faye J. Wong, WSBA #30172
LAW OFFICES OF JOHN BUDLONG
100 Second Avenue South
Edmonds, Washington
(425) 673-1944**

Attorneys for Appellant Susan Camicia

2009 DEC 16 AM 10:48

**FILED
CLERK OF APPEALS
STATE OF WASHINGTON**

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 Reply Brief of Appellant was sent via first class mail, postage prepaid for filing with the courts identified below and delivered to the following attorneys:

Washington State Court of Appeals, Division I
One Union Square
600 University Street
Seattle, Washington 98101-4170
(Original + 1 Copy)

Washington Supreme Court
425 12th Avenue SW
P.O. Box 40929
Olympia, Washington 98504
(Copy)

Mr. Andrew G. Cooley
KEATING, BUCKLIN & McCORMACK, INC.
800 Fifth Avenue, Suite 4141
Seattle, Washington 98104-3175
Attorney for Respondent

Mr. Roy A. Umlauf
FORSBERG & UMLAUF, P.S.
901 Fifth Avenue, Suite 1700
Seattle, Washington 98164-1039
Attorney for Defendant Howard S. Wright Construction Co.

DATED this 14th day of December, 2009.

By: Debra M. Watt
DEBRA M. WATT