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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

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR AND RELATED ISSUE

Assignment of Error. The trial court erred in granting summary judgment dismissing appellant Susan Camicia's tort lawsuit against the City of Mercer Island based on the Recreational Use Immunity Act, RCW 4.24.210.

Related Issue: Does a public landowner who charges the Washington State Department of Transportation a fee to maintain a regional, public, non-motorized transportation route have immunity under RCW 4.24.210 from tort claims arising from its failure to maintain the route in a reasonably safe condition for ordinary travel?

II. OVERVIEW OF THE APPEAL

The I-90 Trail on Mercer Island is a regional, non-motorized, public transportation route which provides 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. Public transportation on the I-90 Trail is under the jurisdiction and control of the Washington State Department of Transportation. CP 749. The City of Mercer Island charges WSDOT an annual fee to maintain the I-90 Trail under a landscape maintenance contract. CP 508-526, 734-737, 740.

The I-90 Trail has always been a public transportation route. CP 727-728, 749. It has never been designated as a recreational land. CP 782, 785-786. In 2004, two years before Susan Camicia was injured, the City of Mercer Island, the Federal Transit Administration, and Sound Transit all concurred in a National Environmental Policy Act Environmental Assessment that the location on the I-90 Trail where Susan's accident occurred was a public transportation route, *not* a park or recreational area. CP 771-775.

The City of Mercer Island did not open the I-90 Trail to the public for outdoor recreation. CP 777-778. Its top officials testified that the WSDOT has "controlling authority" over transportation on the trail. CP 783. The officials testified the City lacks independent authority to close the I-90 Trail permanently to public transportation and would have to obtain WSDOT's permission to do so. CP 777-778, 844-845.

In June of 2006, Susan Camicia was severely injured in a bicycle accident on the portion of I-90 Trail that runs along the sidewalk next to the Mercer Island Park & Ride lot. After her lawsuit was filed, the City sought recreational use immunity by characterizing the I-90 Trail as a recreational land running through a city park. It filed two motions for summary judgment to dismiss based on RCW 4.24.210. Both motions

relied on the same material evidence. CP 128-140, 587-604. In August 2008, Judge McBroom denied the City's first recreational use immunity motion. CP 571-573. In June 2009, Judge Inveen granted the City's second motion. CP 862-868.

In this appeal, Susan Camicia is asking the Court to reverse Judge Inveen's summary dismissal and to rule that recreational use immunity does not apply to her claim.

III. STATEMENT OF THE CASE

A. The Nature of the Case.

This is a roadway maintenance case involving the I-90 Trail, which runs along the N. Mercer Way sidewalk next to the Mercer Island Park & Ride construction project at the intersection of 81st Avenue SE on Mercer Island. CP 1-8. Defendant Howard S. Wright Construction Company ("HSW"), the general contractor on the Park & Ride project, installed a chain link fence and stored construction signs and materials in the public right-of-way on the I-90 Trail.¹ CP 185-186, 727. HSW's fence and the construction signs obstructed the westbound lane of bicycle travel on the trail. CP 727.

¹Howard S. Wright Construction Company is a defendant in the lawsuit but is not a party to this appeal. The trial court has continued the trial of Camicia's claims against HSW pending the outcome of this appeal.

There were three wood bollard posts on each side and in the middle of the I-90 Trail next to HSW's construction fence. The bollards were not painted or reflectorized in a contrast color, and there were no warning stripes on the trail running up to them. CP 249, 292, 294, 728, 730-732.

On June 19, 2006, Susan Camicia was commuting by bicycle on the I-90 Trail from her job in Seattle to her home on Mercer Island. CP 411, 430-432, 839, 841. She rode from Seattle across the Lake Washington floating bridge, met another bicyclist at the east end of the bridge, rode with him around the south end of the island, then rode westbound on the I-90 Trail along the N. Mercer Way sidewalk toward her home. CP 841.

After crossing the intersection of 81st Avenue SE, Susan encountered HSW's chain link construction fence along the N. Mercer Way sidewalk next to the Park & Ride lot. One of the fence footings encroached 30 inches into the sidewalk in Susan's westbound lane of travel. CP 294, 727. Susan moved to the left to avoid the fence footing and two construction signs which also were in the public right-of-way in her lane of travel. CP 727, 842. This leftward movement brought her into the path of the middle bollard. She did not see the middle bollard until an

instant before her bicycle hit it. CP 842. Susan fell from her bicycle onto the pavement and sustained a permanent spinal cord injury. CP 712.

Susan Camicia claims the City negligently failed to maintain the I-90 Trail in a reasonably safe condition at the accident location. CP 9-10. Her expert witnesses have testified that the City's failure to stripe the I-90 Trail up to the middle bollard, or to paint or reflectorize the bollards in a contrast color, or to maintain adequate clearances between the construction fence and the trail made the middle bollard inherently deceptive and dangerous. CP 691-698. These conditions also violated bicycle facility safety standards promulgated by the Manual on Uniform Traffic Control Devices ("MUTCD"), the Washington State Department of Transportation, and the American Association of State Highway Transit Officials ("AASHTO"). CP 691-698.

The City concedes for purposes of summary judgment that it negligently maintained the I-90 Trail and the bollards in a dangerous condition that proximately caused Susan's injuries. RP 2.

B. Judge McBroom's Recreational Use Immunity Ruling.

On August 22, 2008, the City brought a motion before King County Superior Court Judge Douglas McBroom to dismiss this lawsuit based on RCW 4.24.210. CP 128-140. The City argued it was entitled to

recreational use immunity because it owned the I-90 Trail, which was located in “Linear Park”, and because it allowed the trail to be used for recreational as well as public transportation purposes. RP 2-3. The City argued that “as long as recreation is a use [of the I-90 Trail] and the public are allowed to use it for that purpose, the [recreational use immunity] statute applies.” RP 26.

Judge McBroom concluded that the sidewalk where the accident occurred was probably owned by the City and within Linear Park. RP 12-13, 21. But he denied summary judgment because the I-90 Trail is a “transportation corridor” and there were issues of fact or law “as to whether or not the City has the power to close this transportation corridor, whether the City is actually the owner, and whether this is recreational use land at all.” RP 54-55. Judge McBroom retired from the Superior Court in January 2009, and the case was transferred to Judge Laura Inveen.

C. Judge Inveen’s Recreational Use Immunity Ruling.

On May 29, 2009, the City brought a second motion to dismiss under RCW 4.24.210 before Judge Inveen. CP 587-604. Judge Inveen granted the City’s motion. CP 862-868. Judge Inveen’s Memorandum Opinion says Camicia’s arguments that the City did not open the trail to public recreational use or have legal authority to close it to public

transportation, and that the city viewed the trail as a regional public transportation route, rather than a recreational facility, “fail.” CP 864.

The Memorandum Opinion concluded that RCW 4.24.210 barred Camicia’s lawsuit for some or all of the following reasons: 1) the City owned and controlled the portion of I-90 Trail where the accident occurred; 2) there is no legal authority which exempts “regional transportation routes” from RCW 4.24.210; 3) the City’s prohibition of adult entertainment and social service transitional housing near the I-90 Trail shows that it viewed the I-90 Trail the same as a park or recreational facility; and 4) the state and federal agency determinations that the I-90 Trail is a public transportation route, not a park or recreational area, “relate only to the path on the I-90 bridge” and do not “carr[y] any weight for purpose of the application of the [recreational use immunity] statute....” CP 864-868.

Judge Inveen granted Camicia’s CR 54(b) motion to certify the summary judgment order for an immediate appeal and entered supporting findings of fact. CP 884-891, 919-924. Camicia timely filed this appeal. CP 956-972.

D. The I-90 Trail Is a Public Transportation Route Built Exclusively with State and Federal Highway Funds.

In October 2002, the Washington State Department of Transportation prepared an “Evaluation of the I-90 Bicycle and Pedestrian Path as a Potential Section 4(f) Resource” for the I-90 Two Way Transit and HOV Operations Project, which included expanding the Mercer Island Park & Ride lot. CP 747-750. WSDOT’s Evaluation stated that the I-90 Trail on Mercer Island is part of a non-motorized transportation facility built exclusively with federal and state highway funds, not recreation funds. It stated that while the I-90 Trail can be used for recreational purposes, it was developed and exists primarily for transportation, is an important link in the regional transportation system, and serves as an integral part of the local Mercer Island transportation system:

The I-90 bicycle and pedestrian path was built as part of a multi-modal transportation facility, using federal and state highway funds. No funds designated for recreational facilities were used in constructing the path and separate accounts were used to ensure the separation of recreational and transportation funds.

By providing a means of non-motorized access across Lake Washington, the path permits users to travel between Seattle and Mercer Island and access other areas in the Puget Sound Region. The path, in fact, is the only means for non-motorized access to Mercer Island and across Lake Washington. As such, it is an important link in the regional transportation system. 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.

The I-90 Trail runs along the public sidewalks of the City of Mercer Island and across intersecting city streets. CP 728. It is designated as a “shared use path” which is used by bicyclists, pedestrians, and by transit commuters who park in the Mercer Island Park & Ride lot and ride the bus to and from Seattle. CP 728, 749.

E. The City Did Not Open the I-90 Trail to Outdoor Recreation Use.

Mercer Island City Engineer Patrick Yamashita testified that the City did not open the I-90 Trail to outdoor recreation or make any changes in the trail’s use after the City obtained legal title under a quitclaim deed from the State in 2000:

Q. Was the I-90 trail, where it runs across Mercer Island, open to pedestrians, bicyclists, and other non-motorized traffic when the State owned it before 2000?

A. Yes.

Q. When the City of Mercer Island acquired the transportation route represented by the I-90 trail in the year 2000, did it make any changes in the types of non-motorized use on the trail?

A. No, not to my knowledge. CP 777-778.

F. The City Lacked Authority to Close the I-90 Trail to Public Transportation.

In its October 2002 Evaluation, WSDOT identified itself as “the officials having jurisdiction over the I-90 bicycle and pedestrian path....”

CP 749. The Federal Transit Administration (“FTA”) confirmed WSDOT’s jurisdiction: “Your agency [*i.e.* WSDOT] has jurisdiction of the I-90 shared-use path....” CP 752-753.

The City’s Development Director and CR 30(b)(6) witness Steven Lancaster testified the City lacks authority to close the I-90 trail to public transportation within the Mercer Island city limits:

Q. ...Would it be accurate to say that the City of Mercer Island could not unilaterally exclude public use on the I-90 trail in the City of Mercer Island?

A. To my knowledge, it could not.... CP 844-845.

Mr. Lancaster testified the City could not close the I-90 Trail without WSDOT’s permission because the trail is a regional transportation facility under WSDOT’s “controlling authority”:

A. I believe that Washington State Department of Transportation essentially acts as the controlling authority, but my understanding is that they are under certain obligations to the federal government as well. They might be required to obtain that kind of approval.... CP 845.

Q. ... If the City of Mercer Island wanted to close off the I-90 trail on the island, would it have to consult with any state or federal agencies?

A. To my knowledge, I believe it would.

Q. And why do you say that, sir?

A. Well, because it is my understanding portions at least of the trail are on state-owned facilities that are part of the interstate highway system, and it is designated in regional documents as a regional facility.

Q. So would one of those agencies that you would -- the City would have to get permission to close the trail be the Washington State Department of Transportation?

A. I assume it would be. CP 845.

City Engineer Patrick Yamashita also testified that the City lacks independent authority to close the I-90 Trail permanently:

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.² CP 777-778.

² The trial court's Memorandum Opinion incorrectly states that "Yamashita's testimony relates to the closing of the I-90 *freeway*, not the trail." CP 865. Mr. Yamashita actually testified that the City lacks authority to close *either* the I-90 Trail or the I-90 freeway. CP 778.

When Judge McBroom asked, “Does the Washington Department of Transportation have authority to keep the I-90 Trail open to public use as a regional non-motorized transportation” route?, the City responded, “I don’t know the answer to that.” RP 52.

G. Before this Lawsuit, the City Concurred that the Accident Site Was Not in a Park or Recreation Area.

In September 2004, the Federal Transit Administration and Sound Transit, “in coordination with the City of Mercer Island”, prepared a “NEPA Environmental Assessment for the Mercer Island Park-And-Ride and Bus Platform Project.” CP 771-775. The Environmental Assessment covered the Park & Ride lot and “the adjacent sidewalks”—*i.e.* the exact location where Camicia was injured.³ CP 772. It determined that “The proposed site is not a publicly owned public park, recreation area, or wildlife and waterfowl refuge, or an historic site.” CP 774. Mercer Island

³The trial court’s Memorandum Opinion incorrectly says that “the evidence cited by Plaintiff [that the I-90 Trail is a public transportation route, not a park or recreational area] relates to portions of the trail across the I-90 floating bridge, *not* the portion crossing Mercer Island.” CP 867. To the contrary, the October 2002 WSDOT Evaluation says the I-90 Trail “was developed and exists primarily for transportation, and serves as an integral part of the *local* [*i.e.* Mercer Island] transportation system.” CP 749. The September 2004 NEPA Environmental Assessment says that the accident location—*i.e.* the “sidewalk” adjacent to the Park & Ride construction site—is *not* a park or recreation area. CP 774.

City Manager Rich Conrad, Assistant City Manager Deb Symmonds, City Transportation Planner Nancy Fairchild, City Engineer Patrick Yamashita, City Development Services Director Richard Hart, City Associate Planner Shelley Krueger and six City Design Commissioners were consulted and concurred in this NEPA determination. CP 769, 775.

City Engineer Yamashita testified that before this lawsuit, the City did not dispute the NEPA determination that the accident site was not in a city park or recreation area:

Q. Did anyone from the City of Mercer Island ever, to your knowledge, dispute or contest or challenge in any way the statement in the Environmental Assessment that the proposed site was not a publicly owned park or recreation area?

A. I'm not aware of any City officials doing that. CP 779.

H. The City Did Not Designate the I-90 Trail as a Land to which RCW 4.24.210 Applied.

City Development Director Lancaster confirmed that the City did not designate any portion of I-90 Trail, including the sidewalk where Camicia was injured, as a land or facility to which RCW 4.24.210 applied:

Q. Did you find any meeting minutes involving any City of Mercer Island personnel or Sound Transit personnel which designate that sidewalk as recreational facility or recreational land?

- A. I did not. CP 782, 785.
- Q. Did you find anything in all of your search, Mr. Lancaster, which said that the City ...has designated any portion of the I-90 regional trail on Mercer Island as a recreational facility for purposes of the recreational immunity statute?
- A. I did not find anything that specifically referenced the recreational immunity act. CP 786.
- I. **The City Charged the Washington State Department of Transportation a Fee to Maintain the I-90 Trail.**

The City charged WSDOT an annual fee under their "I-90 Turnback and Landscape Maintenance Agreement" to maintain the I-90 Trail on Mercer Island. The Agreement, which the City and WSDOT signed on January 28, 1987, provided:

2. The City agrees to accept maintenance responsibility for each of the areas shown on Exhibit 1 hereto [which include the area on the I-90 Trail where the accident occurred]....
3. City maintenance responsibility will involve all street and landscape maintenance and operation within the areas shown in Exhibit 1 provided, however, that WSDOT will remain responsible for structures and structural maintenance of retaining walls and overcrossing within the State right-of-way.
5. WSDOT agrees to reimburse the City in the amount of Sixty-eight thousand dollars (\$68,000.00) per year for maintenance of the areas depicted on Exhibit 1. This payment will be adjusted for inflation annually using the State of Washington CPIW (September to September), with 1986 as a base year.

Payments will be made by WSDOT to the City on a semi-annual basis on July 1 and January 1 of each year upon receipt of a statement from the City certifying that the maintenance services have been performed. CP 508-510, 734-737.

The I-90 Turnback and Landscape Maintenance Agreement was in effect in 2006 when this accident occurred. CP 740, 745; 777-778.

IV. ARGUMENT

A. **The Standard of Review on Summary Judgment Motions Based on Recreational Use Immunity.**

In *Van Dinter v. City of Kennewick*, the Supreme Court said that when a landowner moves for summary judgment based on RCW 4.24.210:

...all facts and all reasonable inferences therefrom should be construed in the light most favorable to the [plaintiff opposing recreational immunity]. We also must give [plaintiff] the benefit of every reasonable inference that can be drawn from the facts.⁴

In *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, the Supreme Court said that “a trial court’s grant of summary judgment [is reviewed] de novo.”⁵

Under the legal authority discussed below, recreational use immunity is unavailable to the City because 1) RCW 4.24.210 does not

⁴121 Wn.2d 38, 44, 846 P.2d 522 (1993).

⁵162 Wn.2d 59, 69, 170 P.3d 10 (2007).

abrogate a city's common law and contractual duties to maintain its public transportation routes in a reasonably safe condition for ordinary travel; 2) the City did not open the I-90 Trail to recreational use or have legal authority to close it to public transportation, so it lacked power to "allow" or disallow members of the public to use the I-90 Trail for outdoor recreation; and 3) the City charged WSDOT a fee to maintain the I-90 Trail for transportation and outdoor recreation purposes.

B. The Scope and Purpose of the Recreational Use Immunity Statute.

RCW 4.24.210(1) limits recreational use immunity to public or private landowners or others who "allow members of the public to use [lands] for outdoor recreation purposes... without charging a fee of any kind therefor...":

(1) [A]ny public or private landowners or others 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... *without charging a fee of any kind therefor*, shall not be liable for unintentional injuries to such users.⁶

RCW 4.24.200 says the legislative purpose of the recreational immunity statute is:

⁶Appendix A (emphasis supplied).

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.....⁷

In *Nielsen v. Port of Bellingham*, Division I stated that “[t]he purpose of the statutory grant of immunity is to encourage property owners to open up their properties for public recreational use.”⁸ In *Riksem v. City of Seattle*, Division I said, “[t]he 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.*”⁹

C. The City Owed Common Law and Contractual Duties to Maintain the I-90 Trail in a Reasonably Safe Condition for Public Transportation.

In *Keller v. Spokane*, the Supreme Court held that a city owes a common law duty of ordinary care to all persons to maintain its public transportation routes in a reasonably safe condition for ordinary travel:

A city has a 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.¹⁰...

⁷Appendix B.

⁸107 Wn. App. 662, 667, 27 P.3d 1242 (2001).

⁹47 Wn. App. 506, 511, 736 P.2d 275 (1987) (emphasis supplied).

¹⁰146 Wn.2d 237, 254, 44 P.3d 845 (2002).

We therefore hold 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.¹¹

In *American Nursery Products, Inc. v. Indian Wells Orchards*, the Supreme Court said, “the negligent performance of a contract may create a tort claim if a duty exists independently of the performance of the contract.”¹² In *Kelley v. Howard S. Wright Constr. Co.*, the Supreme Court held that a party who assumes a contractual obligation to maintain reasonable safeguards in its operations may become liable to other persons who are injured by its failure to perform the duty properly:

[O]ur past decisions support the proposition that an affirmative duty assumed by contract may create a liability to persons not party to the contract, where failure to properly perform the duty results in injury to them. See *Sheridan v. Aetna Casualty & Surety Co.*, 3 Wash.2d 423, 100 P.2d 1024 (1940); *Lough v. John Davis & Co.*, 30 Wash. 204, 70 P. 491 (1902).¹³

Under these authorities, the City owed a common law duty to Susan Camicia to maintain the I-90 Trail in a reasonably safe condition for ordinary travel. It also had a contractual duty under its I-90 Turnback and Landscape Maintenance Agreement to “accept maintenance responsibility”

¹¹*Id.* at 249.

¹²115 Wn.2d 217, 797 P.2d 477 (1990).

¹³90 Wn. 2d 323, 333-34, 582 P.2d 500 (1978).

for “all street and landscape maintenance and operation” on the I-90 Trail, which included maintaining the bollards and the I-90 Trail surface.

D. RCW 4.24.210 Did Not Abrogate the City’s Common Law and Contractual Duties to Maintain the I-90 Trail.

The trial court’s Memorandum Opinion says that no legal authority exempts “regional transportation routes” from recreational use immunity under RCW 4.24.210. CP 865. That is incorrect. Washington case law follows *Smith v. Southern Pac. Transp. Co.*, where the Louisiana Court of Appeals ruled that recreational use immunity is not available to a city that breaches a contractual duty to maintain, in a reasonably safe condition, a public transportation route in a city park that was allowed to be used for non-recreational travel.¹⁴

In *Smith*, the plaintiff was injured when the top of the commercial van he was driving struck the bottom of a railroad overpass in a city park. The van was within the legal height limit for vehicles, but the overpass was too low to provide clearance. The City of New Orleans had assumed contractual responsibility for maintaining the roadway through the city park. The City knew the overpass provided inadequate clearance for legal

¹⁴467 So.2d 70 (La.Ct.App.1985).

vehicles, but failed to post warning signs to advise motorists of the hazard.¹⁵

New Orleans denied liability under Louisiana's recreational use immunity statutes, La.R.S. 9:2791 and 9:2795. Sec. 9:2791 provided:

If such an owner, lessee or occupant give permission to another to enter the premises for such recreational purposes he does not thereby extend any assurance that the premises are safe for such purposes or constitute the person to whom permission is granted one to whom a duty of care is owed....¹⁶

The Louisiana court held that recreational use immunity did not bar the plaintiff's claim because the roadway through the city park was open to the public for non-recreational travel:

In the instant case, although City Park is set aside for recreational purposes, the street use by plaintiff is open to the motoring public for purposes other than recreational use. The intent of the above cited statutes was to encourage landowners to allow the public to use their property for recreational purposes. [Citation omitted] The statutes specifically refer to the use of the land for recreational purposes. However, where persons are allowed to use the property for purposes not associated with recreational activities, the statutes should not apply.

In the instant case, the City allows the motoring public to use the streets in City Park for travel not associated with recreations. We

¹⁵*Id.* at 72.

¹⁶*Id.*

therefore hold that under the facts of the instant case the immunity granted under the above cited statutes does not apply.¹⁷

In *Nielsen v. Port of Bellingham*,¹⁸ Division I approved the analysis in *Smith v. Southern Pac. Transp. Co., Inc.* Plaintiff Nielsen was injured when she fell on a floating dock in Squalicum Harbor that was slippery from the accumulation of algae. Before she fell, Nielsen had been visiting a tenant who lived aboard a yacht that was moored at the dock. Nielsen brought a premises liability lawsuit against the Port of Bellingham, which owned the dock. The Port claimed it was immune under RCW 4.24.210 because it allowed members of the public to walk on the floating dock for recreational purposes without charging them a fee.

Division I held that RCW 4.24.210 did not apply because Nielsen was not a recreational user and the Port's purpose in having the marina was objectively commercial:

The Port appeals, claiming, inter alia, that it is entitled to immunity because it allows the general public to walk on its floats for recreational purposes without charging a fee. We affirm because Nielsen, who fell on slippery algae as she left the boat of a "live-aboard" tenant moored at the marina, was not a "recreational

¹⁷*Id.* at 73.

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

user” within the meaning of the recreational use statute.... [S]he was an invitee of Dr. Wilkins, a paying moorage customer....¹⁹

Here, from any reasonably objective measure of the Port's “standpoint”, the purpose of its marina at Squalicum Harbor is commercial—the mooring of fishing boats and pleasure craft for a fee. The facts of this case are more like *Smith* than *Gaeta*. We decline to extend our statement in *Gaeta* [that the applicability of RCW 4.24.210 is viewed from the standpoint of the landowner] to the facts of the instant appeal.²⁰

The *Nielsen* court also noted that its earlier decision in *Gaeta v. Seattle City Light*—which applied recreational use immunity to a roadway over a dam that led to a resort and abutting lands left open for recreational use—had also distinguished the situation in *Smith*, where the roadway happened to run through a city park, but was built and maintained primarily for non-recreational, commercial use:

The *Gaeta* court was careful to distinguish the facts in that case from those in *Smith v. Southern Pac. Transp. Co., Inc.*, 467 So.2d 70 (La.Ct.App.1985). In *Smith*, a commercial truck driver was injured as the result of the city’s failure to post a sign warning of the low clearance of a railroad overpass while driving on a roadway that happened to run through a city park. The roadway was built and maintained primarily for commercial use, as opposed

¹⁹*Id.* at 664, 666.

²⁰*Id.* at 668.

to recreational use. *See Gaeta*, 54 Wash. App. at 608, 774 P.2d 1255.²¹

Susan Camicia was a vocational commuter whose injuries for summary judgment purposes were caused by the City's negligence and failure to perform its maintenance contract for the I-90 Trail, which was built and funded exclusively with state and federal highway funds for transportation purposes.²² In *Nielsen* and *Gaeta*, Division I followed the analysis in *Smith* that recreational use immunity does not abrogate a city's contractual or common law duties of care to maintain public transportation routes that are allowed to be used for non-recreational purposes. Under these authorities, RCW 4.24.210 does not immunize the City from liability for failing to maintain the I-90 Trail in a reasonably safe condition for ordinary travel.

²¹*Id.* The trial court's Memorandum Opinion says, "*Smith* should be limited to its facts, as noted in *Gaeta v. Seattle City Light*, 54 Wn. App. 603 (1989)." CP 865. But *Gaeta* does not say that. To the contrary, it was the court in *Nielsen* which limited *Gaeta's* rulings that the applicability of recreational use immunity is "view[ed] from the standpoint of the landowner or occupier" and that "it is not significant that a person coming onto the property may have some commercial purpose in mind" to *Gaeta's* facts. 107 Wn. 2d at 667, referencing *Gaeta*, 54 Wn. App. at 608-09. In *Nielsen*, Division I said: "Our statement in *Gaeta* quoted above must be read in the context of the facts of that case." 107 Wn. App. at 667.

²²

E. RCW 4.24.210 Does Not Apply because the City Did Not “Allow” Members of the Public to Use the I-90 Trail for Outdoor Recreation Purposes.

RCW 4.24.210 only confers immunity on landowners or others who “allow members of the public to use [lands] for the purposes of outdoor recreation.” In *Tennyson v. Plum Creek Timber Co.*, Division I held that recreational use immunity is not available to those who lack continuing authority to determine if lands should be open to public use:

[T]he contractors had no continuing authority to determine whether the land should be open to the public, and extending immunity to them would not further the purpose behind the act, which is to encourage landowners to open their land by limiting their liability.²³

Conversely, in *Jones v. United States*, the Ninth Circuit held RCW 4.24.210 applied to a recreational injury claim in Olympic National Park because the United States had regulatory authority to “close a park or a part thereof or restrict its use.”²⁴

The City of Mercer Island did not have statutory or regulatory authority to close the I-90 Trail, or to restrict its use to outdoor recreation

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

²⁴693 F.2d 1299, 1303 (9th Cir. 1982), *citing* 36 C.F.R. § 2.6, which authorized National Park Superintendents to “close to public use all or any portion of a park area when necessary for the protection of the area or the safety and welfare of persons or property.”

purposes, or to “allow” or disallow its use for commuter transportation. City Engineer Yamashita testified the City did not open the I-90 Trail to public recreational use. Yamashita and City Development Director Lancaster testified the City did not have legal authority to determine whether the I-90 Trail should be open to public use because WSDOT had “controlling authority” over the trail, and the City would have to obtain WSDOT’s permission to close the trail permanently to public use.

Judge McBroom ruled that RCW 4.24.210 does not apply because the City did not have “the power to close this transportation corridor” and therefore did not “allow” the public to use the I-90 Trail for outdoor recreation purposes. RP 54-55.

F. **RCW 4.24.210 Does Not Apply because the City Charged WSDOT a Fee to Maintain the I-90 Trail.**

RCW 4.24.210 limits immunity to landowners or others who open up their lands for recreational use “without charging a fee of any kind therefor....” Under the Court of Appeals’ decisions in *Plano v. City of Renton*²⁵ and *Nielsen v. Port of Bellingham*²⁶, “a fee of any kind” includes fees charged to third-parties as well as user fees. Since the City charged

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

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

WSDOT annual fees to maintain the I-90 Trail under the I-90 Turnback and Landscape Maintenance Agreement, it is not entitled to immunity under RCW 4.24.210.

In *Plano v. City of Renton*, the plaintiff was injured when she fell on a ramp that connected a pier and a moorage dock at Gene Coulon Memorial Beach Park on Lake Washington. Renton charged moorage fees to boaters who used the dock. But it argued it was entitled to recreational use immunity because the plaintiff did not pay a user fee for mooring her boat at the dock on the day she was injured, and no fee was charged to members of the public who walked on the dock for outdoor recreation.

Division I rejected both arguments. It held Renton was not immune under RCW 4.24.210 because it charged *third-parties* a fee to moor their boats at the dock, which was “a fee-generating portion of the park”.²⁷

Renton claims immunity from Plano’s suit on the basis that Plano did not pay a fee for moorage on the day the injury occurred. ... The question under Washington’s statute, however, is not whether Plano 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.

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

...Under the statute, immunity is available only if Renton does not charge a fee of any kind for such use.²⁸

Renton also claims immunity on the theory that there is no fee charged to people who walk on the dock or the gangway without mooring a boat, or who moor for less than four hours during the day. But Washington's statute does not say that a landowner can have immunity so long as the lands or water areas are available free of charge some of the time. The statute simply states that there is no immunity if the owner charges "a fee of any kind."²⁹

Similarly, in *Nielsen v. Port of Bellingham*, the Port argued it was "immune from Nielsen's suit because it allows members of the public to use its floats and docks for recreational purposes without charging a fee of any kind to such users."³⁰ But Division I disagreed and held that RCW 4.24.210 did not apply because the Port charged a fee to third-parties who moored their boats at the dock:

Here, the reason the float at Gate One exists is to provide moorage for commercial fishing boats and one "live aboard"-the Port's paying customers.³¹

Here, from any reasonably objective measure of the Port's "standpoint", the purpose of its marina at Squalicum Harbor is

²⁸*Id.* at 913-14.

²⁹*Id.* at 914.

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

³¹*Id.* at 669.

commercial—the mooring of fishing boats and pleasure craft for a fee....³²

The trial court’s Memorandum Opinion cites *Plano v. Renton* for the rule that “for immunity to attach, the landowner must show that no fees of any kind were charged.” CP 866. The trial court erred in not applying this rule and dismissing the City’s recreational use immunity defense because it charged WSDOT a fee to maintain the I-90 Trail.

G. The City’s Land Ownership Does Not Affect Its Liability or Confer Immunity.

As the City conceded to Judge McBroom, its ownership of the section of the I-90 Trail where Camicia was injured does not affect its liability because it could be liable for maintaining a dangerous condition on either its own or on state-owned portions of the I-90 Trail. RP 10.

Nor does the City’s ownership confer recreational use immunity. The City concedes that RCW 4.24.210 would not apply to injuries at locations where public streets intersect the I-90 Trail, (“the bike path starts at the curb”) RP 7, or on the state-owned portions of the I-90 Trail that it maintains (“at other locations, certainly at the edge of the bridge where

³²*Id.* at 668.

WSDOT's bridge connects with the island, that's owned by Washington DOT, and the city could not walk (sic--"block") that off)." RP 51-52.

But the City argues that RCW 4.24.210 creates patchwork immunity for injuries occurring on its own sections of the I-90 Trail because it claims it could unilaterally close its own sections to public transportation. *See e.g.* Supplemental Declaration of City Engineer Yamashita, which opines that the City could "unilaterally 'shut down' or limit use of the portion of the I-90 Trail" where the accident occurred without "seek[ing] permission from any other authority since it is owned by the City."³³ CP 498-499. The City's contentions are factually and legally insupportable.

Yamashita's supplemental declaration that the City could close its sections of the I-90 Trail directly contradicts his own (and Lancaster's) deposition testimony that the City could *not* close the I-90 Trail without

³³Camicia asked the trial court to disregard Yamashita's supplemental declaration, CP 719-721, under the rule in *Marshall v. A.C.&S., Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989), which provides:

When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.

WSDOT's permission because it was a regional transportation route over which WSDOT had "controlling authority."³⁴ Yamashita's declaration also is contradicted by the City's admission that it doesn't know if WSDOT has authority to keep the I-90 Trail open to public use. RP 52. The I-90 Turnback and Landscape Maintenance Agreement, which contractually obligates the City to maintain the I-90 Trail for public transportation, itself proves the City could not unilaterally close the trail.

The City's claim to patchwork immunity also is legally insupportable under *Plano v. Renton* and *Nielsen v. Port of Bellingham*. In *Plano*, Renton argued it was entitled to immunity because although it charged moorage fees for using its floating dock, "no fee of any kind was charged for use of the subject ramp or gangway" where the plaintiff fell.³⁵ The Court of Appeals rejected the argument that patchwork immunity follows the situs of an accident and held that RCW 4.24.210 does not apply if the accident location was a "necessary and integral part" of a larger non-recreational land or facility:

³⁴Judge McBroom ruled that Lancaster's answer that WSDOT had "controlling authority" over the I-90 Trail pertained "to the whole transportation corridor. That's the way I read this in context." RP 52.

³⁵103 Wn. App. at 915.

But the metal ramp where Plano fell is a necessary and integral part of the moorage. 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. An overnight moorage patron cannot even pay the required moorage fee without walking up one of the ramps, including the one on which Plano fell.³⁶

In this case, the City-owned sections are a “necessary and integral part” of the I-90 Trail because bicycle commuters could not use this public, non-motorized transportation route without riding over them.

The trial court’s Memorandum Opinion says “bicycle commuters are quite able to use Mercer Island surface roads to traverse the north end of the island.” CP 865. But making bicycle commuters leave the I-90 Trail and ride through city streets to get across Mercer Island would defeat the I-90 Trail’s purpose “as an important link in the regional transportation system” and “an integral part of the local transportation system.” CP 749. It would interfere with the I-90 Trail’s commercial purpose by wasting the time of bicycle commuters trying to get to and from work.

Paradoxically, the Memorandum Opinion would subject bicycle commuters to the dangers of riding with cars on city streets for the sole purpose of relieving the City of its common law and contractual duties to

³⁶*Id.* See also *Nielsen*, 107 Wn. App. at 668-69, affirming this reasoning and result.

maintain the I-90 Trail in a reasonably safe condition for ordinary commuter travel. It would invite bicyclists who are afraid of being hit by cars to ride on the sidewalks of Mercer Island's business district in violation of WAC 308-330-555, which says "(1) No person shall ride a bicycle upon a sidewalk in a business district."

Judge McBroom rejected the City's argument that RCW 4.24.210 requires bicycle commuters to get off the I-90 Trail and ride on city streets or lose their protection against the City's negligence:

THE COURT: "If you are going from downtown to Bellevue, from work to home, the only way you are protected from the negligence of Mercer Island is to get off the established, most direct route across the island and get down on the city streets? ...

So the only way you can escape the recreational use statute is to get off the transportation corridor along I-90 onto the city streets?"

THE CITY: "That's correct." RP 15.

H. RCW 4.24.210 Does Not Apply from a Reasonably Objective Landowner's Viewpoint.

In *Nielsen v. City of Bellingham*, Division I held that a *reasonably objective* standard is used to determine a landowner's viewpoint on whether RCW 4.24.210 should apply to lands it possesses or controls:

“From any reasonably objective measure of the Port’s “standpoint”, the purpose of its marina at Squalicum Harbor is commercial....”³⁷

In *Gaeta v. Seattle City Light*, Division I held that recreational use immunity applied from the landowner’s objective standpoint because City Light’s federal license to operate Diablo Dam required it to “in no way prevent the use of ...the reservoirs and project area for boating, fishing and other recreational purposes....”³⁸ In *Nielsen*, Division I commented:

Our statement in *Gaeta* [that “whether or not the recreational use act applies is to view it from the standpoint of the landowner or occupier”] must be read in the context of the facts of that case.³⁹

From any “reasonably objective measure of the [City of Mercer Island’s] ‘standpoint’”, the purposes of the I-90 Trail were transportation and commerce—to provide regional, public, non-motorized transportation across Lake Washington and Mercer Island and to charge WSDOT fees of \$68,000 a year adjusted for inflation to maintain the trail.

The Memorandum Opinion says “the City of Mercer Island views the trail in question as part of its park system” because 1) the trail is listed

³⁷107 Wn. 2d at 668.

³⁸54 Wn. App. at 605.

³⁹107 Wn. 2d at 667.

in the City's 1991 parks and trails plan as being in its future "Linear Park" along the I-90 freeway; 2) "it is maintained by the Parks Department rather than the Streets Department"; and 3) "it is placed in the same category as other parks and recreation facilities for purposes of applying the city's adult entertainment ordinance and the location of social service transitional housing limiting proximity to recreation areas." CP 866.

But none of these circumstances establishes that RCW 4.24.210 should apply from a reasonably objective landowner's standpoint. *Smith, Gaeta* and *Nielsen* stand for the rule that recreational use immunity does not apply to a public transportation route in a city park that is open to non-recreational, commuter and commercial uses. Consequently, even if this accident location was in Linear Park (which the City denied in the September 2004 NEPA Environmental Assessment), RCW 4.24.210 would not apply from a reasonably objective landowner's standpoint. Since *Smith, Gaeta* and *Nielsen* say a landowner who breaches its common law and contractual duties to maintain a public transportation route in a city park is *not* immune from liability for resulting injuries to a commuter, no reasonably objective landowner could assume otherwise.

Since RCW 4.24.210 does not apply to public transportation routes in or out of city parks that are allowed to be used for non-recreational purposes, it is legally inconsequential that the City may have placed the I-90 Trail “in the same category as other parks and recreation areas” for purposes of zoning adult entertainment and transitional social service housing. The City’s decision to apply WSDOT’s landscape maintenance fees to its Parks Department rather than its Streets Department also is irrelevant to recreation use immunity. None of this evidence establishes that the City “allow[s] members of the public to use [the I-90 Trail] for the purposes of outdoor recreation... “without charging a fee of any kind....” Indeed, it establishes the opposite.

I. *Riksem v. City of Seattle Is Not Analogous to This Case.*

The Memorandum Opinion says “the facts at hand [in Camicia’s case] are more analogous to those in *Riksem v. City of Seattle*, 47 Wn. App. 506 (1987)” than to the facts in *Smith v. Southern Pac. Transp. Co.*, *supra*. CP 865. That also is incorrect. For purposes of recreational use immunity, the I-90 Trail has much more in common with the public transportation route in *Smith* than the Burke-Gilman Trail in *Riksem*.

The Burke-Gilman Trail is “a former railroad track which was converted (improved) by the City [of Seattle] to an asphalt trail for walkers, joggers, and bicyclists.”⁴⁰ It is a “land which was primarily used for recreational purposes....”⁴¹, not a regional, public transportation route like the I-90 Trail that was built exclusively with federal and state highway funds and is primarily used for transportation purposes. Unlike Mercer Island, which charges WSDOT a fee to maintain the I-90 Trail, Seattle does not charge a fee to maintain the Burke-Gilman Trail.

Seattle could close the Burke-Gilman Trail to public outdoor recreation use without WSDOT’S permission because WSDOT does not own portions of or have controlling authority over the Burke-Gilman Trail. Consequently, but for RCW 4.24.210 the Burke-Gilman Trail “might not otherwise be open to the public.”⁴² In contrast, the I-90 Trail would be open to the public, with or without RCW 4.24.210, because it is a regional, non-motorized, public transportation route.

⁴⁰*See Partridge v. City of Seattle*, 49 Wn. App. 211, 214, 741 P.2d 1039 (1987).

⁴¹*Riksem v. City of Seattle*, 47 Wn. App. 506, 512, 736 P.2d 275 (1987).

⁴²*Id.* at 511.

Anton Riksem was a recreational cyclist who was injured while “using the Burke-Gilman Trail for recreational purposes.”⁴³ Susan Camicia was injured while using the I-90 Trail for the commercial purpose of commuting between her job in Seattle and her home in Mercer Island. In *Riksem*, “there was no causal relationship between the city’s alleged negligence and the accident.”⁴⁴ In this case, the City admits for purposes of summary judgment that its negligent failure to maintain the I-90 Trail proximately caused Camicia’s accident.

Riksem contains dicta that for equal protection purposes:

The statute [RCW 4.24.210] applies equally to everyone who enters a recreational area. 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.⁴⁵

These dicta do not apply here because Susan Camicia was injured while commuting on a public transportation route, not in a recreational area. Moreover, in *Nielsen v. Port of Bellingham*, Division I later held that RCW 4.24.210 does *not* apply to tort claims of non-recreational users who

⁴³*Id.* at 512.

⁴⁴*Van Scoik v. State*, 149 Wn. App. 328, 334, 203 P.3d 389 (2009), citing *Riksem*, 47 Wn. App. At 511-12, 736 P.2d 275.

⁴⁵47 Wn. App. at 512.

are injured on lands that are open to the public for both non-recreational and outdoor recreation purposes: “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.”⁴⁶

The City cites the statement in *Riksem* that “Land which was primarily used for recreational purposes having other incidental uses would certainly apply under the [recreational use immunity] statute as well”⁴⁷ as support for its argument that RCW 4.24.210 applies to any land that is allowed to be used for recreational purposes. RP 26. This argument is contrary to *Smith v. Southern Pac. Transp. Co.*, which holds that recreational use immunity does *not* apply to commuters injured on public transportation routes that are allowed to be used for non-recreational, transportation or commercial purposes.

The City’s argument also is extravagant and contrary to legislative intent because it would eliminate a municipality’s common law duty to

⁴⁶107 Wn. App. at 664.

⁴⁷47 Wn. App. at 512, *citing McCarver v. Manson Park & Recreation Dist*, 92 Wash.2d 370, 597 P.2d 1362 (1979) where the Supreme Court declined to hold that RCW 4.24.210 applied only to land primarily used for non-recreational purposes but which had incidental recreational uses as well.

maintain its public transportation routes in a reasonably safe condition for ordinary travel. If RCW 4.24.210 applies to public transportation routes—any of which can be used for outdoor recreation purposes of “pleasure driving... of other vehicles” or “viewing or enjoying... scenic...sights”⁴⁸—then a city’s common law duty to maintain its public roads in a reasonably safe condition for ordinary travel would be replaced by RCW 4.24.210(4)'s lesser duty to avoid “known dangerous artificial latent condition[s] for which warning signs have not been conspicuously posted.” There is no evidence that the Legislature intended to use the recreational use immunity statute to abolish a city’s common law duty to exercise ordinary care in maintaining its public roadways.

J. The City Did Not Meet Its Burden of Proving that RCW 4.24.210 Applies.

In *Gaeta v. Seattle City Light*, Division I ruled that to obtain immunity under RCW 4.24.210, a landowner must “br[ing] himself within the terms of the statute” ...[b]y opening up the lands for recreational use without a fee....⁴⁹ In *Nielsen v. Port of Bellingham*, Division I said RCW 4.24.210 must be strictly construed against landowner immunity: “As

⁴⁸See RCW 4.24.210(1).

⁴⁹54 Wn. App. 603, 608-09, 774 P.2d 1255 (1989).

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.”⁵⁰

The City had the burden of proving that RCW 4.24.210 applied to Susan Camicia’s tort claims.⁵¹ To do that, the City had to prove: 1) that RCW 4.24.210 creates tort immunity for landowners who breach their common law and contractual duties to maintain public transportation routes in a reasonably safe condition for ordinary travel;⁵² 2) that it had legal authority to permanently close the I-90 Trail to public transportation and therefore had the power to “allow” members of the public to use the trail for outdoor recreation;⁵³ and 3) that it did not charge a fee of any kind to maintain the trail.⁵⁴ The City did not prove any of these statutory requirements.

⁵⁰107 Wn. App. 662, 666-67, 27 P.3d 1242 (2001); *see also Van Scoik v. State*, 149 Wn. App. 328, 334, 203 P.3d 389 (2009).

⁵¹*Brougham v. Swarva*, 34 Wn. App. 68, 661 P.2d 138 (1983) (a defendant has the burden of proving its affirmative defenses).

⁵²*See Smith v. Southern Pac. Transp. Co.*, *Nielsen v. Port of Bellingham* and *Gaeta v. City of Seattle*, *supra*.

⁵³*See Tennyson v. Plum Creek Timber Co.*, *Riksem v. City of Seattle* and *Jones v. United States*, *supra*.

⁵⁴*See Plano v. City of Renton* and *Nielsen v. Port of Bellingham*, *supra*.

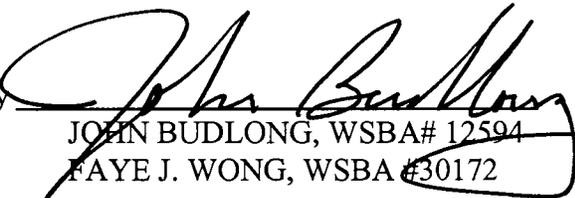
The trial court's Memorandum Opinion does not say the City met its burden of proving these statutory requirements. Instead, it "queries as to whether either of those individuals [*i.e.* Yamashita or Lancaster] has the testimonial capacity or personal knowledge to opine on the issue" of whether the City had the power to close the I-90 Trail. CP 865. This suggestion of testimonial incapacity further demonstrates the City's failure to produce any competent evidence to meet its burden of bringing itself within the terms of the statute. Since the City failed to prove that RCW 4.24.210 applies, this Court should reverse the summary judgment and dismiss the City's recreational use immunity defense.

V. 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 16th day of September 2009.

LAW OFFICES OF JOHN BUDLONG

By 
JOHN BUDLONG, WSBA# 12594
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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**

APPENDICES

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APPENDIX A

4.24.210. Liability of owners or others in possession of land and water areas for injuries to recreation users--Limitation

(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, the cutting, gathering, and removing of firewood by private persons for their personal use without purchasing the firewood from the landowner, hunting, fishing, camping, picnicking, swimming, hiking, bicycling, skateboarding or other nonmotorized wheel-based activities, hanggliding, paragliding, rock climbing, the riding of horses or other animals, clam digging, pleasure driving of off-road vehicles, snowmobiles, and other vehicles, boating, nature study, winter or water sports, viewing or enjoying historical, archaeological, scenic, or scientific sites, without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users.

(2) Except as otherwise provided in subsection (3) or (4) of this section, any public or private landowner or others in lawful possession and control of any lands whether rural or urban, or water areas or channels and lands adjacent to such areas or channels, who offer or allow such land to be used for purposes of a fish or wildlife cooperative project, or allow access to such land for cleanup of litter or other solid waste, shall not be liable for unintentional injuries to any volunteer group or to any other users.

(3) Any public or private landowner, or others in lawful possession and control of the land, may charge an administrative fee of up to twenty-five dollars for the cutting, gathering, and removing of firewood from the land.

(4) Nothing in this section shall prevent the liability of a landowner or others in lawful possession and control for injuries sustained to users by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted. A fixed anchor used in rock climbing and put in place by someone other than a landowner is not a known dangerous artificial latent condition and a landowner under subsection (1) of this section shall not be liable for unintentional injuries resulting from the condition or use of such an anchor. Nothing in RCW 4.24.200 and this section limits or expands in any way the doctrine of attractive nuisance. Usage by members of the public, volunteer groups, or other users is permissive and does not support any claim of adverse possession.

(5) For purposes of this section, the following are not fees:

(a) A license or permit issued for statewide use under authority of chapter 79A.05 RCW or Title 77 RCW; and

(b) A daily charge not to exceed twenty dollars per person, per day, for access to a publicly owned ORV sports park, as defined in RCW 46.09.020, or other public facility accessed by a highway, street, or nonhighway road for the purposes of off-road vehicle use.

RCW 4.24.200. Liability of owners or others in possession of land and water areas for injuries to recreation users--Purpose

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.

APPENDIX B

RCW 4.24.200. Liability of owners or others in possession of land and water areas for injuries to recreation users--Purpose

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.

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

CERTIFICATE OF SERVICE

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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 Brief of Appellant and Appendices were sent by legal messenger for filing with the court identified below and delivered to the following attorney for Respondent:

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DATED this 22nd day of September, 2009.

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