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No. 85583-8

RECEIVED BY E-MAIL
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SUSAN CAMICIA,

Plaintiff/Appellant,

vs.

HOWARD S. WRIGHT CONSTRUCTION COMPANY,

Defendant,

and

CITY OF MERCER ISLAND,

Defendant/Respondent.

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SUPREME COURT
STATE OF WASHINGTON
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BRIEF OF AMICUS CURIAE
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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of the Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of plaintiffs under the civil justice system, including an interest in the proper interpretation and application of the recreational use statute, RCW 4.24.210.

II. INTRODUCTION AND STATEMENT OF THE CASE

Susan Camicia (Camicia) was seriously injured while riding her bicycle on property owned by the City of Mercer Island (City), and sued the City and Howard S. Wright Construction Company (HSW) for negligence.¹ This appeal presents this Court with its first opportunity to address whether the immunity provided by the recreational use statute, RCW 4.24.210, applies to land that is part of Washington's public transportation system. The underlying facts are drawn from the Court of Appeals opinion and the briefing of the parties. See Camicia v. Howard S. Wright Constr. Co., 2010 WL 4457351, *review granted*, 171 Wn.2d 1026

¹ The claim against HSW is not involved in this appeal.

(2011); Camicia Supp. Br. at 1-7; City Pet. for Rev. at 1-8; Camicia Ans. to Pet. for Rev. at 1-6; Camicia Br. at 1-15; City Br. at 1-16.²

For purposes of this brief, the following facts are relevant: The Washington State Department of Transportation (WSDOT) built a bicycle trail in conjunction with construction of the Interstate-90 (I-90) limited-access highway. This bicycle trail (I-90 trail) is an 8-10 foot wide asphalt trail principally adjacent to the I-90 roadway, and is part of a non-motorized transportation route between Seattle, Mercer Island, and Bellevue. The trail includes “bollards,” or wooden posts, which are placed at intersections with city streets to keep motor vehicles off the trail.

In 1987, WSDOT and the City entered into the “I-90 Turnback and Landscape Maintenance Agreement.” Camicia WL 4457351 at *1. Under detailed terms and conditions, WSDOT transferred ownership of a portion of the I-90 trail to the City, which agreed to accept responsibility for maintenance of the trail. The quitclaim deed transferring the ownership interest from WSDOT to the City provides in part that the “property is transferred for road/street purposes only, and no other use shall be made of said property without obtaining prior written approval of the grantor [WSDOT].” Camicia at *2 (quoting quitclaim deed).

Camicia’s negligence claim against the City is based on the City’s failure to maintain in a reasonably safe manner that portion of the I-90 trail transferred by WSDOT. Camicia contends that as a result of the

² Two amicus curiae memoranda (ACMs) were filed at the petition for review stage of proceedings, one by the Washington State Association of Municipal Attorneys (WSAMA ACM), and the other by the City of Seattle (City of Seattle ACM).

City's negligence she struck a bollard on the trail and sustained injuries. In response, the City claims immunity under the recreational use statute, RCW 4.24.210. The City obtained summary judgment of dismissal of Camicia's claim on this basis in the superior court.

The Court of Appeals, Division I, reversed, concluding that the City did not establish its authority to control the relevant segment of the I-90 trail as part of its recreational parks system. The court found a genuine issue of material fact regarding whether the City was authorized by WSDOT, its grantor, to designate this segment of the trail as recreational land:

while the City owns the part of the trail where the accident occurred, there are material issues of fact as to whether the City has the authority to designate the I-90 trail as recreational land and assert immunity under RCW 4.24.210. There is no evidence in the record that WSDOT authorized the City to use the I-90 trail for any purpose other than "for road/street purposes." Nor is there any evidence that WSDOT, as the predecessor in interest, ever viewed that I-90 trail as recreational land. To the contrary, the evidence shows that WSDOT always characterized the I-90 trail as part of the regional transportation system and not as recreational land.

Camicia at *7.

The City then petitioned for review. While it does not contain a discrete section framing the issues, the City's petition addresses several perceived failings of the Court of Appeals opinion, including:

- The Court of Appeals misinterpreted the quitclaim deed from WSDOT to the City, and did so without any input from the parties. See City Pet. for Rev. at 17-19.
- "Contrary to all known precedent, the Court of Appeals concluded that the bike path's potential 'transportation use' created an issue of fact. This analysis is just plain wrong; no court has ever stripped a

landowner of immunity because its bike path had a transportation element—though many have done the opposite. Given that even Camicia’s own evidence demonstrates that recreation is an ‘important function,’ immunity necessarily applies.” *Id.* at 1-2.

- “Division I’s reversal of summary judgment is based upon the unstated but faulty premise that ‘a part of the regional transportation system’ cannot have an important recreational use. This was error.” *Id.* at 14.³

In her answer to the petition for review, Camicia reserves other issues raised before the Court of Appeals in the event this Court disagrees that genuine issues of material fact exist on whether the City had authority to designate its portion of the I-90 trail for recreational use purposes. *See* Camicia Ans. to Pet. for Rev. at 15-16.

III. ISSUE PRESENTED

Does RCW 4.24.210, which provides certain landowners with immunity regarding lands used “for the purposes of outdoor recreation,” apply to land that is a part of Washington’s public transportation system?

IV. SUMMARY OF ARGUMENT

Under the plain language of RCW 4.24.210, recreational use immunity should not apply to land that is part of a public transportation system, because such land cannot be “for the purposes of outdoor recreation.” To the extent that the relevant language of the statute could be considered ambiguous, it must be strictly construed because the statute immunizes conduct that may otherwise be actionable under tort law.

³ *See also* City of Seattle ACM at 5-6 (urging that person using public bicycle trail for transportation purposes may also be using it for recreational purposes); *cf.* WSAMA ACM at 6 (criticizing Court of Appeals opinion for implying that if recreational land is used for non-recreational purposes it is ineligible for immunity under RCW 4.24.210).

State and local governmental entities are subject to a duty of reasonable care in constructing and maintaining public transportation routes. Reasonably interpreted, RCW 4.24.210 should not be read as altering this duty of care, particularly in the absence of any indication by the Legislature that it intended to limit its broad waiver of sovereign immunity in this manner.

Bicycle trails comprise an integral component of the state's public transportation systems. If the portion of the I-90 trail involved in this case is part of a public transportation system, the recreational use statute should not apply. Public transportation must be deemed the defining function of this land. To the extent that Chamberlain v. Dep't of Transp., 79 Wn.App. 212, 901 P.2d 344 (1995), holds otherwise, it should be disapproved.

V. ARGUMENT

The Court of Appeals concludes that the City owns the portion of the I-90 trail where Camicia was injured, but that a question of fact exists whether the City had the authority to designate it for recreational use, rendering this land subject to RCW 4.24.210. See Camicia 2010 WL 4457351 at *6-8. In the course of its analysis, the court notes it is undisputed the I-90 trail was built "as part of a regional, non-motorized public transportation system." Id. at *1; see also id. at *6. The City itself acknowledges that the I-90 trail serves public transportation purposes. See City Supp. Br. at 18-19. However, the City argues that just because the I-90 trail is for public transportation does not prevent it from being

characterized as recreational land within the contemplation of RCW 4.24.210, as long as there is at least some recreational use of the property. See id.; see also City of Seattle ACM at 4-5, 9-10.

This argument raises a threshold question about whether land that is part of a public transportation system can be considered “for purposes of outdoor recreation,” or is subject to the recreational use statute *at all*. This Court has not had the occasion to address this question.⁴ This brief only addresses this issue, and it is assumed for purposes of argument that the portion of the I-90 trail involving Camicia’s injury is part of a public transportation system. The argument below addresses three points: 1) the recreational use statute should be strictly construed, if necessary; 2) Washington statutory law includes bicycle trails as an integral part of the public transportation system; and 3) properly construed, the recreational use statute does not apply to land that is part of a public transportation system.

⁴ Camicia does not appear to argue that RCW 4.24.210 is inapplicable to lands that are part of a public transportation system. But see Camicia Supp. Br. at 13. However, this should not prevent the Court from addressing this threshold question. The briefing of the parties and amici raises this issue, albeit implicitly. See City Pet. for Rev. at 1-2, 14, 17-18; City Supp. Br. at 18-19; Camicia Supp. Br. at 13, 16; City of Seattle ACM at 4-5. Moreover, this question of statutory construction has broad public import and could also resurface in this case after remand, if this Court agrees with the Court of Appeals that there is a fact question regarding authority and control.

In any event, the Court is not bound by the parties’ arguments when a statute is involved, and amicus curiae is permitted to call an issue to the attention of the Court if required by the necessities of the case. See Maynard Inv. Co., Inc. v. McCann, 77 Wn.2d 616, 623, 465 P.2d 657 (1970) (describing “salutary” exception to preservation of error rule allowing court to address an issue not advanced by parties “if the parties ignore the mandate of a statute or an established precedent”); Harris v. Dep’t of Labor & Indus., 120 Wn.2d 461, 467-68, 843 P.2d 1056 (1993) (noting that while amicus curiae generally may not address new issues, this rule does not apply when consideration of an issue is necessary for proper disposition of the case).

A. The Recreational Use Statute Provides Certain Landowners A Qualified Immunity That Alters Their Applicable Duty Of Care, And As Such It Should Be Strictly Construed.

Both state and local government entities are liable for negligent construction and maintenance of roads and highways. See Stewart v. State, 92 Wn.2d 285, 294-95, 597 P.2d 101 (1979); Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). Even before the waiver of sovereign immunity, municipalities were subject to tort liability because road construction and maintenance was considered a proprietary rather than a governmental function. See Kilbourn v. City of Seattle, 43 Wn.2d 373, 375-79, 261 P.2d 407 (1953); Hagerman v. City of Seattle, 189 Wash. 694, 698, 66 P.2d 1152 (1937); Hewitt v. Seattle, 62 Wash. 377, 378-83, 113 Pac. 1084 (1911). After the waiver of sovereign immunity, state and local governments are liable in tort to the same extent as a private person, regardless of whether the basis for liability was previously considered a proprietary or governmental function. See RCW 4.92.090; Kelso v. Tacoma, 63 Wn.2d 913, 916-19, 390 P.2d 2 (1964) (holding that RCW 4.92.090, as originally enacted, also waived sovereign immunity of local governmental entities); RCW 4.96.010 (confirming waiver of sovereign immunity of local governmental entities); McCarver v. Manson Park, 92 Wn.2d 370, 377, 597 P.2d 1362 (1979) (noting at time of 1972 amendment to recreational use statute governmental entities “were not otherwise immune from tort liability”).

Without specifically addressing liability for negligent construction or maintenance of roads, the recreational use statute alters the liability of landowners and others in lawful possession and control of property (landowners) when they allow members of the public to use their land “for purposes of outdoor recreation.” RCW 4.24.210; see also RCW 4.24.200 (explaining legislative intent underlying RCW 4.24.210).⁵ The immunity provided by the statute is qualified in nature. For example, landowners remain subject to tort liability for “unintentional injuries,” if they charge a fee for use of their land, if there is a “known dangerous artificial latent condition that causes injury to a user of the land for which warning signs have not been conspicuously posted,” or, as the Court of Appeals below noted, if the landowner in question does not have authority to designate the land as recreational. See RCW 4.24.210; Camicia at *7.

When RCW 4.24.210 was first enacted in 1967, it only referenced “any landowners.” Laws of 1967, Ch. 216 §2. In 1972, the Legislature substituted “any public or private landowners” for “any landowners.” Laws of 1972, Ch. 173 §17.⁶ From the time of its original enactment, the statute has altered the common law liability of private landowners, who generally have an affirmative duty to discover dangerous conditions and render their property safe for invitees. See generally Egede-Nissen v. Crystal Mountain, 93 Wn.2d 127, 132, 606 P.2d 1214 (1980); Van Dinter

⁵ The current versions of RCW 4.24.200 and 4.24.210 are reproduced in the Appendix.

⁶ The recreational use statute has been amended on many occasions over the years. See McCarver, 92 Wn.2d at 374-77 (discussing early revisions); Curran v. Marysville, 53 Wn.App. 358, 361-62, 766 P.2d 1141 (same), *review denied*, 112 Wn.2d 1020 (1989).

v. Kennewick, 121 Wn.2d 38, 41-42, 846 P.2d 522 (1993). At least since the 1972 amendment, the statute has also modified the liability of the State and other governmental entities. See Laws of 1972, Ch. 173 §17.

This Court should strictly construe RCW 4.24.210 to the extent necessary because the statute serves to immunize conduct that may otherwise be subject to tort liability. Statutory grants of immunity are not favored in the law, and should be strictly construed. See Tennyson v. Plumb Creek Timber Co., 73 Wn.App. 550, 557-58, 872 P.2d 524 (narrowly construing RCW 4.24.210 based on strict construction analysis of New Jersey court interpreting similar statute), *review denied*, 124 Wn.2d 1029 (1994); Matthews v. Elk Pioneer Days, 64 Wn.App. 433, 439, 824 P.2d 541 (narrowly construing “outdoor recreation” under RCW 4.24.210, noting trend toward abrogating statutory and common law immunities for negligence, and concluding that “immunities which remain should be strictly construed and limited so that only that immunity which is necessary to serve the particular societal interest involved is recognized”), *review denied*, 119 Wn.2d 1011 (1992).⁷ As this Court noted in Keene v. Edie, 131 Wn.2d 822, 832, 935 P.2d 588 (1997):

⁷ This analysis is separate from the rule of construction invoked elsewhere in Matthews, requiring strict construction of a statute in derogation of the common law. See 64 Wn.App. at 437. As the City notes, this rule of construction has been criticized. See City Br. at 19 & n.7; see also Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 102, 829 P.2d 746 (1992) (acknowledging but not addressing criticism of the rule). Nonetheless, the rule continues to serve as an analytical tool in appropriate cases. See Potter v. Wash. State Patrol, 165 Wn.2d 67, 76-80, 196 P.3d 691 (2008) (refusing to find statutory vehicle impoundment procedures abrogated common law recovery for conversion); Michaels v. CH2M Hill, Inc., 171 Wn.2d 587, 600, 257 P.3d 532 (2011) (invoking rule in interpreting design professional immunity statute, RCW 51.24.035).

As we stated in *Freehe v. Freehe*, 81 Wash.2d 183, 192, 500 P.2d 771 (1972) “absent express statutory provision, or compelling public policy, the law should not immunize tort-feasors or deny remedy to their victims.”

If the Court cannot resolve the question of whether the recreational use statute applies to lands that are part of a public transportation system by reference to the plain language of RCW 4.24.200-.210 and common sense, then it should resolve any ambiguities by strictly construing this immunity statute, as discussed below.

However, before addressing interpretation of RCW 4.24.210, it is necessary to place this statute in the larger context of the statutory scheme establishing Washington’s public transportation system, including detailed provisions relating to transportation via bicycle trails.

B. In Washington, Bicycle Trails May Be Created And Maintained As Part Of A Public Transportation System.

Underlying the City’s argument is the assumption that the reference to “bicycling” as a type of “outdoor recreation” in the recreational use immunity statute defines the character of any and all land where bicycling occurs as recreational. While it is undoubtedly true that certain land where bicycling occurs is properly considered recreational, this is not necessarily the case. Certain bicycle facilities are integral to our state public transportation system.

Washington has an elaborate, codified scheme creating a public transportation system, Title 47 RCW, which specifically includes bicycle

The rule of strict construction for immunities is a sufficient guide for the Court’s analysis here.

trails and paths. See RCW 47.06.050(1)(e); RCW 47.06.100; see also RCW 47.30.005 (defining "trail" and "path").⁸ The Legislature has recognized that bicycle transportation comprises an essential component of this public transportation system:

The state of Washington is confronted with emergency shortages of energy sources utilized for the transportation of its citizens and must seek alternative methods of providing public mobility. Bicycles are suitable for many transportation purposes, and are pollution-free in addition to using a minimal amount of resources and energy. However, the increased use of bicycles for both transportation and recreation has led to an increase in both fatal and nonfatal injuries to bicyclists. The legislature therefore finds that the establishment, improvement, and upgrading of bicycle routes is necessary to promote public mobility, conserve energy, and provide for the safety of the bicycling and motoring public.

RCW 47.26.300.⁹ Further:

The legislature finds and declares that bicycling and walking are becoming increasingly popular in Washington as clean and efficient modes of transportation, as recreational activities, and as organized sports. Future plans for the state's transportation system will require increased access and safety for bicycles and pedestrians on our common roadways, and federal transportation legislation and funding programs have created strong incentives to implement these changes quickly. As a result, many more people are likely to take up bicycling in Washington both as a leisure activity and as a convenient, inexpensive form of transportation.

RCW 43.59.010(2).¹⁰

⁸ The current versions of RCW 47.06.050, RCW 47.06.100 and RCW 47.30.005 are reproduced in the Appendix.

⁹ RCW 47.26.300-.305 create the state Transportation Improvement Board (TIB) to fund and encourage the development of a system of bicycle routes within counties, cities and towns. See also RCW 47.26.044 (defining "board").

¹⁰ Ch. 43.59 RCW is the enabling statute for the Washington Traffic Safety Commission. See also RCW 43.43.390 (creating "bicycle awareness program" within the Washington State Patrol in recognition of the fact that "[b]icycling is increasing in popularity as a form of recreation *and as an alternative mode of transportation*"; emphasis added); RCW 47.04.190-.200 (creating WSDOT "bicycle transportation management program").

Under the Growth Management Act, Ch. 36.70A RCW, comprehensive plans adopted by local government entities must contain a "transportation element" that includes a "bicycle component" to encourage "enhanced community access and promote healthy lifestyles." RCW 36.70A.070(6)(a)(vii).¹¹ Local government entities must adopt "comprehensive transportation programs" that incorporate the new or enhanced bicycle facilities identified in the comprehensive plan.¹² The Legislature periodically reviews these plans to determine expenditures for various non-motorized transportations facilities, specifically including bicycle facilities. See RCW 44.04.290 (referring to RCW 35.77.010 and 36.81.121).

In addition to transportation planning at the local level, the state coordinates and engages in planning on a statewide basis. See RCW 47.06.010. WSDOT is charged with developing a statewide multimodal transportation plan in compliance with state and federal law "to ensure the continued mobility of people and goods within regions and across the state in a safe, cost-effective manner." RCW 47.06.040. This plan includes "[a] state-owned facilities component, which shall guide

¹¹ The nature of the bicycle component is described in particular in WAC 365-196-430(2)(j)(i)-(v), and additional provisions regarding bicycle transportation are discussed throughout the regulation. See WAC 365-196-430(1)(g), (2)(b)(i) & (iii), (2)(c)(ii)(B), (2)(e)(vii), (2)(f), (2)(g)(iv), (2)(h), (2)(k)(ii), 2(m)(i), (ii), (vii) & (ix).

¹² See RCW 36.81.121(1) (incorporating RCW 36.70A.070(6) bicycle component for counties); RCW 36.81.122 (providing "annual revision and extension of [county] comprehensive road programs pursuant to RCW 36.81.121 shall include consideration of and, wherever reasonably practicable, provisions for bicycle paths, lanes, routes, and roadways"); RCW 35.77.010(1) (incorporating RCW 36.70A.070(6) bicycle component for cities); RCW 35.77.015 (providing "annual revision and extension of [city] comprehensive street programs pursuant to RCW 35.77.010 shall include consideration of and, wherever reasonably practicable, provisions for bicycle routes").

state investment for state highways including bicycle ... facilities,” as well as “[a] state-interest component, which shall define the state interest in ... bicycle transportation,” among other things. RCW 47.06.040(1)-(2); see also RCW 47.06.050(1)(e) (describing state-owned facilities component with respect to bicycles). With respect to the state-interest component in particular:

the statewide multimodal transportation plan shall include a bicycle transportation and pedestrian walkways plan, which shall propose a statewide strategy for addressing bicycle and pedestrian transportation, including the integration of bicycle and pedestrian pathways with other transportation modes; the coordination between local governments, regional agencies, and the state in the provision of such facilities; the role of such facilities in reducing traffic congestion; and an assessment of statewide bicycle and pedestrian transportation needs. This plan shall satisfy the federal requirement for a long-range bicycle transportation and pedestrian walkways plan.

RCW 47.06.100.

Consistent with state and local planning and safety concerns, facilities for bicyclists must be incorporated into the design of highways and freeways along corridors where they do not exist. See RCW 47.30.020. Where safety concerns dictate, state and local government entities are authorized and directed to provide separate bicycle trails. See RCW 47.30.030; see also RCW 47.30.005 (defining “trails”).

Local government entities are eligible for funding from WSDOT and TIB for bicycle facilities, see RCW 47.04.0001 (WSDOT); RCW 47.26.305 (TIB); and they are required to spend a portion of funds received from statewide fuel taxes on such facilities, see RCW 47.30.050.

Cities and towns may use any funds available “for street or road construction, maintenance, or improvement for building, improving, and maintaining bicycle paths, lanes, roadways, and routes, and for improvements to make existing streets and roads more suitable and safe for bicycle traffic,” on condition that such bicycle facilities are “suitable for bicycle transportation purposes and not solely for recreation purposes.” RCW 35.75.060.¹³

Counties are authorized to use “funds deposited in the county road fund” and “funds credited to the county road fund from any county or road district tax levied for the construction of county roads” for the construction of “bicycle paths, lanes, routes and roadways.” See RCW 36.82.145 (county road fund); RCW 36.75.240 (taxes credited to county road fund). The construction of such “bicycle paths, lanes, routes and roadways” must comply with “the standards of the state department of transportation” if such bicycle facilities were constructed or modified after June 10, 1982. See RCW 36.82.145; RCW 36.75.240; see also RCW 35.75.060 (same for cities and towns). In constructing such facilities, counties are deemed to be acting “as agents of the state.” See RCW 36.75.020.

With a fuller understanding of the role of bicycle trails in the state public transportation system, it is possible to address whether these trails

¹³ Local government entities have separate authorization to build recreational bicycle paths, see RCW 36.68.090, and the state separately designates recreational trails for “foot powered bicycle” use, see RCW 79A.35.080.

can be considered as land that is “for purposes of outdoor recreation” under RCW 4.24.210.

C. RCW 4.24.210 Should Not Apply To Land Owned By The State Or Local Governmental Entities That Is Part Of A Public Transportation System, Including Bicycle Trails.

The threshold question on this review ought to be whether the Legislature intended that lands that are part of a public transportation system be subject to the immunity provided by the recreational use statute. The answer should be “no.” These lands are for transportation, not for “purposes of outdoor recreation.” This conclusion follows from the plain text of RCW 4.24.210 and its companion statute, RCW 4.24.200, aided by common sense.

This Court’s primary goal in construing a statute is to determine and give effect to the Legislature’s intent. See Custody of E.A.T.W., 168 Wn.2d 325, 343, 227 P.3d 1284 (2010). Where possible, this task begins and ends with the text of the statute, if it is plain and unambiguous. See id. Undefined terms used in the statute are given their common dictionary meaning, absent a strong indication that the Legislature meant something else. See Michaels, 171 Wn.2d at 601.

The legislative intent of the recreational use statute is to encourage landowners, public or private, to make their land available to the public “for the purposes of outdoor recreation.” RCW 4.24.210; see also RCW 4.24.200 (stating “for recreational purposes”). “Recreation” is playful activity that nourishes the spirit. See The American Heritage

Dictionary, s.v. “recreation” (2nd Coll. Ed., 1991) (defining as an “activity that amuses or stimulates; play”); Merriam-Webster Online, s.v. “recreation” (defining as “refreshment of strength and spirit after work”; “a means of refreshment or diversion”; “hobby”; viewed Oct. 15, 2011).

The state public transportation system is not maintained for the amusement or stimulation of travelers, whether the component is a roadway or bicycle trail, or the vehicle is motorized or not. It is for transportation. This land is sui generis, and transportation should be deemed to fall outside of the ordinary meaning of the phrase “outdoor recreation” as a matter of law. It should make no difference that a traveler using a public thoroughfare would be deemed to be recreating in other contexts.

It is true that the public transportation system plan recognizes recreational aspects of the system in general and bicycling in particular. See e.g. RCW 47.06.050(1)(c) (regarding developing and designating certain transportation routes as “scenic and recreational highways”); RCW 47.26.300 (recognizing “use of bicycles for both transportation and recreation”). Nonetheless, this recognition should not fundamentally alter the character of the land in question from transportation to recreation. Nothing in the statutory scheme establishing Washington’s public transportation system suggests the recreational use statute can apply in this context.

The City may argue that the plain meaning of the statute supports application of the recreational use immunity to public thoroughfares. For example, “pleasure driving of...other vehicles” and “viewing...scenic sights” no doubt occurs on Washington’s public thoroughfares every day. See RCW 4.24.210(1). However, such a literal reading defies common sense and leads to the absurd consequence of relieving the state and local governmental entities of their customary duty of care to construct and maintain public thoroughfares in a reasonably safe manner, without any indication the Legislature intended this result. See Tingey v. Haisch, 159 Wn.2d 652, 663-64, 152 P.3d 1020 (2007) (stating court will avoid literal reading of statute that would produce unlikely, absurd, or strained consequences). Although this interpretation is conceivable, it is not a reasonable interpretation of the common usage for “outdoor recreation.” See Custody of E.A.T.W. at 344. The Court should conclude that the plain and ordinary meaning of “outdoor recreation” does not include land that is part of a public transportation system.

On the other hand, if this Court concludes that RCW 4.24.210 and the definition of “outdoor recreation” is ambiguous because it is susceptible to more than one reasonable interpretation, then it should apply the rule of strict construction discussed in §A and conclude that “outdoor recreation” does not encompass land that is part of a public transportation system.

The City argues that the recreational use statute “has been repeatedly applied to accidents *on roads and bridges*, where there is an overwhelming ‘transportation use.’” City Br. at 17. The Court of Appeals cases it relies upon for this argument are Riksem v. City of Seattle, 47 Wn.App. 506, 736 P.2d 275, *review denied*, 108 Wn.2d 1026 (1987); Gaeta v. Seattle City Light, 54 Wn.App. 603, 774 P.2d 1255, *review denied*, 113 Wn.2d 1020 (1989); Chamberlain v. Dep’t of Transp., *supra*; and Widman v. Johnson, 81 Wn.App. 110, 912 P.2d 1095 (1996). See City Br. at 30-32; City Pet. for Rev. at 11-13; City Supp. Br. at 8-12; see also City of Seattle ACM at 5-7. These cases do not appear to involve land that is part of a public transportation system, except Chamberlain, which should be disapproved to the extent it applies RCW 4.24.210 to a state highway.

Riksem involved a bicycle accident on the Burke-Gilman Trail in the Seattle area. See 47 Wn.App. at 507-08. The court rejected the argument that the recreational use statute did not apply to this trail, but there is no indication that the trail is part of a public transportation system. See id. at 510; Partridge v. Seattle, 49 Wn.App. 211, 214, 741 P.2d 1039 (1987) (describing Burke-Gilman Trail as former railroad track converted by the City of Seattle for walkers, joggers and bicyclists); see also City of Seattle ACM at 6 & n.2.

Gaeta involved a motorcycle accident on a roadway over Diablo Dam. In applying the recreational use statute, the Court of Appeals

concluded the roadway was not a public highway. See Gaeta, 54 Wn.App. at 608. The court found it determinative that “[t]he Diablo Dam roadway is not a thoroughfare, but leads only to the reservoir and abutting lands left open by Seattle City Light to the public for recreational use.” Id.

Widman involved a motor vehicle accident that occurred on a state highway, when the vehicle in which the plaintiff passenger was riding failed to yield to traffic on the highway when coming off a private logging road made available to the public for recreational purposes. See 81 Wn.App. at 112. The gravamen of the plaintiff’s claim against the landowner was the failure to properly maintain the private logging road, and the landowner’s claim for recreational use immunity was upheld. See id. at 112-15. (The State, as owner of the public highway, was not a party in Widman.)

Chamberlain does appear to involve application of RCW 4.24.210 to land that is part of a public transportation system, a state highway. See 79 Wn.App. at 218-19. In Chamberlain, a 7-year old boy was killed while sightseeing on Deception Pass Bridge when he was struck by a vehicle traversing the bridge when the boy was either on the highway itself or at the edge of an abutting sidewalk. See id. at 220. The Court of Appeals concludes that the bridge – consisting of both highway and sidewalk – is land subject to the recreational use statute. See id. at 216-19 (citing Riksem). In reaching this result the court reads the term “land” expansively, while also focusing on the Chamberlain family’s purpose for

being on the bridge. See *id.* at 218, 221. The court's uneasiness with this analysis seems evident in a telling passage at the end of the opinion:

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.

Id. at 221. Chamberlain should have been resolved under a traditional negligence analysis insofar as whether the state constructed and maintained its public highway and adjoining sidewalk in a reasonable manner. See Stewart v. State, *supra*. If this Court concludes that land that is part of a public transportation system falls outside the ambit of RCW 4.24.210, then the holding in Chamberlain must be disapproved.¹⁴

VI. CONCLUSION

The Court should hold that lands that are part of a public transportation system, including bicycle trails, should not be subject to recreational use immunity under RCW 4.24.210. If the I-90 trail segment at issue in this case qualifies as part of a public transportation system, then the City should not be allowed to invoke immunity under the statute.

DATED this 17th day of October, 2011.

George M. Ahrend
FOR BRYAN P. HARNETIAUX, GEORGE M. AHREND
WITH AUTHORITY

On behalf of WSAJ Foundation

¹⁴ Ravenscroft v. Washington Water Power Co., 136 Wn.2d 911, 921, 923, 924-25, 969 P.2d 775 (1998), cites Chamberlain for the propositions that recreational use immunity is not limited to land in its "natural" state, and also that an artificial condition is not "latent" within the meaning of RCW 4.24.210 if it is readily apparent to the general class of recreational users. Neither of these aspects of Chamberlain is at issue in this case.

Appendix

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.

[1969 ex.s. c 24 § 1; 1967 c 216 § 1.]

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, hydroelectric project owners, 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, kayaking, canoeing, 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)(a) 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.

(i) 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.

(ii) Releasing water or flows and making waterways or channels available for kayaking, canoeing, or rafting purposes pursuant to and in substantial compliance with a hydroelectric license issued by the federal energy

regulatory commission, and making adjacent lands available for purposes of allowing viewing of such activities, does not create a known dangerous artificial latent condition and hydroelectric project owners under subsection (1) of this section shall not be liable for unintentional injuries to the recreational users and observers resulting from such releases and activities.

(b) Nothing in RCW 4.24.200 and this section limits or expands in any way the doctrine of attractive nuisance.

(c) 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;

(b) A pass or permit issued under section 3, 4, or 5 of this act; and

(c) 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 46.09.310, or other public facility accessed by a highway, street, or nonhighway road for the purposes of off-road vehicle use.

[2011 c 320 § 11, eff. July 1, 2011; 2011 c 171 § 2, eff. July 1, 2011; 2011 c 53 § 1, eff. July 22, 2011; 2006 c 212 § 6, eff. June 7, 2006. Prior: 2003 c 39 § 2, eff. July 27, 2003; 2003 c 16 § 2, eff. July 27, 2003; 1997 c 26 § 1; 1992 c 52 § 1; prior: 1991 c 69 § 1; 1991 c 50 § 1; 1980 c 111 § 1; 1979 c 53 § 1; 1972 ex.s. c 153 § 17; 1969 ex.s. c 24 § 2; 1967 c 216 § 2.]

RCW 47.06.050. State-owned facilities component

The state-owned facilities component of the statewide multimodal transportation plan shall consist of:

(1) The state highway system plan, which identifies program and financing needs and recommends specific and financially realistic improvements to preserve the structural integrity of the state highway system, ensure acceptable operating conditions, and provide for enhanced access to scenic, recreational, and cultural resources. The state highway system plan shall contain the following elements:

(a) A system preservation element, which shall establish structural preservation objectives for the state highway system including bridges, identify current and future structural deficiencies based upon analysis of current conditions and projected future deterioration, and recommend program funding levels and specific actions necessary to preserve the structural integrity of the state highway system consistent with adopted objectives. Lowest life cycle cost methodologies must be used in developing a pavement management system. This element shall serve as the basis for the preservation component of the six-year highway program and the two-year biennial budget request to the legislature;

(b) A highway maintenance element, establishing service levels for highway maintenance on state-owned highways. The highway maintenance element must include an estimate of costs for achieving those service levels over twenty years. This element will serve as the basis for the maintenance component of the six-year highway program and the two-year biennial budget request to the legislature;

(c) A capacity and operational improvement element, which shall establish operational objectives, including safety considerations, for moving people and goods on the state highway system, identify current and future capacity, operational, and safety deficiencies, and recommend program funding levels and specific improvements and strategies necessary to achieve the operational objectives. In developing capacity and operational improvement plans the department shall first assess strategies to enhance the operational efficiency of the existing system before recommending system expansion. Strategies to enhance the operational efficiencies include but are not limited to access management, transportation system management, demand management, and high occupancy vehicle facilities. The capacity and operational improvement element must conform to the state implementation plan for air quality and be consistent with regional transportation plans adopted under chapter 47.80 RCW, and shall serve as the basis for the capacity and operational improvement portions of the six-

year highway program and the two-year biennial budget request to the legislature;

(d) A scenic and recreational highways element, which shall identify and recommend designation of scenic and recreational highways, provide for enhanced access to scenic, recreational, and cultural resources associated with designated routes, and recommend a variety of management strategies to protect, preserve, and enhance these resources. The department, affected counties, cities, and towns, regional transportation planning organizations, and other state or federal agencies shall jointly develop this element;

(e) A paths and trails element, which shall identify the needs of nonmotorized transportation modes on the state transportation systems and provide the basis for the investment of state transportation funds in paths and trails, including funding provided under chapter 47.30 RCW.

(2) The state ferry system plan, which shall guide capital and operating investments in the state ferry system. The plan shall establish service objectives for state ferry routes, forecast travel demand for the various markets served in the system, develop strategies for ferry system investment that consider regional and statewide vehicle and passenger needs, support local land use plans, and assure that ferry services are fully integrated with other transportation services. The plan must provide for maintenance of capital assets. The plan must also provide for preservation of capital assets based on lowest life cycle cost methodologies. The plan shall assess the role of private ferries operating under the authority of the utilities and transportation commission and shall coordinate ferry system capital and operational plans with these private operations. The ferry system plan must be consistent with the regional transportation plans for areas served by the state ferry system, and shall be developed in conjunction with the ferry advisory committees.

[2007 c 516 § 10, eff. July 22, 2007; 2002 c 5 § 413; 1993 c 446 § 5.]

RCW 47.06.100. Bicycle transportation and pedestrian walkways plan

The state-interest component of the statewide multimodal transportation plan shall include a bicycle transportation and pedestrian walkways plan, which shall propose a statewide strategy for addressing bicycle and pedestrian transportation, including the integration of bicycle and pedestrian pathways with other transportation modes; the coordination between local governments, regional agencies, and the state in the provision of such facilities; the role of such facilities in reducing traffic congestion; and an assessment of statewide bicycle and pedestrian transportation needs. This plan shall satisfy the federal requirement for a long-range bicycle transportation and pedestrian walkways plan.

[1993 c 446 § 10.]

RCW 47.30.005. Definitions

For the purposes of this chapter, "trail" or "path" means a public way constructed primarily for and open to pedestrians, equestrians, or bicyclists, or any combination thereof; other than a sidewalk constructed as a part of a city street or county road for the exclusive use of pedestrians. The term "trail" or "path" also includes a widened shoulder of a highway, street, or road when the extra shoulder width is constructed to accommodate bicyclists consistent with a comprehensive plan or master plan for bicycle trails or paths adopted by a state or local governmental authority either prior to such construction or prior to January 1, 1980.

[1979 ex.s. c 121 § 4.]