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**SUPREME COURT
OF THE STATE OF WASHINGTON**

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

CITY OF MERCER ISLAND

Petitioner,

vs.

SUSAN CAMICIA,

Respondent.

**SUPPLEMENTAL BRIEF OF RESPONDENT
SUSAN CAMICIA**

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WSBA #12594**

**Howard Mark Goodfriend
WSBA #14355
Catherine Wright Smith
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ORIGINAL

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I. INTRODUCTION

May a municipality that owns for “road/street purposes only” a section of a state-controlled, regional public transportation route for which it charges annual “street and landscape maintenance and operation” fees invoke the recreational use immunity statute, RCW 4.24.210(1), to nullify its duty to keep the public transportation route in a reasonably safe condition for ordinary travel? The answer to this question must be “no.”

The City of Mercer Island argues that any owner of any “land used for ‘bicycling’ [is] . . . explicitly protected by the recreational use immunity statute,” *Petition for Review at 1*, even if the land is a public transportation route that the City charges money to maintain and cannot close off to public use. The City’s position conflicts with its duty to maintain its public transportation routes in a reasonably safe condition for ordinary travel under *Keller v. City of Spokane*, 146 Wn.2d 237, 254, 44 P.3d 845 (2002). No legislation or case law supports the City’s argument that RCW 4.24.210(1) abrogates a municipality’s duty to maintain reasonably safe public transportation routes for non-motorists, especially when the City charges a maintenance fee to do so. The City’s sweeping premise that municipalities owe no duty of care to non-motorists who use public transportation routes for any of the purposes listed in RCW 4.24.210(1) would reinstate through

judicial action sovereign immunity that the Legislature decisively waived in RCW 4.96.010(1).

The City also seeks to expand immunity beyond the purpose and terms of the recreational use statute. The Legislature's purpose in enacting 4.24.210(1) was to "encourage owners or others in lawful possession and control of land . . . to make them available to the public for recreational purposes," RCW 4.24.200, not to promote immunity as an end in itself or to vouchsafe immunity on landowners like the City whose public corridors must remain open for non-recreational non-motorized transportation. RCW 4.24.210(1) also only immunizes landowners "who allow members of the public to use the[ir lands] for the purposes of outdoor recreation . . . without charging a fee of any kind therefor." But the City cannot prevent public use of the I-90 trail for outdoor recreation because WSDOT allows members of the public to use it for "road/street purposes," and the City charges annual fees to maintain the trail. Even if the I-90 trail were deemed "recreational land," RCW 4.24.210(1) would not immunize the City for creating and maintaining the hazardous conditions that led to Susan Camicia's accident and injuries.

II. STATEMENT OF THE CASE

A. **The I-90 Trail Is A Regional Public Transportation Route Under WSDOT's Jurisdiction.**

The I-90 trail is a regional public transportation route and the only direct way for bicyclists and pedestrians to commute over Lake Washington from the Eastside to Seattle and back. CP 702, 747-50. The Washington State Department of Transportation (WSDOT) built the I-90 trail exclusively with non-recreational federal and state highway funds. CP 749. In 1987, WSDOT and the City of Mercer Island entered into an "I-90 Turnback and Landscape Maintenance Agreement," in which the City "accept[ed] maintenance responsibility. . . [for] all street and landscape maintenance and operation" of the I-90 trail on Mercer Island in exchange for \$68,000.00 per year, to be adjusted annually for inflation. CP 508-10.

B. **The State Conveyed To The City For "Road/Street Purposes Only" The Section Of The I-90 Trail Where Susan Camicia Was Injured.**

In April 2000, WSDOT quitclaimed to the City the section of the I-90 trail where Susan Camicia was later injured, limiting the City's use of the property conveyed to "road/street purposes only" unless WSDOT gave "prior written approval" for any other use:

It is understood and agreed that the above referenced property is transferred for road/street purposes only, and no other use shall be made of said property without the prior written approval of the grantor.

CP 624.

WSDOT's quitclaim deed does not authorize the City to designate the I-90 trail as recreational land. WSDOT has never given written approval to the City for any use other than road/street purposes. City Development Director Steven Lancaster admitted that the City lacks authority to close the I-90 trail because WSDOT is the "controlling authority" over the trail, and closing the trail would require WSDOT and/or federal approval. CP 845. City Engineer Patrick Yamashita also testified that the City lacks authority to permanently close the I-90 trail across Mercer Island. CP 778.

In 2002, WSDOT reaffirmed its jurisdiction over the I-90 trail in requesting Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) "concurrence with the determination that the I-90 bicycle and pedestrian path is not a §4(f) [park or recreation land] resource" under 49 U.S.C. §303(c):

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; see *COA Opinion at 12* (Appendix A-24 to Petition for Review).

Today, the City contends the portion of the I-90 trail where Susan Camicia was injured was recreational land. But in September 2004, the Federal Transit Administration and Sound Transit, “in coordination with City of Mercer Island,” prepared an Environmental Assessment that concluded that the Park & Ride lot and “the adjacent sidewalks”—*i.e.*, the location where Camicia was later injured, CP 772, “is *not* a publicly owned public park, recreation area, or wildlife and waterfowl refuge, or an historic site.” CP 774 (emphasis supplied). *See also* CP 769, 775.

C. The City Created and Maintained the Transportation Hazard That Gravely Injured Susan Camicia.

The City maintained three unpainted, non-reflectorized wood bollard posts, without any warning striping leading up to them, at the site of Susan Camicia’s accident on the I-90 trail. CP 730-32. The City’s Right of Way Use Permit ordered its contractor to install a chain link fence “on the trail” beside the bollards: “A chain link fence, gate and signage *shall be installed on the trail* to prevent public access during construction.” CP 831 (emphasis supplied). One of the fence footings protruded 30 inches into the I-90 trail about 15 feet up the trail from the bollards. CP 711, 727-29.

On June 19, 2006, Susan Camicia, who commuted to her employment by bicycle, was riding on the I-90 trail alongside the Mercer Island Park & Ride lot, CP 841-42. As Susan steered to avoid the protruding fence footing,

her bicycle came into the path of the unmarked bollard in the middle of the trail. Susan's front tire hit the bollard and she fell head-first over her handlebars onto the pavement. CP 842. Susan instantly suffered a C-6 spinal cord injury that left her paralyzed for life at the age of forty-one. CP 712.

Transportation safety expert Edward Stevens testified that the City's unmarked bollards and the construction fence on the trail violated the Manual on Uniform Traffic Control Devices ("MUTCD"), WSDOT, and American Association of State Highway Transit Officials ("AASHTO") safety standards. CP 693, 697. Mr. Stevens concluded the City created an inherently deceptive, dangerous condition by not maintaining required clearances between the construction fence and the trail, and by not striping the trail up to the middle bollard or painting or reflectorizing the bollards in a contrasting color. CP 697-98.

As Susan's lawsuit was dismissed on summary judgment, the City must concede that Susan was using the trail for non-recreational transportation, and that the City created the dangerous condition that caused her injuries by negligently failing to maintain the I-90 trail in a reasonably safe condition for ordinary travel. *See* RP 2.

D. The Court of Appeals Reversed The Dismissal Of Camicia's Claim Based On The City's Assertion of Immunity.

In August 2008, King County Judge Douglas McBroom denied the City's motion for summary judgment based on RCW 4.24.210(1) because 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. In June 2009, Judge Laura Inveen granted the City's renewed motion to dismiss, and certified her ruling as final under CR 54(b). CP 862-868, 919-924. On November 8, 2010, Division One reversed the summary judgment, ruling that "there are material issues of fact as to whether the City has the authority to designate the I-90 trail as recreational land and assert immunity under RCW 4.24.210" and "whether the recreational land use statute applies to the City." *COA Opinion at 12, 14* (Appendix A-24, A-26 to Petition for Review).

III. ARGUMENT

A. Municipalities Have A Duty To Provide Reasonably Safe Public Transportation Routes.

The I-90 trail is a public transportation route that was funded, constructed, and maintained exclusively with state and federal transportation funds. This Court held in *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002) that since the Legislature waived sovereign immunity in 1967,

municipalities have owed a duty of care to all persons to maintain their public transportation routes in a reasonably safe condition for ordinary travel, and to not create hazards on them:

Since the Washington State Legislature waived sovereign immunity for municipalities in 1967, municipalities are generally held to the same negligence standards as private parties. . . . The municipality, as an individual, is held to a general duty of care, that of a “reasonable person under the circumstances.”

...

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.

Keller, 146 Wn.2d at 242-43, 249 (citations and footnotes omitted).

Three years after deciding *Keller*, this Court ruled in *Owen v. Burlington Northern Santa Fe Railroad Co.*, 153 Wn.2d 780, 108 P.3d 1220 (2005) that a city may be liable for violating roadway design standards and creating or failing to eliminate inherently dangerous or misleading conditions:

A city’s duty to eliminate an inherently dangerous or misleading condition is part of the overarching duty to provide reasonably safe roads for the people of this state to drive upon. *See Keller*, 146 Wash.2d at 249.

...

The MUTCD provides at least some evidence of the appropriate duty. *See* RCW 47.36.030; WAC 468-95-010; *see also Kitt v. Yakima County*, 93 Wash.2d 670, 611 P.2d 1234 (1980).

Owen, 153 Wn.2d at 788, 787. See also *Stewart v. State*, 92 Wn.2d 285, 294, 597 P.2d 101 (1979) (discretionary governmental immunity does not apply to negligent roadway design decisions).

Under RCW 4.96.010 and this Court's decisions in *Keller* and *Owen*, municipalities have an overarching duty of reasonable care not to create and maintain public transportation hazards.

B. Immunity Is Limited To Landowners Who Can Choose To Open, Or To Close, Their Lands To Public Recreation.

The purpose of RCW 4.24.210(1) is to "encourage owners or others in lawful possession and control of land[s] . . . to make them available to the public for recreational purposes," RCW 4.24.200, by "open[ing] up their properties for public recreational use." *Nielsen v. Port of Bellingham*, 107 Wn. App. 662, 667, 27 P.3d 1242 (2001), *rev. denied*, 145 Wn.2d 1027 (2002). The statute does not abrogate a municipality's "overarching duty to provide reasonably safe" public transportation routes. *Owen*, 153 Wn.2d at 786. Nor does it reinstate the local governmental immunity that the Legislature waived in RCW 4.96.010.

RCW 4.24.210(1) is in derogation of a municipality's common law duty to maintain its public transportation routes in a reasonably safe condition for ordinary travel and must be strictly construed; "no intent to change that [common] law will be found, unless it appears with clarity." *Matthews v. Elk*

Pioneer Days, 64 Wn. App. 433, 437, 824 P.2d 541, *rev. denied*, 119 Wn.2d 1011 (1992) (recreational use statute does not apply to outdoor festivals), *citing McNeal v. Allen*, 95 Wn.2d 265, 269, 621 P.2d 1285 (1980). RCW 4.24.210(1) limits recreational use immunity to landowners or others who “allow members of the public to use [lands] for outdoor recreation . . . without charging a fee of any kind therefor.” The statute’s limitation of immunity to defendants with “lawful possession and control” of recreational lands further limits immunity to landowners who have “continuing authority” to open or to close lands to the public. *Tennyson v. Plum Creek Timber Co., L.P.*, 73 Wn. App. 550, 557-58, 872 P.2d 524, *rev. denied*, 124 Wn.2d 1029 (1994) (no immunity because defendant contractors lacked continuing authority to close Plum Creek lands); *Bernstein v. State*, 53 Wn. App. 456, 459-60, 767 P.2d 958, *rev. denied*, 112 Wn.2d 1024 (1989) (statute applied because State had continuing authority to close Dash Point State Park, where plaintiff’s decedent had drowned).

Since immunity is an affirmative defense, the City has the burden of bringing itself within the purpose and terms of the statute. *Robinson v. City of Seattle*, 119 Wn.2d 34, 61, 830 P.2d 318, *cert. denied*, 506 U.S. 1028 (1992); *Evans v. Thompson*, 124 Wn.2d 435, 445, 879 P.2d 938 (1994). The City has failed to meet its burden of establishing immunity here, because the

I-90 trail is available to the public "for the purposes of outdoor recreation" (and, non-motorized transportation) through WSDOT's authority, not the City of Mercer Island. RCW 4.24.210(1). Further, the City cannot bring itself within the terms of the statute because it only has "lawful possession and control" of its section of the I-90 trail for "road/street purposes only," it lacks continuing authority to "allow" or disallow public use of the trail, and it charges annual fees for "street and landscape maintenance and operation" of the I-90 trail on Mercer Island. CP 508.

Since the City cannot bring itself within the terms of the statute, it argues that every owner of any "land used for 'bicycling' [is] explicitly protected by the recreational use immunity statute." *Petition for Review at 1*. Under the City's theory, RCW 4.24.210(1) would bar the claims of any person injured by a transportation hazard while "pleasure driving . . . other vehicles," "viewing or enjoying . . . scenic . . . sights," or doing any of the other activities listed in the statute, on any highway, street or public transportation route. That reading would nullify a municipality's "overarching duty to provide reasonably safe roads for the people of this state. . . ". *Owen*, 153 Wn.2d at 788. Certainly, it does not "appear with clarity," *Matthews*, 64 Wn. App. at 437, that the Legislature in enacting RCW 4.24.210(1) intended to abrogate a municipality's duty to maintain its public

transportation routes in a reasonably safe condition for ordinary travel. Nor did the Legislature intend to grant municipalities that create and maintain dangerous conditions on public transportation routes they charge fees to maintain the legal protections intended for landowners who make their lands available to the public for outdoor recreation purposes “without charging a fee of any kind therefor.”

Finally, RCW 4.24.210(1) is concerned with whether the landowner “charges a fee of any kind,” not with whether members of the public pay a user fee. *See Plano v. City of Renton*, 103 Wn. App. 910, 913-14, 14 P.3d 871 (2000) and *Nielsen*, 107 Wn. App. at 668-69 (municipal landowners not entitled to immunity because they charged moorage fees, even though plaintiffs did not pay user fees). The applicability of the statute is determined from the “reasonably objective” standpoint of the landowner, *Nielsen*, 107 Wn. App. at 668, who decides both whether to open its lands to public outdoor recreation and whether to charge a fee “of any kind.” The City charged an annual fee of \$68,000 to WSDOT for its “maintenance and operation” of the I-90 trail on Mercer Island. CP 508. From any “reasonably objective” landowner’s perspective, the City lacks any claim to immunity under RCW 4.24.210(1).

C. The Cases The City Cites Confirm The Limited Immunity Conferred On Recreational Landowners.

This Court has never extended recreational use immunity to a street, road or highway dedicated to public use not for recreation, but as a public transportation corridor. None of the cases the City cites have extended the scope of RCW 4.24.210(1) to circumstances where, as here, the landowner lacks authority to close the property to public use.

The City cites *McCarver v. Manson Park and Recreation Dist.*, 92 Wn.2d 370, 377, 597 P.2d 1362 (1979), for the proposition that recreational use immunity is not determined “based upon ‘primary’ or ‘secondary’ use of the land.” *Petition for Review at 11*. But *McCarver* does not remotely support the City’s argument that RCW 4.24.210(1) applies to any land—such as a public street, highway or non-motorized transportation route—that may have a “secondary” outdoor recreation use. The dispositive issue in *McCarver* was whether RCW 4.24.210(1) applied to a public park’s recreational water areas and adjacent lands. The Court rejected the plaintiff’s argument that the statutory immunity should apply only to “land primarily used for other purposes, but with incidental recreational uses.” *McCarver*, 92 Wn.2d at 377. This Court held the statute could also apply to exclusively recreational lands, because the Legislature did not “differentiat[e] land classifications between primary and secondary uses. . . .” *McCarver*, 92

Wn.2d at 377. *McCarver* merely holds that the statute applies to *exclusively* recreational lands, not that it applies to any land that may be used for recreational in addition to other purposes.

Intermediate appellate court cases interpreting the statute recognize that the immunity granted by RCW 4.24.210(1) is dependent upon the landowner's ability to open (or close) the land to the public for recreational activities. In *Gaeta v. Seattle City Light*, 54 Wn. App. 603, 605, 774 P.2d 1255, *rev. denied*, 113 Wn.2d 1020 (1989), for instance, the United States' power license required Seattle City Light to construct and maintain an access road across Diablo Dam to allow "boating, fishing and other recreational purposes by the public" on the adjacent "reservoirs and project area." "The roadway across the dam led only to the resort and abutting lands left open by Seattle City Light for public recreational use." *Nielsen*, 107 Wn. App. at 668 (distinguishing *Gaeta*). RCW 4.24.210(1) applied because the Diablo Dam access road was not a public transportation "thoroughfare." *Gaeta*, 54 Wn. App. at 608, distinguishing *Smith v. Southern Pac. Transp. Co., Inc.*, 467 So.2d 70 (La.App.1985) (street through city park was "built and maintained primarily for commercial use, as opposed to recreational").

RCW 4.24.210(1) applied in *Widman v. Johnson*, 81 Wn. App. 110, 912 P.2d 1095, *rev. denied*, 130 Wn.2d 1018 (1996), because the landowner,

which allowed the public to use its logging road for outdoor recreation without charging a fee, had unrestricted authority to determine if the road should be open to the public. And in *Chamberlain v. Dep't of Transp.*, 79 Wn. App. 212, 901 P.2d 344 (1995), the State owned the scenic overlook where the plaintiff's decedent was killed, and had authority to designate it as a recreation area and close it to public use. In contrast, the City owns its section of the I-90 trail at issue here for "road/street purposes only," and there is substantial evidence that it lacks the authority to re-designate it as recreational land or to close it to public use.

Chamberlain confirms that immunity under RCW 4.24.210(1) is determined according to the statute's terms, not by how the land where an injury occurred is defined or characterized:

The fact that "highway" and "sidewalk" are defined elsewhere does not require that they be excluded from the provisions of the recreational use immunity statute.

79 Wn. App. at 218. The City cannot establish immunity by calling the I-90 trail a "bike path" or "bicycle trail" any more than the plaintiff in *Chamberlain* could defeat immunity by characterizing a scenic overlook as a "highway" or "sidewalk." Nor can the City avoid its duty to maintain its public transportation routes, whether motorized or non-motorized, in a

reasonably safe condition for ordinary travel just because RCW 4.24.210(1) lists “bicycling” as an outdoor recreation activity.

Finally, in *Riksem v. City of Seattle*, 47 Wn. App. 506, 736 P.2d 275 (1987), the Court of Appeals held that RCW 4.24.210(1) applied to the Burke-Gilman trail, which unlike the I-90 trail, was not built with state and federal transportation funds, but instead is “a former railroad track which was converted (improved) by the City to an asphalt trail for walkers, joggers, and bicyclists.” See *Partridge v. City of Seattle*, 49 Wn. App. 211, 214, 741 P.2d 1039 (1987). Seattle was immune because it had “lawful possession and control” over the Burke-Gilman trail and authority to “allow” or permanently exclude outdoor recreation on it. In contrast, the I-90 trail is a state-controlled, regional public transportation route that Mercer Island owns for “road/street purposes only, and no other use. . . .” and which it charged an annual fee to maintain and operate.

Even if the City had owned its section of the I-90 trail in fee simple, instead of for “road/street purposes only,” RCW 4.24.210(1) still would not apply because there was also evidence that the site of Camicia’s injury is a “necessary and integral part” of the I-90 trail, which itself is not recreational land but a non-motorized transportation route. In *Plano v. City of Renton*, the plaintiff was injured on a walkway that connected a city park to a floating

dock. Division One held the plaintiff's claim was not barred by RCW 4.24.210(1) because the walkway was a "necessary and integral part of the moorage," for which Renton charged moorage fees. *Plano*, 103 Wn. App. at 915. Thus, even if the City was authorized to re-designate its own quitclaimed sections of the I-90 trail as recreational land, under *Plano* it could not create "patchwork" immunity for sections of the trail that are "necessary and integral" to the I-90 trail as a non-motorized public transportation route.

D. The Court Of Appeals Correctly Ruled That The Limited Terms Of The State's Quitclaim Deed To The City Precluded Summary Judgment.

The Court of Appeals properly considered the WSDOT quitclaim deed for "road/street purposes only," which the City offered into evidence on its motion for summary judgment. CP 588, 606, 624. The City had the burden of proving its affirmative defense of immunity. *Evans v. Thompson*, 124 Wn.2d at 445. Its own evidence, the WSDOT quitclaim deed that the City offered to prove it owned and controlled the accident location, also disproved its argument that the I-90 trail was recreational land and that the City could close the I-90 trail to recreational users. The Court of Appeals correctly held that the terms of the conveyance from the State of Washington, which limited the use of the property conveyed "for road/street purposes only,

and no other use shall be made of said property without obtaining prior written approval" of WSDOT, raised a material issue of fact whether the City could designate the I-90 trail as recreational land or close it to public use.

IV. CONCLUSION

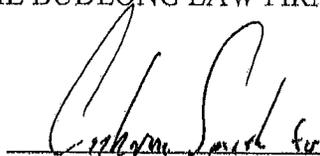
The City did not have authority to designate the I-90 trail as recreational land or to prevent members of the public from using it, for transportation or outdoor recreation. The City charged and received from the State of Washington fees to maintain and operate the I-90 trail as a regional public transportation route. Accordingly, the Court of Appeals decision to reverse and remand for trial should be affirmed.

RESPECTFULLY OFFERED this 11th day of July, 2011.

THE BUDLONG LAW FIRM

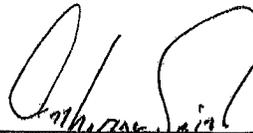
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By



Howard Mark Goodfriend
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Attorneys for Appellant Susan Camicia

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July 11, 2011, I arranged for service of the foregoing Notice of Supplemental Brief of Respondent Susan Camicia, the court and the parties to this action as follows:

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DATED at Seattle, Washington this 11th day of July, 2011.


Tara D. Friesen

APPENDIX A

RCW 4.96.010. Tortious conduct of local governmental entities--Liability for damages

(1) All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation.

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.

RCW 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.