No. 102586-6
SUPREME COURT OF THE
OF THE STATE OF WASHINGTON

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, a Washington municipal corporation, BARRY CHRISMAN and KERRY CHRISMAN, individually and as husband and wife,

Respondents,

v.

STATE OF WASHINGTON, SIERRA PACIFIC INDUSTRIES DBA SIERRA PACIFIC INDUSTRIES, INC., a California corporation, PRECISION FORESTRY, INC., a Washington corporation, and JOHN DOE NOS. 1-10,

Petitioner.

RESPONDENT PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY'S ANSWER TO SIERRA PACIFIC INDUSTRIES' AND PRECISION FORESTRY INC.'S PETITIONS FOR REVIEW

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I. INTRODUCTION

The State of Washington ("State"), Sierra Pacific Industries ("SPI"), and Precision Forestry, Inc. ("Precision") each filed a Petition for Review in this case. Respondent Public Utility District No. 1 of Snohomish County (the "District") has filed a separate response to the State's Petition for Review and files this combined response to SPI and Precision's Petitions for Review to address additional arguments raised by SPI and Precision that were not included in the State's Petition for Review. In the interest of avoiding duplicative briefing, the District hereby incorporates the arguments presented in its Answer to the State's Petition for Review.

As did the State, SPI and Precision assert that review is warranted pursuant to RAP 13.4(b)(2), arguing the Court of Appeals' decision conflicts with *Ruiz v. State*, 154 Wn. App. 454, 225 P.3d 458 (2010), *rev. denied*, 169 Wn.2d 1012 (2010). *See* SPI's Petition at 27; Precision's Petition at 1. And like the State, SPI and Precision attempt to manufacture a conflict and

expand the scope of RCW 76.09.330 immunity by mischaracterizing and overstating the holding of *Ruiz*. But, like the State, they similarly fail to demonstrate an actual conflict with *Ruiz* such that this Court should grant review. Precision also claims that the Court of Appeals' decision "improperly allows Precision's actions to be judged by rules not in effect at the time of harvesting" and, thus, somehow conflicts with *Ruiz* and "long held jurisprudence." Precision's Petition at 18-19. This argument holds no water, as detailed below.

SPI and Precision also echo the State's claim that this Court should accept review pursuant to RAP 13.4(b)(4) because the Court of Appeals' decision (allegedly) implicates an issue of "substantial public interest." *See* SPI's Petition at 21-27; Precision's Petition at 20-23. Precision claims that the Court of Appeals' decision "profoundly affects an industry declared by the legislature to be of public interest" and that "[t]he interpretation of statutes and rules relating to the designation of a[n] RMZ is of public interest to the forestry community given

that foresters must rely on DNR's designations of protected areas to comply with the Forest Practice[s] Act." Precision's Petition at 23, 5. SPI conjectures that the Court of Appeals' decision "will have a chilling effect on the forest industry, alter environmental practices, and have negative consequences for the people of Washington[,]" including "less revenue [from timber sales] resulting in less money provided to the state and counties for schools and essential services." SPI's Petition at 22, 27. SPI and Precision's arguments that this Court should accept review because of the "substantial public interests" at stake rely on speculation as to the decision's impact on the industry of which they are a part. But the Court of Appeals' decision's perceived impact on one industry is insufficient to support acceptance of review pursuant to RAP 13.4(b)(4). If that were the case, then any business entity impacted by an adverse Court of Appeals decision interpreting a statute relevant to that industry's business practices would be entitled to this Court's review of that decision. That is not the law.

For the reasons detailed below, and in its Answer to the State's Petition for Review, incorporated herein by reference, the District respectfully requests that the Court deny SPI and Precision's Petitions for Review.

II. IDENTITY OF RESPONDENT

Respondent is the Public Utility District No. 1 of Snohomish County.

III. RESTATEMENT OF ISSUES FOR REVIEW[1]

1. Whether SPI and Precision have met their burden, pursuant to RAP 13.4(b)(2), to establish that the Court of Appeals' decision holding that RCW 76.09.330 does not immunize SPI and Precision from the District's tort claims because SPI and Precision do not meet the statutory definition of "forestland owner" is in conflict with a published decision of the Court of Appeals.

2. Whether SPI and Precision have met their burden,

[1] As noted above, this Answer addresses only the issues raised in SPI and Precision's Petitions that were not also included in the State's Petition.

pursuant to RAP 13.4(b)(2), to establish that the Court of Appeals' decision that there is a genuine issue of material fact as to whether the RMZ was properly designated is in conflict with a published decision of the Court of Appeals.

3. Whether SPI and Precision have met their burden, pursuant to RAP 13.4(b)(4), to establish that the Court of Appeals' decision regarding the scope of immunized conduct raises a substantial public interest that should be determined by this Court.

4. Whether SPI and Precision have met their burden, pursuant to RAP 13.4(b)(4), to establish that the Court of Appeals' decision that there is a genuine issue of material fact as to whether the RMZ was properly designated raises a substantial public interest that should be determined by this Court.

IV. RESTATEMENT OF THE CASE

For the purpose of answering SPI and Precision's Petitions, the District relies on the facts as set forth in the Court of Appeals' decision. *See Pub. Util. Dist. No. 1 of Snohomish*

Cnty. v. State, __ Wn. App.2d __, 534 P.3d 1210, 1215 (2023). The District also incorporates by reference the summary of the Court of Appeals' decision included in its Answer to the State's Petition for Review.

V. ARGUMENT

As detailed below, neither SPI nor Precision have demonstrated that there is any basis for this Court to review the Court of Appeals' decision that SPI and Precision may not avail themselves of statutory immunity under RCW 76.09.330. The decision does not conflict with *Ruiz* and does not implicate the "public interests" SPI and Precision claim are impacted by the Court of Appeals' decision, let alone to the degree of "substantial" public interests that should be determined by this Court.

A. The Court of Appeals' Decision That Precision and SPI Are Not Entitled to Statutory Immunity As A Matter of Law Because They Do Not Meet the Statutory Definition of "Forestland Owner" Does Not Conflict with *Ruiz*.

RCW 76.09.330 defines the classes of alleged tortfeasors

subject to statutory immunity: "the landowner, [DNR], and the state of Washington." RCW 76.09.330. As the Court of Appeals explained, RCW 76.09.330, in pertinent part, provides that "[f]orestland owners may be ***required*** to leave trees standing in riparian and upland areas" and that "the landowner, [DNR, and the State of Washington] shall not be held liable for any injury or damages resulting from these actions." *Pub. Util. Dist. No. 1*, 534 P.3d at 1217 (quoting RCW 76.09.330) (emphasis added). The FPA defines "forestland owner" as "any person in actual control of forestland, whether such control is based either on legal or equitable title, or on any other interest entitling the holder to sell or otherwise dispose of any or all of the timber on such land in any manner." RCW 76.09.020(16). "[A]ny lessee or other person in possession of forestland without legal or equitable title to such land" – in other words, a person with "actual control of forestland" based "on any other interest" – "shall [nonetheless] be excluded from the definition of 'forestland owner' unless such lessee or other person has the

right to sell or otherwise dispose of any or all of the timber located on such forestland." *Id.*

Analyzing the plain language of both the FPA and of SPI's contract with the State (which, by extension, applied to Precision via the Logging Agreement with SPI), the Court of Appeals properly concluded that "Precision and SPI are not forestland owners required to leave trees standing in riparian areas – they were not involved in the decision regarding which trees to leave and which to harvest"; they "had no control or possession ***outside of the timber sale area*** under the terms of the contract"; and "the RMZ is not part of the sale area." *Pub. Util. Dist. No. 1*, 534 P.3d at 1217 (emphasis added). In other words, "forestland owners" are only those persons who have the right to harvest or dispose of timber in the area the DNR has designated for protection: the RMZ.

Straining to find a "conflict" with *Ruiz* to support its argument that this Court should accept review under RAP 13.4(b)(2), Precision argues that the Court of Appeals'

opinion "conflicts with the holding [in] *Ruiz* that ***all*** entities within the definition of 'forestland owner' are entitled to immunity." Precision's Petition at 10 (emphasis added). Likewise, SPI argues that the Court of Appeals' opinion conflicts with *Ruiz* "by holding that SPI and [Precision] are not 'Forestland Owners' even though [*Ruiz*] held that their counterparts in *Ruiz* were Forestland Owners." SPI's Petition at 27.[2]

Precision and SPI mischaracterize both the facts and the holding in *Ruiz*. Importantly, in *Ruiz*, the forestland that included the RMZ was privately owned, and the defendant seeking "forestland owner" immunity (*i.e.*, Hancock) "managed and controlled the [RMZ] property, including the cutting and selling of timber"; "signed the application" to harvest timber inside and

[2] Notwithstanding its claim that the Court of Appeals' ruling that SPI was not a "forestland owner" for purposes of FPA immunity conflicts with *Ruiz*, SPI fails to develop this argument. *See generally* SPI's Petition at 31-32. It claims that "SPI is just like Hancock[,]" the management company in *Ruiz*, because Hancock, like SPI "also lacked the right to harvest RMZ trees." *Id.* at 31. But SPI makes no attempt to argue that SPI had "actual control" of the RMZ or that it otherwise was Hancock's "counterpart." *Id.* at 31-32.

outside of the RMZ; and met with DNR and agreed "that forest practice rules prohibited harvesting" in the RMZ. *See Ruiz*, 154 Wn. App. at 456. Accordingly, the *Ruiz* decision did not reach the issue of whether a party merely in control of forestland ***adjacent*** *to* an RMZ is entitled to "forestland owner" immunity.

In contrast, here the State owned the property, "the RMZ is not part of the sale area," and SPI and Precision "had no control or possession ***outside of the timber sale area*** under the terms of the contract" with the State. *Pub. Util. Dist. No. 1*, 534 P.3d at 1217. Based on these factors, which were not at issue in *Ruiz*, the Court of Appeals held that SPI and Precision are not entitled to immunity. *Id*. 1217-18.

As the Court of Appeals explained, the issue before the *Ruiz* court was the plaintiff/appellant's argument that "the respondent [Hancock] was not a landowner within the meaning of the FPA because it was merely a management company for the landowner, not because it did not have possession or control of the area where the tree was left." *Pub. Util. Dist. No. 1*, 534

P.3d at 1217. The Court of Appeals noted that the *Ruiz* plaintiff/appellant's argument "was distinct from [the District and the Chrismans'] argument here, where they contend Precision and SPI are not forestland owners because they have no control or possession of the RMZ." *Id.* The Court of Appeals found that as such, "*Ruiz* is distinguishable and does not control; we instead look to the plain language of the statute." *Id.*[3]

Accordingly, there is no conflict between *Ruiz* and the Court of Appeals' decision that SPI and Precision are not entitled to "forestland owner" immunity because, unlike the *Ruiz* defendants, SPI and Precision "had no control or possession" of the RMZ. *Pub. Util. Dist. No. 1*, 534 P.3d at 1217.

Aside from its attempt to manufacture a conflict with *Ruiz*, Precision's argument that this Court should accept review to

[3] Further, even if the *Ruiz* court *had* considered whether the management company had control over the RMZ and the right to harvest or remove forest products from the RMZ, the facts of *Ruiz* confirm that the management company ***did*** have the right to sell or otherwise dispose of timber ***in the RMZ***, but that DNR prohibited the company from logging the RMZ trees, ***which the company controlled***. *See Ruiz*, 154 Wn. App. at 456.

address whether Precision is included in the class of persons whose tortious conduct is immunized by the FPA relies on its claim that the Court of Appeals "ignore[ed] the express terms" of RCW 76.09.330 and the definition of "forestland owner" set forth in RCW 76.09.020(16). Precision's Petition at 11. But a petitioner's disagreement with the Court of Appeals' interpretation of statutory language, by itself, is not a basis for this Court to accept review.

Precision's purported "plain language" reading of the FPA also ignores RCW 76.09.020(16)'s requirement that a "forestland owner" must be a person "***in actual control of forestland***…" (emphasis added). Rather, Precision argues that it "met the definition of forestland owner based on its role in harvesting trees as agent of SPI and its right to harvest and dispose of forest products as described in testimony, and specific terms of the bill of sale and contract." Precision's Petition at 12. Precision conveniently ignores its owner's testimony that Precision was not "in control" of the forestland it was logging.

See CP 776 (p. 162:9-16) (agreeing that Precision was not "in control" of "the areas to be logged"). Nor does Precision contend that it had any right to sell the timber it harvested. *See generally* Precision's Petition. In contrast, the management company in *Ruiz* "was in ***actual control*** of the forest land and had the right to sell or otherwise dispose of the timber." *Ruiz*, 154 Wn. App. at 461 (emphasis added).

In a final attempt to persuade this Court that the Court of Appeals' decision "directly conflicts with *Ruiz*[,]" SPI argues that "[t]he Court of Appeals stated that it was merely distinguishing *Ruiz*, but its avoidance of the opinion (one paragraph of the Court's 17-page opinion is about *Ruiz*) belies the truth[.]" SPI's Petition at 32. A court's failure to cite a particular opinion as many times as a party believes it should is not proof of a conflict that satisfies RAP 13.4(b)(2).

Precision and SPI have not met their burden to show that the Court of Appeals' decision conflicts with a decision of the Court of Appeals.

B. The Court of Appeals' Decision That There Is A Genuine Issue of Material Fact as to Whether The RMZ Was Properly Designated Does Not Conflict With *Ruiz*.

The Court of Appeals found that there was a genuine issue of material fact as to whether the tree that struck Mr. Chrisman was outside of the RMZ. *Pub. Util. Dist. No. 1*, 534 P.3d at 1221. The Court of Appeals' finding was based on its careful review of the record, including expert declarations, "in the light most favorable to appellants, as we must." *Id.*

Precision argues that the Court of Appeals' reversal of the superior court's summary judgment "improperly allows Precision's actions to be judged by rules not in effect at the time of harvesting" and "directly contradicts long held jurisprudence and *Ruiz* by allowing the fact finder to change the rules which Precision was required to follow in 2018." Precision's Petition at 18-19.

The Court should reject this basis for granting review on four grounds. First, Precision did not raise this argument in the

Court of Appeals and consequently, the Court of Appeals did not address it. This Court ***reviews*** Court of Appeals' decisions, *see* RAP 13.4(a), and "generally does not consider issues, even constitutional ones, raised first in a petition for review[.]" *Crystal Ridge Homeowners Ass'n v. City of Bothell*, 182 Wn.2d 665, 671, 678, 343 P.3d 665 (2015) (declining to reach merits of constitutional argument "because [the appellant] failed to raise it prior to filing its petition for review").

Second, the Court of Appeals did not "[a]llow the appellants to redefine the RMZ" as Precision claims. Precision's Petition at 19. The Court of Appeals merely held that there was "a genuine issue of material fact as to whether the RMZ was correctly designated" and remanded to the superior court. *Pub. Util. Dist. No. 1*, 534 P.3d at 1221.

Third, the Court of Appeals' reversal of the trial court's summary judgment dismissal in Precision's (and the State's and SPI's favor) does not conflict with *Ruiz*. Precision claims that "*Ruiz* held that a post-harvest determination that RMZ size

should be changed 'does not repeal the prior requirements' that the defendants needed to meet." Precision's Petition at 19 (quoting *Ruiz*, 154 Wn. App. at 461). Neither party in *Ruiz*, however, argued that there was a genuine issue of material fact as to whether the RMZ was correctly designated, or argued, as Precision does here, that "[i]mposing a different RMZ designation" – which the Court of Appeals did not do – violates [the] fundamental legal concept of fairness." Precision's Petition at 18. Rather, the *Ruiz* plaintiff argued that "the rules did not require the trees to be left in the riparian zone because the State later ***waived those riparian rules*** after the accident and authorized the removal of trees adjacent to SR 410[,]" the roadway where the accident occurred. *Ruiz*, 154 Wn. App. at 460-61 (emphasis added). The *Ruiz* court rejected this argument, finding that the post-accident removal of the trees did not "'repeal' the prior requirements that [the landowner's management company] and the State needed to meet to protect the riparian zone." *Id.* at 462.

Notwithstanding its reference to "long held jurisprudence" Precision contends supports its argument – "jurisprudence" which it suggests the Court of Appeals' decision is in conflict with – the three cases Precision cites besides *Ruiz* do not conflict with the Court of Appeals' decision here and merely stand for the principle that ***legislative enactments*** do not apply retroactively in the absence of clear statutory language to the contrary. *See Lynch v. Dep't of Labor & Indus.*, 19 Wn.2d 802, 807, 813, 145 P.2d 265 (1944) (explaining that "a statute will be presumed to operate prospectively only, and that it will not be held to apply retrospectively in the absence of language clearly indicating such legislative intent" and finding that widow's entitlement to pension under workers compensation law was governed by law as it existed when her late husband was injured); *Mercer Enters., Inc. v. City of Bremerton*, 93 Wn.2d 624, 627, 611 P.2d 1237, 1241 (1980) (holding that rights of an applicant for a building permit vest under zoning ordinance in effect at time of application); *Sorensen v. Western Hotels, Inc.*, 55 Wn.2d

625, 635-36, 349 P.2d 232 (1960) (holding that ordinance adopting building code governing ramps applied prospectively in the absence of language clearly indicating it was intended to apply retroactively). Here, whether the subject tree was indeed in the RMZ is a factual determination involving "a genuine issue of material fact as to whether a CMZ exists in Olney Creek," not a retroactive application of any legislative enactment.[4] *Pub. Util. Dist. No. 1*, 534 P.3d at 1221.

C. Precision and SPI Have Not Met Their Burden to Show That Their Petitions for Review Involve Issues of Substantial Public Interest That Should Be Determined by This Court.

Precision and SPI have not met their burden to show that their Petitions "involve[ ] an issue of substantial public interest that should be determined by" this Court.

Asserting that this case merits review under

[4] To the extent that Precision is arguing, as did the State, that the Court of Appeals impermissibly allowed a collateral attack on DNR's determination of the RMZ, contrary to the APA, this argument is easily dispelled by RCW 34.05.510(1), as the District explains in its Answer to the State's Petition for Review.

RAP 13.4(b)(4), Precision contends that the Court of Appeals' decision "profoundly affects an industry declared by the legislature to be of public interest," and that "[t]he interpretation of statutes and rules relating to the designation of a RMZ is of public interest ***to the forestry community*** given that foresters must rely on DNR's designations of protected areas to comply with the [FPA]." Precision's Petition at 5, 23 (emphasis added). But whether a case raises issues of public interest to a particular industry is not the standard this Court applies when determining whether review is warranted pursuant to RAP 13.4(b)(4). Indeed, in the case that Precision cites, *Johnson Forestry Contracting, Inc. v. Dep't. of Nat. Res.*, where Division II rejected a forester's challenge to civil penalties issued by DNR for violation of the FPA, this Court ***denied*** review. *See Johnson Forestry*, 131 Wn. App. 13, 126 P.3d 45 (2005), *rev. denied*, 158 Wn.2d 1002, 143 P.3d 828 (2006).

Precision also suggests that "the issue of the [FPA's] immunity based on RMZ designations is of substantial public

interest" because "logging is a commercially significant industry in Washington." Precision's Petition at 20. But Precision cites no authority to support its argument that the particular industry of which an alleged tortfeasor is a member is relevant to the Court's RAP 13.4(b)(4) analysis. Indeed, if this were the case, then any Court of Appeals decision involving or impacting "commercially significant industr[ies]" in Washington (*see* Precision's Petition at 20), such as aerospace, agriculture, or information technology, would be subject to a more lenient RAP 13.4(b)(4) standard. But that standard is nothing more than wishful thinking on Precision's part.

SPI also fails to meet its burden to show that this Court should accept review pursuant to RAP 13.4(b)(4). There is no dispute that forestry is a significant industry in the State of Washington, but that in and of itself is not a basis for this Court to accept review. Indeed, this Court declined to review the Court of Appeals' decision in *Ruiz*, which also addressed issues of interest to foresters. Further, SPI has no support for its

speculative assertion that the Court of Appeals' decision merely holding that RCW 76.09.330 does not immunize all tortious conduct by foresters ***outside of*** an RMZ, and that there is a genuine issue of material fact as to whether the RMZ was properly designated, materially threatens funding for education and essential services and impacts the livelihood of "more than 102,000 people working in the timber industry[.]" *See* SPI's Petition at 26-27.

Nor is there any basis for SPI's conjecture that the Court of Appeals' decision somehow "revoked" immunity; that "[l]iability for past and future timber harvesting would alter forestry practices, cut into revenue and wages, and ultimately lead to significant losses to the economic and environmental benefits the timber industry provides Washington"; that "timber sales would generate less revenue resulting in less money provided to the state and counties for schools and essential services"; and that "[t]he Court can expect repeated, future occurrence of [the RCW 76.09.330 immunity] question." SPI's

Petition at 26-27. Disproving SPI's parade of horribles, Washington's appellate courts have, in fact, faced the question of RCW 76.09.330's immunity only twice in the nearly four decades since the statute was first enacted, namely, *Ruiz* and the Court of Appeals' decision here.

Every industry subject to an adverse court decision could (and does) argue that such decisions will have a significant impact on its business and the economy more generally, but that does not mean each such decision presents issues of "substantial public interest" that must be determined by this Court.

VI. CONCLUSION

As detailed above, and in the District's Answer to the State's Petition for Review, there is no basis for review of the Court of Appeals' decision under RAP 13.4(b). The Court of Appeals' decision does not conflict with any decision of the Court of Appeals (or this Court, for that matter) or implicate an issue of substantial public interest. The District respectfully requests this Court deny Precision and SPI's Petitions for

Review.

RESPECTFULLY SUBMITTED this 19th day of January, 2024.

I certify that this memorandum contains 3,878 words, in compliance with Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I certify that on this 19th day of January, 2024, a copy of this document was sent as stated below.

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DATED this 19th day of January, 2024.

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