NO. 94643-4

SUPREME COURT OF THE STATE OF WASHINGTON

PIERCE COUNTY, a political subdivision of the State of Washington; and BLAIR SMITH, individually, and as an employee of Pierce County;

Petitioner,

v.

MARGIE LOCKNER, an individual;

Respondent.

WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS' MEMORANDUM IN SUPPORT OF REVIEW

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I. INTRODUCTION

This case involves conflicting appellate interpretations of Washington's recreational immunity statute, RCW 4.24.200-.210, whose purpose 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."[1]The Court of Appeals decision being challenged by Pierce County in this casewas a product of the uncertainty created in the wake of *Camicia v. Howard S. Wright Const. Co.*, 179 Wn.2d 684, 317 P.3d 987 (2014), a highly fact-intensive decision. Given the importance of encouraging landowners to make land available for public recreation, and the violence done to the landowner incentive when immunity is subject to uncertain interpretation, this Court should grant review and clarify the law.

II. IDENTIFICATION OF *AMICI* AND STATEMENT OF INTEREST

The Washington Association of Municipal Attorneys (WSAMA) is a Washington nonprofit corporation that provides education and training in the area of municipal law to attorneys who represent cities, towns, and other local governments throughout Washington State. WSAMA also regularly participates as an *amicus curiae* in cases before this Court involving issues affecting local governments.[2]

Local governments are uniquely affected by appellate interpretations of Washington's recreational immunity statute. In particular, cities and towns rely

[1] RCW 4.24.200.
[2] *See, e.g., University of Washington v. City of Seattle*, No. 94232-3 (Wash., July 20, 2017) 2017 WL 3138623, at *6 (extensive discussion of WSAMA amicus brief).

on the recreational immunity statute to protect them from liability that may arise when they take actions to meet their obligations under the Growth Management Act (GMA) to plan and provide for adequate parks and recreation facilities as well as transportation facilities.[3] Under the GMA's anti-sprawl framework, cities and towns are being asked to accommodate all of the urban needs that come along with urban density, including recreational and transportation needs, and they are being asked to do so in an increasingly constrained and crowded environment. In some cases, when cities and towns choose to make lands available to the public for recreational purposes, they are required to also make them available for other purposes such as transportation – such as when recreational trails are made available for bicycle transportation purposes.[4] As a result of their unique role in making the urban environment livable, cities and towns are particularly vulnerable to the uncertainty surrounding the recreational use statute that has resulted from the Court of Appeals decision at issue in this case. WSAMA files this brief on behalf of local governments seeking to resolve that uncertainty so that cities and towns may plan for recreational and transportation needs, and open appropriate lands to recreational uses, in a way that does not expose them to needless liability.

[3] *See* RCW 36.70A.070(6), (8).
[4] *See, e.g.*, RCW 35.75.060 (providing that when cities and towns use funds for paths, lanes, roadways, routes, or streets, the paths, lanes, roadways, routes, or streets "shall be suitable for bicycle transportation purposes and not solely for recreation purposes"). See also RCW 47.06.100 (designating bicycles as an integral part of Washington's statewide multimodal transportation); RCW 4.24.210 (listing "bicycling" as an example of outdoor recreation).

III. STATEMENT OF THE CASE

WSAMA adopts the Background Facts and Procedural History of the Opinion. *See* Slip Op., pp. 3-4.

IV. ARGUMENT

This case presents two independent grounds for review under RAP 13.4(b). In the immediate sense, Division II's application of the "opened solely for the purpose of recreational use" standard—while purporting to apply *Camicia*—is in conflict with *Camicia* itself; with this Court's prior precedent, *McCarver v. Manson Park*, 92 Wn.2d 370, 597 P.2d 1362 (1979); with that of the other Divisions, *see Chamberlain v. Dep't of Transp.*, 79 Wn. App. 212, 901 P.2d 344 (1995), *Riksem v. City of Seattle*, 47 Wn. App. 506, 736 P.2d 275 (1987), and *Archer v. Marysville Sch. Dist*., 195 Wn. App. 1014 (2016)[5]; and with Division II itself, *Widman v. Johnson*, 81 Wn. App. 110, 912 P.2d 1095 (1996). Thus, review of Division II's decision is appropriate under RAP 13.4(b)(1)-(2).But perhaps more fundamentally, because this confusion is having a palpable impact on the public interest, review is appropriate under RAP 13.4(b)(4). In the face of legal uncertainty and limitless exposure, public entities will decline to make such land available for recreation. This affects all of Washington, but most profoundly the lower and middle class, who are uniquely dependent upon cost-free recreational opportunities. For municipalities, the growing uncertainty in this area of the law creates conflicts between the desire (and sometimes mandate) to provide

[5] *Archer*, an unpublished decision cited as nonbinding authority pursuant to GR 14.1, specifically held that "*Camicia* stands for neither the proposition that the land must be exclusively used for recreational purposes nor the proposition that the District must provide affirmative evidence that it intended to open the playground for recreational use purposes."

recreational opportunities to taxpayers, on the one hand, and the obligation to limit the municipalities' liability (which is funded by those same taxpayers), on the other hand.

WSAMA would respectfully submit that this is a matter of public concern.

A. The Recreational Immunity Statute

The Court's primary goal is to determine and give effect to the legislature's intent. *Custody of E.A.T.W.*, 168 Wn.2d 325, 343, 227 P.3d 1284 (2010). And in this instance, the Legislature made no secret of that intention:

> 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 4.24.200; *Ochampaugh v. City of Seattle*, 91 Wn.2d 514, 523, 588 P.2d 1351 (1979) ("it is apparent that this statute was enacted because of a greatly expanding need and demand for outdoor recreational opportunities"); *see also* 62 Am.Jur.2d *Premises Liability* § 127 (2005) (noting that states sought "to reduce the growing tendency of landowners to withdraw land from recreational access by removing the risk of gratuitous tort liability").

By design, the legislature codified a statute that deals in absolutes. It reflects no balancing, multifactor test, or qualification related to properties that could conceivably be used for multiple purposes. So long as the property owner considers his or her property recreational, immunity is generally upheld. *See Cultee v. City of Tacoma*, 95 Wn. App. 505, 514, 977 P.2d 15 (1999); *see also*

Gaeta v. Seattle City Light, 54 Wn. App. 603, 608, 774 P.2d 1255 (1989) (rejecting user-centric analysis as insufficiently protective of the landowner).

And this makes sense as a practical matter. Introduction of variables and uncertainty, outside the landowner's control, renders immunity unreliable, especially in the sympathetic case. Property owners—who often derive no particular benefit from gratuitously permitting the public on their property—will simply close their land, completely frustrating the legislature's intent. Municipalities that try to maximize taxpayer dollars through the multiple use of government property will be faced with critical policy decisions regarding whether to accept the risk of those multiple uses. Predictability is critical for both private and public owners.

B. The Courts' Treatment Of Dual Use Properties

1. *Municipally-owned property.*

Unlike private property, most public property is dual-use. Washington's GMA contemplates this dual-use approach, and it requires cities to plan for it. RCW 36.70A.070(1) (Land use element) requires cities to plan for recreation. It also says that, "Wherever possible, the land use element should consider utilizing urban planning approaches that promote physical activity." RCW 36.70A.070(6) requires the transportation element to be consistent with the land use element. It also requires cities to plan for "[p]edestrian and bicycle component[s] to include collaborative efforts to identify and designate planned improvements for pedestrian and bicycle facilities and corridors that address and encourage enhanced community access and promote healthy lifestyles." RCW

36.70A.070(6)(a)(vii).

Many cities' non-motorized transportation plans ("NMTPs") do **not** distinguish between recreational and transportation uses. Some describe "shared use paths."[6] Other cities blend the uses.[7] Under these plans, some cities designate bike and pedestrian facilities as part of road construction (cites). Many designate unopened rights-of way for non-motorized purposes.[8]

In some cases, as noted above, when cities and towns choose to make lands available to the public for *recreational* purposes, they are required by state law to also make them available for *transportation* purposes.[9] In other cases, municipalities are required by federal law to allow the public to access such facilities for recreational purposes.[10] Courts have not distinguished usage.

This was not significant until recently, as courts refused to adopt a limiting construction of RCW 4.24.210 based upon dual use. In *McCarver v. Manson Park & Rec. Dist.*, 92 Wn.2d 370, 377, 597 P.2d 1362 (1979), the first case to consider primary and secondary usage, the plaintiff was killed in a diving accident at a local park. The estate argued that the statute should not apply because the land that was held open "exclusively" for recreational use. *Id*. This court rejected

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[6] City of Bremerton NMTP, Section 2.1.1.
[7] City of Bainbridge Island NMTP, Page 4-1, Section 4 "The Non-motorized system is made up of a continuous network of facilities that represents the principal commute, school and recreational travel corridors." Maple Valley NMTP, Page 1 "the majority of users cited their primary reason for walking and biking as recreation, secondarily commuting….")
[8] City of Port Townsend Non-Motorized Transportation Plan, Page 29 "Many street rights-of-way in Port Townsend are currently unopened. Approximately 30% of Port Townsend's land is in rights-of-way, offering tremendous opportunities for the development of non-motorized facilities that are seperated from the street if some of the streets are not opened to automobile travel.")
[9] RCW 35.75.060.
[10] 18 CFR, Part 2 (Federal Energy Regulatory Commission, Order 313, requiring the acquisition and development of federally-accessible recreational facilities.)

the argument, observing that recreational immunity does not turn on the "extent" of recreation:

> We decline to impose a limiting construction upon the statute differentiating land classifications based upon primary and secondary uses where the legislature did not. Arguments to achieve such a result should appropriately be addressed to the legislature.

Id. Subsequent courts followed suit. *See, e.g, Riksem v. City of Seattle*, 47 Wn. App. 506, 736 P.2d 275 (1987) ("***The statute applies equally to everyone who enters a recreational area***. If an individual is commuting from one point to another, by either walking, running, or bicycling, said individual is at least secondarily gaining the benefits of recreation even though his primary goal may be the actual act of commuting."); *Chamberlain v. Dept. of Transp.*, 79 Wn. App. 212, 901 P.2d 344 (1995) ("[t]he fact that 'highway' and 'sidewalk' are defined elsewhere does not require that they be excluded from the provisions of the recreational use immunity statute."); *Widman v. Johnson*, 81 Wn. App. 110, 114, 912 P.2d 1095 (1996) ("other purposes… lack[ed] legal significance").

Indeed, until 2014, the state of the law was uniform, unbroken, and wholly consistent with the statutory language—which did not require "sole purpose" or "single use."

C. The *Camicia* Decision

In 2014, this Court issued a split decision in *Camicia v. Howard S. Wright Const. Co.*, 179 Wn.2d 684, 317 P.3d 987 (2014), which involved a woman who suffered severe injuries while bicycling on the I-90 bike path in Mercer Island.

The location where the accident occurred was subject to a restriction in a quitclaim deed, transferring the land from WSDOT to Mercer Island "for road/street purposes ***only***." *Id* (emphasis added). Additionally, it turned out that both WSDOT and the Federal Department of Transportation had previously determined that the location—which served as "the only means for non-motorized access… across Lake Washington [and] an important link in the regional transportation system"— primarily served a transportation function. *Id.* at 689.

On that record, this Court found an issue of fact with respect to the City's "authority to open and close the land" in light of the quitclaim deed. *Id.* at 696. The Court also found an issue of fact with respect to whether the property was "open to the public." In doing so, the majority distinguished several of the cases discussed above:

> In *McCarver*, it was undisputed that the public was allowed to enter for a recreational purpose (indeed, that was the *only* public purpose for the land). Likewise, the public license to recreate was clear in *Widman*, where a private company opened its forest land to the public exclusively for recreational purposes and posted signs… That the logging roads could be used for nonrecreational uses, such as a driving shortcut by the nonrecreating public, did not change the fact that every reasonable person would also believe that the company had opened the roads for recreational use...
>
> In *Chamberlain*, recreational use immunity shielded the State from the claims asserted after a boy was killed on the Deception Pass Bridge overlook, but the nature of the land was not at issue. It was undisputed in *Chamberlain* that the overlook was recreational in nature and that viewing scenery was an outdoor recreational activity.
>
> Finally, the City cites *Riksem*, a case arising out of injuries sustained by a bicyclist along the Burke–Gilman Trail in Seattle. The Court of Appeals in that case held that recreational use immunity applied, rejecting the plaintiff's claims premised on

> public policy and a constitutional equal protection claim. Significantly, *Riksem* did not dispute that the trail was open to the public for the purposes of outdoor recreation or that he was a recreational user. Accordingly, the court did not address whether immunity would apply on land that was open to the public for nonrecreational purposes…

Id. at 697-99 (internal citations omitted). While the court's analysis and distinctions were sound—vis-à-vis *Camicia*'s unique factual context—no clear standard was announced. The lower courts have since struggled to fill the gap.

Division II's decision in the instant case presents a good illustration of that struggle. On the one hand, Division II clearly acknowledged *Camicia* and attempted to apply it. But on the other hand, Division II clearly *mis*applied *Camicia* when it insisted that property must be opened "solely for the purpose of recreation," Slip Op., pp. 1-2, a principle this Court never endorsed. Indeed, the cases cited within *Camicia* would not survive that standard; yet, were specifically left intact.

Stated more plainly, *Camicia,* a case seldom analogous to anything, was decided without the announcement of a workable standard. In a context which demands predictability, there is radical uncertainty.

D. The Court Should Accept Review in this Case in Order to Restrict *Camicia* to its Unique Factual Context and Permit the Legislature's Carefully-Crafted Statutory Scheme to Govern.

WSAMA acknowledges competing considerations. The concern expressed in *Camicia* was that an unscrupulous city would attempt to "extend [immunity] to every street and sidewalk," based upon the opportunity pedestrians may have to "view or enjoy historical sites." *Id.* at 699. This obviously

constitutes a perversion of the immunity statute. Conversely, if the Court were to *disallow* immunity every time there were a transportation element in a recreational area, immunity would seldom be available.

Accordingly, WSAMA submits that this case presents a good opportunity to revisit and clarify the unsettled state of recreational immunity. In doing so, the Court should confirm that *Camicia* was decided based upon its facts, and guide the lower courts back to the statutory framework governing transportation and recreation, which exists for the very purpose of drawing these distinctions. The current state of the law does not serve parties, judges, or the recreating public as a whole.

Review should be granted.

V. CONCLUSION

For the foregoing reasons, WSAMA respectfully asks that this Court accept review and give legal certainty to this important area of the law.

RESPECTFULLY SUBMITTED this 7th day of August, 2017.

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