No. 94643-4

IN THE WASHINGTON STATE SUPREME COURT

MARGIE M. LOCKNER, a single woman,

Respondent,

vs.

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

Petitioners.

COURT OF APPEALS, DIVISION II
Case No. 48659-8-II

ANSWER TO PETITION FOR REVIEW

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3. If this Court accepts review of one or more of the issues raised by petitioners it should then also review whether the Court of Appeals erred in its holding that RCW 4.24.210 extends immunity to all negligence actions occurring on recreational land.

II. INTRODUCTION

Margie M. Lockner was riding her bicycle on the Foothills Trail in Pierce County when she was pelted by rocks and debris from a lawnmower being negligently operated by a Pierce County employee. In her attempts to shield herself from the debris, Ms. Lockner lost control of her bicycle and fell – severely injuring her knee.

Ms. Lockner sued and the trial court dismissed her case under RCW 4.24.210 – Washington's recreational immunity statute. The Court of Appeals reversed, correctly holding that the trial court's decision to dismiss on summary judgment was erroneous because material facts suggested the Foothills Trail was open for both recreational and transportation purposes. Therefore, pursuant to Camicia v. Wright Construction Co., 179 Wn.2d 684, 317 P.3d 987 (2014), RCW 4.24.210 (recreational immunity) was not available as a defense. Because that decision was proper, and not in conflict with the cases cited by petitioners, this Court should decline review.

However, if this Court does review the issue(s) raised by petitioners, it is requested that this Court also review whether the Court of Appeals erred in rejecting Ms. Lockner's argument

that RCW 4.24.210 could not serve as a defense where liability stemmed from the negligence of a county employee rather than from a defect on the land.

II. STATEMENT OF THE CASE

A. Procedural History

Following the statutory period for notice of claim, pursuant to RCW 4.96.020, Ms. Lockner filed this case against Pierce County on January 21, 2015. The complaint was a short and plain recitation of the facts pursuant to the Court Rules. The complaint specifically alleged negligence related to her fall on the Foothills Trail in Pierce County, Washington. On April 2, 2015, Pierce County filed a motion to dismiss pursuant to CR 12(c). That motion was denied.

On May 8, 2015, Ms. Lockner amended her complaint and added Pierce County employee, Blair Smith (the operator of the injury-causing lawnmower) to the case as a defendant. CP 1-4. Following several depositions, on January 22, 2016, the trial court dismissed Ms. Lockner's case on summary judgment, finding that RCW 4.24.210 shielded the defendants from liability. CP 118-19. Specifically, the trial court stated:

> I think it is pretty clear from the evidence that has been presented to the Court in the materials that the primary purpose of this Foothills Trail is recreation. There may be a use for transportation or some convenient way to get between different locations that are not recreational. I think the primary purpose of it, in looking at the materials that were provided, is as recreational. I don't think the Carmicia case necessarily applies to what this Court has to decide in this case. It is an area that is under the control of the County. It is an area they restrict the hours that it is open. They can open and close it. There is no evidence of an intentional injury. Appeared to be – I think it does fall under the recreational use immunity.
>
> I am going to grant the motion for summary judgment.

RP 23:7-22.

Ms. Lockner appealed to Division II of the Court of Appeals. She argued summary judgment was improper for two reasons. First, she argued that recreational immunity did not apply because, pursuant to Camicia, material facts suggested the Foothills trail was a mixed-use trail open, at a minimum, for purposes of recreation and transportation. Second, she argued recreational immunity did not apply because the case was not a "premises liability" case, rather a case based on the negligence of a county employee. The Court of Appeals agreed with Ms. Lockner's first argument and reversed the finding of summary judgment. The Court went on to reject Ms. Lockner's second argument and hold that by "its plain language" RCW 4.24.210 "extends to negligence actions and is not restricted to premises liability claims." Pierce County has petitioned this Court to review the Court of Appeals decision as to the first issue. If that issue is accepted for review, Ms. Lockner seeks review of the second issue.

B. Facts

According to the Pierce County website, the Foothills Trail is described as "*a popular commuter route* and recreational destination for bicyclists, while hikers enjoy shorter, more manageable segments of the trail." CP 62 (emphasis added). Within the Pierce County Park, Recreation & Open Space Plan, "Regional Trails Plan," the "Regional Trail Vision" is defined as:

> The Pierce County Regional Trails System will be an accessible and seamless trails network used by people of all ages and abilities *for recreation and transportation*. Pierce County trails will provide users with the opportunity to experience recreation, solitude or companionship, *and provide a practical transportation option. It will offer connections to major developed areas and attractions within the County*, provide opportunities for appreciation of nature, *and connect the County to the greater region.*

CP 66 (emphasis added).

On July 10, 2013, Margie Lockner, plaintiff herein, was riding her bicycle on the Foothills Trail in Pierce County. CP 74, page 9:13-15. According to Ms. Lockner:

> My niece and I were riding in single file. I was residing (sic) behind her. We rounded a curve in the bike trial and encountered Blair Smith who was driving a riding lawn mower. She was on my right mowing grass next to the paved trail and driving at a fast rate. She rode by us and in the process debris (dust, grass, rocks, etc.) from the lawn mower was thrown into the path and swirled up into my eyes. I put my hand up to my eyes to shield them from the debris, and attempted to veer out of the way when I lost my balance, clipped Justine's back tire and crashed. I was very upset, frightened and in pain. I was afraid that I was going to lose my leg. My niece is a nursing student, and she tried to calm me as much as possible. While I was laying on the ground, I saw that Ms. Smith had stopped up ahead. I remember my niece Justine asking if anyone had a phone. Ms. Smith left the scene of the accident, I did not know where she went. I was pretty much in shock.

CP 80.

At the time of this incident, defendant Blair Smith was 20 years old and working as a maintenance worker for Pierce County. CP 83, pages 7-8. Part of her duties were to mow the lawn, something she had been trained by her supervisor, Dennis Bilderback, to do. CP 83-84, pages 9, 14. The mower she was using was a "riding lawn mower" that discharged the grass and other debris out the rear of the mower. CP 89, pages 18-19.

As it related to her training and what to do when mowing near people, Ms. Smith was taught to "idle down the mower," "keep [her] head on a swivel, and "[w]atch for people and objects." CP 84, pages 14-15. Specifically, when asked whether he trained his employees to try and make sure no people were behind the mower when being operated, Mr. Bilderback actually took it a step further, stating, "No, I would say they are not taught to make sure nobody is behind them. In general, they are taught to try to make sure nobody is around them period." CP 89, page 20:5-8. Mr. Bilderback then stated the purpose for that rule: "Even though they are rear

discharge mowers doesn't mean if you were to hit something it's going out the back. It could go out anywhere." Id., page 20:10-12. He further clarified what he taught his employees to do:

> Be aware of their surroundings the best they can while trying to watch where you are mowing. If somebody comes up, shut the blades off. If the motor is revved up or whatever that's one thing, if the blades aren't swinging hopefully nobody gets hit.

Id., page 20:20-25.

As it related to terms like "engine speed" and "idling the blade," Mr. Bilderback explained that the lawn mower has two pedals on the floor that control the direction and speed of the mower. CP 89-90, pages 21-22. There is also a "throttle" which controls the engine speed which controls "the speed of the blade." Id. There is also a separate "shut off" switch for the blades. CP 90, page 23:4-6.

When asked about the purpose of idling the mower, Mr. Bilderback clearly outlined that when people are nearby the operator of the mower must idle down the blades so as to make sure nobody is hit with debris. Id. Specifically, he stated the following during his deposition:

Q: Okay. So then if I understand your testimony correctly, if a person is mowing a lawn and they come up on a mole hill or on some gravel or something that is loose, they are taught to slow the throttle down; is that fair to say?

A: Yes, and shut the blades off.

Q: And there's a separate –

A: There is a separate shut off. It engages the blades or it disengages the blades.

Q: And does the same apply if people are nearby, the same rule of thumb?

A: Yes.

CP 90, page 22:20-23:11 (objections omitted).

Following this incident, Ms. Smith filed two incident reports. The first one was submitted on the day of the incident. Where she was asked to describe the incident, Ms. Smith stated:

> On July 10, 2013 on the Orting trail (02-056) I was mowing on the right side of the trail when I saw 2 bikers coming up on my left side. *I stopped the mower.* As the second bicyclist passed me, she fell and injured her knee. I dialed 911 immediately. She was then taken to Good Sam hospital.

CP 92 (emphasis added).

In the second incident report, Ms. Smith described the incident slightly differently:

> On July 10, 2013, I was mowing one FHT. As two bikers approached from behind me, *I stopped the mower and idled down the engine.* One of the bikers lost control and fell, injuring her knee. I dialed 911…

CP 94 (emphasis added).

As can be seen, in the first incident report, Ms. Smith made no mention of "idling the engine" or slowing the blades as she was taught when people were nearby. In the second incident report, written roughly 40 days later, she did say that she "idled down the engine." CP 92, 94.

Importantly, the July 10, 2013 incident was not Ms. Smith's first time causing debris to be dangerously projected. She previously had to fill out an incident report for shooting rocks from the trail towards someone's car, causing the car's windshield to crack. CP 85, pages 22-24, CP 86, pages 25, 27. She also previously ran a maintenance truck into a pole. CP 86, page 25. In those incidents, Ms. Smith only completed one incident report.

II. ARGUMENT

A. This Court Should Decline Review Because the Court of Appeals Decision is Not in Conflict With Camicia v. Howard S. Wright Constr. Co.

Petitioner argues that the Court of Appeals decision was inconsistent with Camicia v. Howard S. Wright Constr. Co., 179 Wn.2d 684, 317 P.3d 987 (2014), and therefore review is appropriate under RAP 13.4(b)(1). Respectfully, where the Court of Appeals decision was wholly consistent with Camicia, review of that issue should be denied.

In Camicia, this Court reversed summary judgment under RCW 4.24.210 where the land in question potentially served purposes other than solely recreational. In that case, the plaintiff was riding her bike on a trail parallel to I-90 when she collided with a wooden post on the trail and was seriously injured. Camicia, 179 Wn.2d at 687. This Court outlined the background of RCW 4.24.210 and concluded that dismissal was inappropriate where material facts existed suggesting the trail was not open only for recreation but also for purposes of transportation ("it would make little sense to provide immunity on the basis of recreational use when the land would be held open to the public even in the absence of that use.") Id. at 697.

This Court particularly addressed the dual uses of bicycles:

> Bicyclists enjoy an anomalous place in the traffic safety laws of Washington. . . . Statutes variously treat bicycles and bike paths in a recreational context, and at other times the statutes treat them as part of the transportation system. These statutes indicate the Legislature has viewed bicycles and paths on a case by case basis, and without any continuity. . . . Thus, proof that land is opened for bicycling is not proof that it is opened for recreational purposes.

Id. at 700 (internal citations omitted).

In Ms. Lockner's case, the trial court was presented with material facts suggesting the Foothills Trail serves a transportation purpose along with recreational opportunities. CP 62-71. Specifically, the Pierce County website describes the Foothills Trail as "*a popular commuter*

route and recreational destination for bicyclists," (CP 62) and the Pierce County Park, Recreation & Open Space Plan, "Regional Trails Plan," defines the "Regional Trail Vision" as:

> The Pierce County Regional Trails System will be an accessible and seamless trails network used by people of all ages and abilities *for recreation and transportation.* Pierce County trails will provide users with the opportunity to experience recreation, solitude or companionship, *and provide a practical transportation option. It will offer connections to major developed areas and attractions within the County*, provide opportunities for appreciation of nature, *and connect the County to the greater region.*

CP 66 (emphasis added).

This Court, in Camicia, specifically addressed mixed-use bicycle trails:

> Immunity applies only when a landowner allows the public to use the land "for the purposes of outdoor recreation." This reading is in accordance with the statute's plain language and the legislature's stated purpose to "encourage" land possessors to make their land "available to the public for recreational purposes by limiting their liability." Where land is open to the public for some other public purpose--for example as part of a public transportation corridor--the inducement of recreational use immunity is unnecessary. It would make little sense to provide immunity on the basis of recreational use when the land would be held open to the public even in the absence of that use.

Camicia, 179 Wn.2d at 697 (internal citations omitted).

This Court further stated:

> Distinguishing between recreating and nonrecreating users would strip Washington landowners of their statutory protection by hinging recreational immunity on the one factor not mentioned in the statute and over which a landowner has no control: the intent of a public invitee. Because landowners cannot tell the private intentions of one invitee from another, they cannot keep those engaging in permitted activities but for nonrecreational reasons off the land, and therefore cannot limit their liability. A rational landowner faced with such a rule would have every incentive to close the land to the public entirely. This is especially true because the landowner would be forced to take all the same precautions to safeguard the land opened up for public recreation as would apply in the absence of RCW 4.24.210, since he would still owe a greater

> duty of care to those who enter but are not recreating. The legislature plainly intended statutory immunity to apply based not on the intent of the public invitee, but on the landowner's action in opening land to the public for recreation.

Id. at 702.

Here, because material facts showed the Foothills Trail is open for transportation purposes, as well as recreational, the Court of Appeals correctly found Camicia to be controlling. Where that court's decision in this case was wholly consistent with the Camicia holding, review pursuant to RAP 13.4(b)(1) is improper. Review should be denied.

B. This Court Should Decline Review Because the Court of Appeals Decision Is Not In Conflict With Chamberlain v. Department of Transportation or Archer v. Marysville School District. This Court Should Also Decline Review Because Petitioners Have Failed To Articulate Why Review is Appropriate Under RAP 13.4(b)(4).

1. Chamberlain is wholly distinguishable from this case

Petitioners argue, with almost no analysis, that the Court of Appeals decision is inconsistent with the 1995 Division I case Chamberlain v. Department of Transportation, 79 Wn.App. 212, 901 P.2d 344 (1995) and that review is therefore appropriate under RAP 13.4 (b)(2). Respectfully, petitioners' argument fails.

This Court specifically addressed Chamberlain in Camicia, stating:

> 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.

Camicia, 179 Wn.2d at 698 (internal citations omitted).

In this case, as well as in Camicia, it was the mixed-uses of the land that made recreational immunity inapplicable. In Chamberlain, the court was addressing a former version of the recreational immunity statute that stated in relevant part:

> 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 ... 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: ... Provided further, that nothing in this section shall prevent the liability of such 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 ...

Chamberlain, 79 Wn.App. at 216.

The Chamberlain court specifically noted that the act the child was engaged in before his death was specifically recreational – he and his family were enjoying a "scenic site." The signs posted at the end of the bridge declared the area to be a "Scenic Overlook." Id. at 214. There was no evidence that the area of the bridge where the child was injured was also used for another purpose – one that would not be recreational in nature. In fact, the Court stated "it is undisputed that the Chamberlain family was on the bridge on the day of the accident for recreational purposes." Id. at 216.

Additionally, there were signs warning of both the presence of pedestrians on the bridge and the danger posed to pedestrians of passenger vehicle side mirrors. Id.

Other factors also show Chamberlain to be easily distinguishable. First, the plaintiff in that case settled his claim with the driver of the vehicle that struck him. Here, Blair Smith, the driver of the lawnmower, was provided immunity in the trial court's decision. Second, in

Chamberlain, the plaintiff's argument in his attempt to get around recreational immunity was that the bridge was not actually "land." No such argument was made in this case. Third, the Chamberlain court was careful to conclude that recreational immunity "bars the action under the circumstances of this particular case" – clearly indicating that such cases should be analyzed on a case-by-case basis.

Where there is no inconsistency between the Court of Appeals decision in this case and the decision in Chamberlain, review should be denied.

2. *The Court of Appeals decision is Not in Conflict With Archer v. Marysville School District.*

Again, with almost no analysis, petitioners argue that this Court should accept review because the Court of Appeals decision is in conflict with the unpublished Archer v. Marysville School District, 195 Wn.App. 1014, Not Reported in P.3d (2016).

Archer involved an injury on a school playground on a Saturday when school was not in session. Division I specifically distinguished between that scenario and incidents occurring on bike trails like in this case and Camicia. The Court stated:

> Here, at the time Archer was injured, school was not in session nor was the school using the playground for school-related purposes. And, unlike a bike trail which may be open for transportation in addition to recreation purposes, it is difficult to contemplate what the District's alternative intent would be in keeping the playground open to the public during these other times.

Archer, 195 Wn.App. at ___.

Where petitioners have failed to make any showing of how the Court of Appeals decision in Ms. Lockner's case is inconsistent with Archer, this Court should decline review.

3. *This Court Should Decline Review Because Petitioners Have Failed to Articulate Why Review is Appropriate Under RAP 13.4(b)(4).*

RAP 13.4(b)(4) states that review will be accepted if "the petition involves an issue of substantial public interest that should be decided by the Supreme Court." Id. Petitioners argue:

> There are many lands similarly situated to that of the Marysville School District in Archer. Land open to the public for educational activities as well as recreation. Land also similar to Chamberlain. Land held out for transportation and recreation. This Division II decision requires those landowners to evaluate whether to keep those lands open to the public for recreation in light of the possibility they may now be denied the immunity protections of RCW 4.24.210 and held liable for unintentional injuries. This likely chilling effect upon landowners' willingness to open their lands to recreation runs counter to the explicit purpose of RCW 4.24.210....

Brief of Petitioners at 5-6.

The problem with petitioners' analysis is that in Archer, Division I acknowledged specifically that a school playground presents a wholly different analysis of RCW 4.24.210 than a mixed-use trial like in this case. Similarly, the Chamberlain decision was specifically addressed and rejected in the bicycle trail context by this Court in Camicia. Any "chilling effect" from this case would have already occurred via Camicia. Petitioners have failed to raise any issues of "substantial public interest" and therefore review is not proper under RAP 13.4(b)(4).

C. If This Court Accepts Review of One or More of the Issues Raised By Petitioners It Should Then Also Review Whether RCW 4.24.210 Extends Immunity to All Negligence Actions – Not Just Premises Liability Cases.

The Court of Appeals rejected Ms. Lockner's argument that RCW 4.24.210 should have been inapplicable where the case was premised upon a theory of *negligence* rather than one of *premises liability*. The Court of Appeals stated specifically, "[w]e also hold that the plain language of availability of RCW 4.24.210 extends to negligence actions." Where that Court of Appeals holding was erroneous, this Court should accept review pursuant to RAP 13.4(b)(4).

The term "negligence" is defined as conduct that falls below the standard established by law for the protection of others against unreasonable risk of harm. Bodin v. City of Stanwood, 130 Wn.2d 726, 927 P.2d 240 (1996). A negligence claim requires a showing of a duty, breach, causation and damages. Sheikh v. Choe, 156 Wn.2d 441, 128 P.3d 574 (2006).

Ms. Lockner provided the trial court with material facts suggesting Ms. Smith violated her duty of due care by not slowing the lawn-mower blades and thereby allowing rocks and debris to be propelled at her in a manner inconsistent with her training. By shielding her face and eyes from the propelled debris, Ms. Lockner lost control of her bike and fell, seriously injuring her leg. She was therefore able to show that, but for the negligent actions of Ms. Smith, she would not have fallen and been injured.

Ms. Lockner does not contend that she fell off her bike because she hit a crack in the pavement or because the trail was not wide enough. Her claim has nothing to do with the condition of the land. She claims that an agent of Pierce County actively breached the duty of due care and caused her injury. She would have made the same claim if she was run over by a maintenance vehicle on the trail or shot by a sheriff's deputy negligently target-shooting on the property. As this Court is aware, courts must "avoid any reading of [a] statute that would result in unlikely, absurd, or strained consequences." State v. Neher, 112 Wn.2d 347, 351, 771 P.2d 330 (1989).

The opening of one's land for recreational purposes is encouraged by RCW 4.24.210. However, the Court of Appeals erred in holding that landowners who do so are wholly immune from liability if they or their agents act negligently and injure those on the property. It is requested that if this Court accepts review of one or more of the issues raised by petitioners that it also review whether the Court of Appeals erred in its holding that "[b]y its plain language,

[RCW 4.24.210] extends to negligence actions and is not restricted to premises liability claims." Such review is supported by RAP 13.4(b)(4) because whether RCW 4.24.210 grants total immunity from all actions – especially from government agents who act negligently on the recreational property – is an issue of substantial public interest that should be determined by this Court.

III. CONCLUSION

It is respectfully requested that this Court decline review of this case and affirm the Court of Appeals decision reversing summary judgment. However, if this Court elects to review one or more of the issues raised by petitioners it is also then requested that this Court review whether the Court of Appeals erred in holding that RCW 4.24.210 extends immunity to all negligence actions occurring on recreational land.

DATED THIS 6th day of July, 2017.

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By: _____
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CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of this reply brief to be served on the following in the manner indicated below:

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Signed at Tacoma, Washington 7th day of July, 2017.

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