Supreme Court No. 100947-0
Court of Appeals, Division I No. 823299
King Co. Superior Court Cause No. 19-2-32361-2

SVETLANA NATALICHEVA and GREGORY GRIDIN, and the marital community composed thereof,

Plaintiffs-Petitioners,

v.

CITY OF REDMOND, WASHINGTON, a municipal corporation,

Defendant-Respondent.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

A. INTRODUCTION

As a landowner that makes parks available for public use and enjoyment free of charge, the City of Redmond ("City") enjoys the protections of Washington's Recreational Use Immunity Statute, RCW 4.24.210 ("RUIS"). The Legislature enacted this law "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." RCW 4.24.200. The statute furthers this policy by limiting landowners' liability toward persons who may be injured on their lands. *Id*.

Appellant Svetlana Natalicheva sued the City after being injured by a falling tree limb at the City's Idylwood Park. Her claim hinged on a narrow exception to RUIS immunity that arises when a recreational user is injured by a condition that is known, dangerous, artificial, and latent and for which no warning is posted. RCW 4.24.210(4). Finding that she could not meet all

four elements of this exception, the trial court dismissed the claim on summary judgment, and Division I of the Court of Appeals affirmed.

Trees are ubiquitous in outdoor areas where people enjoy recreational activities, and it is common knowledge that tree limbs sometimes fall for various reasons. To impose potential liability for the entirely natural occurrence of a fallen tree limb would be a drastic expansion of a narrow exception and would undermine the legislative purpose behind the RUIS. Division I's decision faithfully serves that legislative purpose, and Natalicheva presents no reason for this court to expend its resources reviewing it.

B. IDENTITY OF RESPONDENT

The City opposes the petition for review.

C. STATEMENT OF THE CASE

1. Idylwood Park and Area of Incident

Idylwood Park occupies approximately seventeen acres on the northwestern shores of Lake Sammamish. It features a swimming beach, a bathhouse, and restrooms. Visitors can launch car-top boats from the park's small ramp, spread out and play games in a large grassy open space, fish from a pier or the beach, and explore a playground area. Picnic shelters and picnic tables are also available. Thousands of visitors enjoy the park throughout the summer. CP 56.

Idylwood Park's beach is on the east side of the park along Lake Sammamish. The beach is approximately 350 feet long. A large grassy area overlooks the beach for its entire length. The beach ends where it meets a copse of black cottonwood trees on

its south end.[1] These trees extend from the shoreline area approximately 150 feet into the park's upland grassy area. *Id*.

The City acquired the park in approximately 1994, taking over ownership and operation from King County. Aside from minor maintenance, including weekly grooming during the summer months and litter pickup, the City has not improved the beach. The stand of native cottonwood trees near the south end of the beach was present and established when the City acquired the park. *Id*.; *see also* CP 44.

2. Natalicheva's Injury

On August 10, 2017, Natalicheva visited Idylwood Park. She was sitting on the south side of the park in a grassy area upland from the beach, near the line of cottonwood trees. CP 61–63, 69–70. This is not a frequently used area of the park. Most patrons visiting the beach congregate at the middle or north end

[1] In 2018, after the incident involving Natalicheva occurred, the City removed some of these trees. CP 56. For simplicity, the City describes the area as it existed on the date of the incident.

where the water is better suited to swimming and trees do not cast shadows on the water and surrounding areas. CP 44–45. While Natalicheva was sitting on the grass, a limb high in a cottonwood tree suddenly broke off. CP 61. The falling limb struck Natalicheva, causing injuries to her head, shoulder, and leg. *Id*.; CP 74–78, 81–83. City personnel, including lifeguards and the Fire Department, responded to the incident and Natalicheva was taken to the hospital. CP 61.

3. The Tree

The City owns or controls more than 1,000 acres of park lands. CP 41. City personnel regularly conduct inspections of the trees in these parks. This includes looking for evidence that a tree is dead or dying, or otherwise poses a hazard to park visitors. To the extent any such hazards are observed, the City develops and implements plans to address those hazards, which may include pruning or removal. Parks Department operation staff, who are present in the parks daily, are also trained to be

observant and be aware of hazardous tree conditions like declining tree health, broken/hanging branches, and leaning trees. If these conditions are discovered, they are reported, and further assessment and action is taken by the City depending on the individual circumstances. CP 41–42. City employees had never observed any concerning indications regarding the tree at issue here and, as a result, performed no formal risk assessment on it before the incident. CP 44.

Every inspection of this tree following the incident—including inspections by professional arborists retained by both the City and Natalicheva—has confirmed that it outwardly appeared completely healthy. CP 44–45, 53, 89, 102, 968.

4. Sudden Limb Drop

Natalicheva contends—and the City accepts for purposes of this appeal—that the limb in question broke due to a

phenomenon called "sudden (or summer) limb drop" ("SLD").[2] In an SLD event, what otherwise appear to be healthy trees unexpectedly and suddenly experience limb failure on hot, calm summer days. CP 42.

Arboriculturists do not know why limbs break under these conditions and have coined the term "SLD" to categorize such events. One theory is that high temperatures promote humidity in tree canopies, which limits evapotranspiration and thereby increases the moisture content within branches, increasing branch weight and leading to limb failure. Straight grained hardwood trees such as maple, alder, sycamore, and cottonwoods, among others, are all species which have been observed to experience SLD. These species abound naturally in western Washington. *Id*.

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[2] Because the terms "sudden limb drop" and "summer limb drop," as well as alternatives substituting "branch" for "limb" in both terms," are used interchangeably in the summary judgment record, the City uses the abbreviation "SLD" in this brief to refer to all such variations.

SLD events are nonetheless rare. CP 45. The parties have managed to identify only three prior instances of tree failures, within the entire City park system, in which SLD was a *possible* cause of a cottonwood limb failure. CP 42–43, 376–78.

In 2013, a limb broke off an 80- to 100-year-old tree in the far northeast corner of Idylwood Park, more than 100 yards from the northern edge of the beach and even farther from the cottonwood stand at the south end of the beach where Natalicheva was injured. That tree was nearly double the age and size of the tree involved in Natalicheva's injury. CP 43.

In 2014, a cottonwood tree in another City park, Grass Lawn Park, lost various small branches into a neighboring homeowner's yard. Some of these failures occurred during wind events. Though the tree was healthy, the City removed it at the neighbor's request. CP 43.

And Natalicheva has pointed to an incident, in 2015, in which a limb apparently fell from another tree in Idylwood Park. CP 378.

Seventeen days after Natalicheva's injury, on August 27, 2017, another cottonwood tree, at the opposite end of the park, shed a limb. The occurrence of two limb failures in short succession was inconsistent with historical trends and caused City personnel to reconsider the risk posed by cottonwood trees in Idylwood Park. CP 45. Because SLD is associated with drought and high heat conditions, personnel believed that climate change or other changing environmental conditions might be affecting trees in the park in a new way. The result was an upgraded risk designation and a recommendation that trees be removed. CP 46.

5. Procedural History

Natalicheva brought a negligence claim against the City in King County Superior Court. The City moved for summary

judgment based on the RUIS. CP 24–34. In response, Natalicheva did not dispute that the RUIS applied. She argued, however, that the exception for artificial conditions applied. CP 125–39. This exception applies only if Natalicheva was injured by a known, dangerous, artificial, and latent condition for which no warning was posted. RCW 4.24.210 (4). The City established that this exception did not apply because the injury-causing condition was not known, latent, or artificial. CP 1019–23.

The trial court granted the City's motion and dismissed the case under the RUIS. CP 1078. A unanimous panel of Division I affirmed in an unpublished decision. Finding that the injury-causing condition was not artificial as a matter of law, Division I held that RUIS immunity barred Natalicheva's claims and that it was unnecessary to address the latency and knowledge elements. *Natalicheva v. City of Redmond*, 82329-9-I, 2022 WL 896349, at *3 n. 2 (Wn. App. Mar. 28, 2022). Natalicheva sought review by this court.

D. ARGUMENT WHY REVIEW SHOULD BE DENIED

Natalicheva asks this Court to accept review under RAP 13.4(a)(1) and (4). These provisions require Natalicheva to establish that Division I's decision either is "in conflict with a decision of the Supreme Court" or "involves an issue of substantial public interest." RAP 13.4(a)(1), (4). Natalicheva has not established either proposition.

1. Natalicheva fails to identify any conflict with any decision of this Court.

Regarding RAP 13.4(a)(1), Natalicheva has not identified any conflict with this court's precedent. Although Natalicheva purports to identify three such conflicts, all three are simply different permutations of her contention that Division I's decision was wrong. None of these points establish any inconsistency with this court's decisions, let alone a conflict that would warrant review. The City addresses each in turn below.

a. *Division I followed this court's precedent in defining the relevant condition.*

Under the RUIS, landowners who allow members of the public to use their land for recreational purposes free of charge are generally immune from liability. RCW 4.24.210; *Davis v. State*, 144 Wn.2d 612, 616, 30 P.3d 460 (2001). It is undisputed that the City permits members of the public to use Idylwood Park for recreational purposes and does not impose a fee for such use. Natalicheva thus does not dispute that the RUIS governs this action.

Instead, she premises her petition on a narrow exception, which applies "when the entrant sustains injuries 'by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted.'" *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 42–43, 846 P.2d 522 (1993) (quoting RCW 4.24.210). To invoke that exception, Natalicheva must prove four elements, including that she was injured by an "artificial" condition. *Davis*, 144 Wn.2d at 616.

In this analysis, the injury-causing condition is the "specific object or instrumentality that caused the injury, viewed in relation to other external circumstances in which the instrumentality is situated or operates." *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 921, 969 P.2d 75 (1998). The specific object or instrumentality that caused Natalicheva's injuries was a fallen tree limb. This point is confirmed by comparison to *Ravenscroft*, where an outboard motor struck a submerged tree stump, which caused the motor to flip into the boat and injure the plaintiff. Despite a lengthy discussion about the external circumstances that contributed to the incident, this court clarified that the "specific object causing the injury in this case was a tree stump." *Id*. at 921. Likewise, here, although Natalicheva discusses at length such external circumstances as the maintenance of a grassy area and the proximity to a swimming beach, the specific injury-causing object was the tree limb.

While not disputing that the limb was a natural condition, Natalicheva claims that Division I should have defined the "injury-causing condition" as the tree together with a maintained grassy area. As Division I noted, however, that interpretation would conflict with this court's opinion in *Davis*.

The plaintiff in *Davis* was injured when he rode his motorcycle over a steep drop-off in a sand dune. *Davis*, 144 Wn.2d at 614. He claimed that he was following a trail of tire tracks, which led him to the drop-off. *Id*. at 614–15.

Although the drop-off was uncharacteristic for the area (*id*. at 615), it was a naturally occurring condition. *Id*. at 617. The plaintiff argued, however, that "the tracks leading to the drop-off were a human made alteration of the natural contours of the sand dunes that became part of the injury-causing condition, transforming it into an artificial condition." *Id*. Thus, in the plaintiff's argument, the specific injury-causing object was the drop-off, the tire tracks were "external circumstances," and

"taken together" they amounted "to an artificial condition." *Id*. at 618.

This court disagreed. Although it agreed that the tire tracks were artificial, it did "not find the tracks and the drop-off so closely related as to create a single artificial condition for purposes of qualifying as an exception to the recreational use immunity statutes." *Id*. at 617. "While these tracks may have altered the natural condition of the flat open space, ***they did not physically alter the natural condition of the drop-off to such an extent as to transform it from a natural state to an artificial one***." *Id*. at 618–19 (emphasis added). This court therefore affirmed the dismissal of the plaintiff's claims on summary judgment. *Id*. at 615, 619.

In so holding, the court distinguished *Ravenscroft*, where external circumstances resulted in an outboard motor striking a tree stump. The landowner there was a power company, WWP, which had created the waterway in question through its damming

operations. *Id*. By raising the water level over the years, WWP caused trees to become surrounded by water. *Id*. at 916. The trees died, and WWP eventually cut down the snags, leaving the stumps. *Id*. Compounding the hazard it had created, WWP artificially maintained the water level at its maximum height throughout the boating season. *Id*. With the water at that level, the tops of the tree stumps were below the water surface. *Id*.

In a 6–3 decision, this court held that the condition that caused the plaintiff's injury was an artificial one:

> The injury-causing condition was created by WWP cutting down trees, leaving stumps near the middle of a water channel, then raising the river to a level which covered the stumps. This condition was contrived through human effort, not by natural causes detached from human effort. The condition was therefore artificial.

Id. at 923–24.

Three years later, in *Davis*, this court distinguished *Ravenscroft*, explaining that "the defendant's artificial control of

the watercourse was an external circumstance that ***physically altered the condition of the tree stump*** so as to transform the condition into a hidden and dangerous one." *Davis*, 144 Wn.2d at 618 (emphasis added). The court explained that the "artificial condition in *Ravenscroft* was unique." *Id*. "The artificial external circumstance was ***so closely related to the natural object that it completely altered the natural condition of that object***." *Id*. (emphasis added).

In an opinion joined by eight justices and concurred in separately by a ninth, this court explained that *Ravenscroft* addressed a rare situation and will seldom be helpful in other cases:

> ***This close relationship between a specific injury-causing condition*** (the tree stump) ***and an artificial external circumstance*** (the shifting of the water level and watercourse so as to submerge the stump) ***is rare***. Consequently, the analysis in *Ravenscroft* ***will rarely apply to other situations***.

Id. (emphasis added).

Davis controlled Division I's decision here. As in *Davis*, the specific injury-causing object (here the tree limb, there the drop-off) was a natural one. Like the plaintiff in *Davis*, Natalicheva argued that an artificial external circumstance (here the maintained grass, there the tire tracks) should be considered part of the injury-causing condition.

But, like the plaintiff in *Davis*, the only relationship she can identify between the external circumstance and the injury-causing object is that the former drew her toward the latter. In *Davis*, the tire tracks invited motorcycle riders toward the drop-off. Here, Natalicheva claims that the maintained grassy area invited visitors to sit under the trees.

The photographs offered by Natalicheva, to contrast the maintained area with an area that has been left in its natural state, do not alter the analysis. The most that can be made of this comparison is that someone is more likely to be under the tree

when a limb falls if the area is maintained than if it is overgrown with vegetation. But the same was true in *Davis*: a motorcyclist was more likely to encounter the drop-off with tracks leading to it than if the dune was in its natural state.

As in *Davis*, the artificial external circumstance here "did not physically alter the natural condition of the [tree limb] to such an extent as to transform it from a natural state to an artificial one." *Id*. at 618–19. The fact that Natalicheva and her companions were sitting in a maintained grassy area "does not alter the fact the [tree limb] itself remained in its natural state." *Id*. at 619. "The relationship between the [grassy area] and the [tree limb] is more attenuated than the relationship between the stump and the artificial control of the watercourse and water level in *Ravenscroft*." *Id*.

Natalicheva does not even attempt to argue that there was a close relationship between the tree limb and the grassy area, let alone that the maintenance of the grassy area somehow

"transformed" the tree limb into an unnatural state. Instead, she argues that "the recreational area is causally related to—and indeed is inseparable from—the target zone where falling limbs can injure park patrons."[3]

But Natalicheva was injured by the falling limb, not by the "target zone." And *Davis* explained that the "rare" result in *Ravenscroft* requires proof that the external circumstance transformed "the natural state of the specific object causing [the plaintiff's] injuries." *Davis*, 144 Wn.2d at 618. Because Natalicheva has not identified any action by the City that transformed the natural state of the tree limb, she cannot establish that she was injured by an artificial condition.

This case is also unlike *Van Dinter*. The plaintiff there injured his eye when he ran into the antenna of a caterpillar-shaped playground equipment. *Van Dinter*, 121 Wn.2d at 40. The equipment was installed inside a gravel-covered area that

[3] Petition for Review at 24–25.

was bordered by wooden beams. *Id*. The plaintiff claimed that the gravel and beams provided an inadequate buffer around the caterpillar. *Id*. at 41.

That analysis is inapposite here because there was no dispute in *Van Dinter* that the specific injury-causing object, a metal rod protruding from playground equipment, was artificial. *Van Dinter* did not address the situation presented here, where the specific injury-causing object was a natural one, and the plaintiff argues that external circumstances transformed it into an artificial condition.

The analysis applicable to that situation was established in *Ravenscroft* and refined in *Davis*. Division I applied that analysis correctly in affirming the dismissal of Natalicheva's claims.

b. *Division I properly concluded that Natalicheva was not injured by an artificial condition.*

The above analysis forecloses Natalicheva's second contention: that the injury-causing condition must be considered artificial.[4] Natalicheva's entire argument on this point is that this court found both the tire tracks in *Davis* and the alterations to the water level in *Ravenscroft* to be artificial. What Natalicheva overlooks is that *Davis* concluded the plaintiff was not injured by an artificial condition, for the reasons discussed above. Again, the key factor that distinguished *Davis* from *Ravenscroft* was that the tire tracks did not transform "the natural state of the specific object causing [the plaintiff's] injuries." *Davis*, 144 Wn.2d at 618.

Division I's decision comports with this precedent because Natalicheva presents no evidence that any "human agency"[5]

[4] Petition for Review at 29.
[5] Petition for Review at 20.

transformed the tree limb—the specific object causing her injuries—in any way. Division I was thus bound to follow *Davis* and conclude that Natalicheva was not injured by an artificial condition. That result did not conflict with any prior decision of this court.

c. *Division I followed this court's precedent regarding burden of proof.*

Natalicheva likewise fails to show that Division I's discussion of the burden of proof conflicted with any prior decision of this court. As Division I explained, the City bore the burden of proving that the RUIS applied and, once the City made that showing, the burden shifted to Natalicheva to show that an exception applied. *Natalicheva*, *supra* at *1. Natalicheva claims that this conflicted with this court's decision in *Camicia v. Howard S. Wright Const. Co.*, 179 Wn.2d 684, 693, 317 P.3d 987 (2014).

But *Camicia* did not address the exception for artificial conditions, or any other exception in the RUIS. The question

presented there was whether the I-90 bicycle trail could be protected by the RUIS when it was open to the public primarily for transportation but was also used incidentally for recreation. *Id*. at 697. In that context, this court stated that "recreational use immunity is an affirmative defense" and that "the landowner asserting it carries the burden of proving entitlement to immunity under the statute." *Id*. (citing *Olpinski v. Clement*, 73 Wn.2d 944, 950, 442 P.2d 260 (1968)). *Camicia* did not purport to address who has the burden to prove exceptions.

Division I relied on this court's opinion in *Jewels v. City of Bellingham*, 183 Wn.2d 388, 394, 353 P.3d 204 (2015). There, this court held that when recreational-use immunity applies, the RUIS "creates an exception where ***an injured party may overcome*** this immunity by showing" one of three exceptions. *Id*. (emphasis added) (quoting *Davis*, 144 Wn.2d at 616). Division I interpreted this language as providing that, once the defendant carries its burden of showing that the RUIS applies,

the burden is on the plaintiff to "overcome" RUIS immunity by establishing an exception. *Natalicheva*, *supra* at *1. Division I properly followed *Jewels*, which addressed exceptions directly, rather than *Camicia*, which did not address exceptions at all.

In any event, this would not be a good case to address the burden of proof relating to exceptions because Natalicheva has not shown that returning the burden to the City, to disprove the exception, would have made any difference. The exception requires proof of four elements: (1) the condition was known; (2) the condition was dangerous; (3) the condition was artificial; and (4) the condition was latent. *Davis*, 144 Wn.2d at 616. "If ***one*** of the four elements is not present, a claim cannot survive summary judgment." *Id.* (emphasis added). Thus, even supposing that the burden was on the City to prove that the exception did not apply, it would meet this burden by showing that any one of the elements was not met.

Under that standard, the City proved on summary judgment that the injury-causing condition was not artificial, and thus the third element could not be met. The essential facts are undisputed: the tree limb was a natural object that fell because of natural causes; the City maintained the grassy area below the tree limb; and such maintenance did not transform the tree limb in any way. Under *Davis*, these facts prove that the exception does not apply. *Davis*, 144 Wn.2d at 618. Summary judgment was thus required regardless of who had the burden of proof.

Natalicheva therefore fails to show that review is warranted under RAP 13.4(b)(1).

2. Natalicheva fails to identify an issue of substantial public interest.

As for RAP 13.4(b)(4), it is unclear how Natalicheva believes this matter triggers a substantial public interest. This Court identified "a prime example of an issue of substantial public interest" in *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). There, the Pierce County Prosecuting Attorney had

circulated a memorandum to all Pierce County Superior Court judges. *Id*. at 575. The memorandum established the Prosecuting Attorney's position on a matter relating to sentencing. *Id*. at 575–76. In a published holding, Division II described the letter as an improper *ex parte* communication. *Id*. at 576. Noting that this holding had "the potential to affect every sentencing proceeding in Pierce County" after the date of the letter, this Court granted review because of "the sweeping implications of the Court of Appeals decision." *Id*. at 577–78.

Natalicheva identifies no such sweeping implications here. To the contrary, she contends that under her theory of landowner liability, landowners "would rarely be subject to liability for SLD…."[6]

Natalicheva's sole basis for invoking RAP 13.4(b)(4) is that Division I considered her proposed holding to be "contrary to the express public policy underlying" the RUIS. *Natalicheva,*

[6] Petition for Review at 34.

supra at *3. Natalicheva appears to argue that, because Division I considered the statute's underlying public policy, this somehow transforms the case into a matter of substantial public interest. But disagreeing with a court's policy interpretation is not the same thing as showing that the court's decision will have sweeping implications—especially given Natalicheva's concession about how rarely this issue would affect landowner liability.

Review under RAP 13.4(b)(4), therefore, is not merited.

E. CONCLUSION

Natalicheva has not shown that Division I's decision conflicts with this Court's precedent or that this dispute involves an issue of substantial public interest. This Court should deny review.

RESPECTFULLY SUBMITTED this 24th day of June, 2022.

I certify that the foregoing memorandum contains 4,218 words, excluding words contained in the title sheet, tables of contents and authorities, certificate of service, signature blocks, any pictorial images or appendices, and this certificate.

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated this 24th day of June, 2022 at Seattle, Washington

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