NO. 48659-8-II

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,

Petitioners,

v.

MARGIE M. LOCKNER, a single woman,

Respondent.

MEMORANDUM OF AMICUS CURIAE STATE OF WASHINGTON IN SUPPORT OF PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

Andy Woo
Assistant Attorney General
WSBA No. 46741
1125 Washington Street SE
Olympia, WA 98504
(360)586-4034
Office ID: OC269103

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authority

Rules

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The State of Washington—through various state agencies, departments, and commissions—owns, manages, and maintains many of Washington's most treasured lands, waters, and historic places for the public's benefit and, in many cases, recreational enjoyment. Many of these lands—whether providing public outdoor recreation as the primary function of a state agency's mandate or as a secondary benefit of its broader mission—implicate mixed, secondary, or multiple-use scenarios.

As set out more fully in the State's accompanying motion to file this memorandum, various state agencies—including the Washington State Parks and Recreation Commission (State Parks), Department of Natural Resources (DNR), and Department of Fish and Wildlife (WDFW)—make lands available to the public for multiple uses.

The State respectfully submits this amicus curiae memorandum to urge the Court to accept review of this case to provide further clarity and guidance, particularly as to how the courts should interpret and apply *Camicia v. Howard S. Wright Const. Co.*, 179 Wn.2d 684, 317 P.3d 987 (2014). The Division II decision imposes additional requirements not present in RCW 4.24.210, deviates from existing jurisprudence on recreational immunity, and highlights the confusion among lower courts as to how *Camicia* should be applied. Additional guidance is needed from the Court to clarify those questions, particularly as to the State's potential liability on public lands and the associated risks to the State and its taxpayers.

II. ISSUES ADDRESSED BY AMICUS CURIAE

Should this Court grant review pursuant to RAP 13.4(b)(1) and (2), where the holding of the Court of Appeals, Division II, departs from prior decisions from the Court of Appeals and this Court by interpreting *Camicia* as limiting the recreational immunity provisions of RCW 4.24.210 only to landowners who open their lands to the public solely for recreation and have the authority to close their lands to the public?

Should this Court grant review pursuant to RAP 13.4(b)(4) where the holding of the Court of Appeals, Division II, implicates issues of substantial public interest by limiting the recreational use immunity provisions of RCW 4.24.210 only to landowners who open their land to the public solely for recreation and have the authority to close their lands to the public, thus creating uncertainty as to the State's potential liability on many of its public lands, and thereby significantly increasing risk to the State and its taxpayers?

III. STATEMENT OF THE CASE

The State relies on the statement of facts set forth in *Lockner v. Pierce County*, 198 Wn. App. 907, 909–10, 396 P.3d 389 (2017).

IV. ARGUMENT

The Court should accept the petition for review pursuant to RAP 13.4(b)(1) and (2) because additional guidance is needed from this Court to clarify the principles it articulated in *Camicia* and to address the divergence of the Division II decision from Court of Appeals decisions both before and after *Camicia.* Further, questions of whether the

recreational immunity statute only protects landowners who open their lands to the public "solely for recreational purposes" and who have the ability to close the lands to the public, *Lockner*, 198 Wn. App. at 909, 913, are questions of substantial public interest that should be determined by this Court. RAP 13.4(b)(4).

A. This Court Should Grant Review Pursuant to RAP 13.4(b)(1) and (2) Because the Division II Decision Is in Conflict with Prior Case Law

1. *"Solely for Recreational Purposes"*

The opinion below diverged sharply from precedent because Washington courts had not previously interpreted the recreational immunity statute as being available only to landowners whose lands are open solely for recreational purposes, or that mixed use would necessarily invalidate recreational immunity. *McCarver v. Manson Park & Recreation Dist.*, 92 Wn.2d 370, 377, 597 P.2d 1362 (1979). *McCarver* noted that imposing such a limiting construct is a matter for the legislature. *Id.* Accordingly, courts repeatedly upheld recreational immunity in cases where recreation was not the exclusive purpose for the land being held open to the public, including lands primarily used for other purposes but with incidental recreational uses, as well as lands primarily used for recreational purposes but with other incidental uses. *Riksem v. City of Seattle*, 47 Wn. App. 506, 512, 736 P.2d 275 (1987); *accord Gaeta v. Seattle City Light*, 54 Wn. App. 603, 608, 774 P.2d 1255, 1258 (1989), *overruled on other grounds by Jewels v. City of Bellingham*, 183 Wn. 2d 388, 353 P.3d 204 (2015).

In parting from this previous line of cases, Division II cited *Camicia* to conclude that recreational immunity is no longer available to landowners who open their lands to the public for "mixed use." *Lockner*, 198 Wn. App. at 909. However, while *Camicia* distinguishes *McCarver*, it does not purport to overturn *McCarver* or the existing line of recreational immunity cases. *See Camicia*, 179 Wn.2d at 697–99. Viewing the Court's analysis in context, *Camicia* should not be read as completely precluding recreational immunity when the land is held open to the public for recreational uses in addition to other uses.

Camicia held that since the trail at issue there was required to be used for a public non-recreational purpose—i.e., transportation—it was a question of fact whether the trail was opened to the public for the purpose of outdoor recreation. The Court refused to extend recreational immunity "simply because some recreational use occurs"—but never went as far as requiring recreational use to be the exclusive use. *Id.* at 699. *But see, id.* at 704 (Madsen, C.J., dissenting) (interpreting the majority opinion as limiting recreational immunity to lands held open to the public solely for recreational use). Rather, the Court's concern in *Camicia* related to the then-unresolved question of whether the trail was opened to the public for the purpose of outdoor recreation at all, because bicycling by itself was not enough to prove public recreational use. *Id.* at 699, 701. The Court left open the possibility that upon remand, further fact-finding may very well reveal that the trail was indeed open for public recreation. *Id.* at 700.

There are already indications of confusion among the lower courts

in interpreting and applying *Camicia*, and different divisions of the Court of Appeals have reached divergent conclusions. In an unpublished opinion, Division I found that "*Camicia* does not require the landowner to intend to open the land for the purpose of recreation to the exclusion of all other purposes." *Archer v. Marysville Sch. Dist.*, No. 73449-1-I, 2016 WL 3982925 at *6 (Wash. Ct. App. July 25, 2016) (unpublished).[1] Division II, on the other hand, concluded that the opposite is true: that the land must be opened to the public "solely for recreational purposes." *Lockner*, 198 Wn. App. at 909. Division II draws this interpretation from Justice Madsen's dissent in *Camicia*, noting that "[t]he majority did not refute the dissent's characterization" and therefore "the majority's opinion seems to extend recreational immunity only to those lands held open to the public solely for the purpose of recreation." *Lockner*, 198 Wn. App. at 915.

2. *"Authority to Close"*

Prior to *Camicia*, Washington courts had not barred the protection of the recreational immunity statute from landowners who involuntarily held open the land for public recreational purposes. *Riksem*, 47 Wn. App. at 510–11 (rejecting plaintiff's contention that the City of Seattle was not entitled to recreational immunity because the city was only a successor in interest to the entity that opened the land); *Gaeta*, 54 Wn. App. at 607 (rejecting plaintiff's contention that Seattle City Light was not entitled to recreational immunity because it was compelled to open its land to the

[1] Pursuant to GR 14.1, this unpublished opinion is cited as a nonbinding authority.

public pursuant to its licensing agreement with the federal government). *Camicia* and the Division II decision in this case, however, put that into question by applying the landowner's "authority to close the land to the recreating public" as a test for determining whether recreational immunity applies. *Camicia*, 179 Wn. 2d at 696.

The recreational immunity statute requires that landowners must have "lawful possession and control" over lands they open to the public for outdoor recreation to avail themselves of its immunity provisions. RCW 4.24.210(1). In *Tennyson v. Plum Creek Timber Co.*, the Court of Appeals associated "lawful possession and control" with "a broader, more permanent interest in the land," noting that the defendant's presence on the land in that case was for the temporary purpose of fulfilling its contractual obligations and that it had no "continuing authority to determine whether the land should be open to the public." 73 Wn. App. 550, 557–58, 872 P.2d 524 (1994). In *Gaeta*, when confronted with the question of whether Seattle City Light, as a licensee on federal land, had "lawful possession and control" if it is compelled by the federal government to open the land to the public for recreational purposes, the court concluded that if the land is opened to the public for recreational purposes without a fee, the recreational use statute applies and "[i]t is of no consequence" that the occupier of the land was compelled to do so. 54 Wn. App. at 607–08.

In *Camicia*, however, this Court further articulated that "[a] landowner must have authority to close the land to the recreating public" to establish that it had "lawful possession and control" over the land. 179

Wn. 2d at 696. This Court should grant review in this case to clarify whether *Camicia* intended to establish the landowner's authority to close the land as the new test for determining "lawful possession and control," whether Division II correctly understood and applied this test, and how this test applies to public landowners like the State, who may be compelled by statute or its public mandate to keep public lands open.

B. This Court Should Grant Review Pursuant to RAP 13.4(b)(4) Because this Case Significantly Implicates the State's Risks and Potential Liability with Respect to State Lands

The Division II decision also presents an issue of substantial public interest that should be determined or further clarified by this Court. RAP 13.4(b)(4). Division II based its conclusion on the premise that "the inducement of recreational use immunity" is unnecessary for landowners who already open their lands for some other public purpose. *Lockner*, 198 Wn. App. at 915. While that is true as to those other public purposes, recreational immunity does incentivize landowners to <u>also</u> open their lands to public recreation. If a land is not afforded immunity simply because it is already open to the public for non-recreational purposes, the intent of the recreational immunity statute, as articulated in RCW 4.24.200, will be seriously undermined, as landowners—both public and private—close their lands to public outdoor recreation in order to avoid liability.

This decision not only affects the parties to this proceeding, but also the recreating public and all landowners who open their lands to the public for outdoor recreation—including public landowners such as county or municipal governments, school districts, and state agencies. The

State, in particular, opens its lands to the public for outdoor recreation in a wide variety of contexts and often in complex scenarios. For example, DNR manages over 3.5 million acres of state trust land and state forest lands[2] for which DNR's primary legal obligation is to generate funds for schools and counties. *County of Skamania v. State*, 102 Wn.2d 127, 132, 685 P.2d 576 (1984); *accord* AGO 1996 No. 11. But the legislature has authorized DNR to manage trust lands for multiple uses so long as fiduciary obligations are not impaired—such as opening the lands to the public for both outdoor recreation as well as a public right-of-way. RCW 79.10.120. Under Division II's ruling, DNR may no longer be able to rely upon RCW 4.24.210 in those instances.

For both State Parks and DNR, it is not uncommon for roads or trail systems on state owned lands to serve both the purposes of public outdoor recreation as well as some form of public transportation.[3] In some cases, the mixed use is by design. *E.g., Chamberlain v. Dep't of Transp.*, 79 Wn. App. 212, 901 P.2d 344 (1995) (recreational immunity case involving Deception Pass Bridge, which serves as a recreational "Scenic

[2] An informational overview of state trust and forest lands: http://www.dnr.wa.gov/managed-lands/forest-and-trust-lands (last visited August 3, 2017).

[3] This becomes all the more troubling for the State if the courts use the source of funding to infer that the public land is being held open for non-recreational purposes. *See Camicia*, 179 Wn.2d at 700 (noting that "[n]o funds designated for recreational facilities were used in constructing the path"). Many state park roads, for example, were constructed using transportation funds. *See generally Wash. Off Highway Vehicle Alliance v. State*, 176 Wn.2d 225, 290 P.3d 954 (2012) (upholding the constitutionality of a legislative appropriation of motor vehicle fuel excise tax revenues for park maintenance). Similarly, roads on DNR lands are very rarely constructed using recreational funds.

Overlook" as well as a transportation corridor of State Route 20). In other cases, roads constructed to provide public access on state owned lands for recreational purposes end up as de facto transportation corridors. This dilemma is by no means unique to State Parks and DNR. WDFW's Beebe Springs Wildlife Area/Water Access Site,[4] for example, is open to the public for outdoor recreational purposes. However, because its on-site restroom facilities and parking area are located right off of US Highway 97, the site has become a de facto rest stop for highway travelers and commuters.

Although the question of mixed, secondary, or multiple use with respect to the recreational immunity statute did not arise in *Chamberlain*, the analysis and result would certainly be different under the interpretation adopted by Division II. In *Chamberlain*, Division I found that the recreational immunity statute applies because Deception Pass Bridge was serving a recreational purpose as a "Scenic Overlook" when the accident occurred. *Id.* at 214. However, under the Division II decision in this case, it would certainly be an issue of material fact as to whether Deception Pass Bridge is opened to the public solely for recreational use. The factfinder could very well find that the bridge's function as a scenic overlook is merely incidental or secondary to its major purpose—a two-lane bridge for connecting State Route 20.

Public lands are frequently held open to the public for multiple

[4] Information about the WDFW Beebe Springs Water Access Site is available at: http://wdfw.wa.gov/lands/water_access/31000/ (last visited August 3, 2017).

uses. If Division II is correct that *Camicia* stands for the proposition that recreational immunity does not apply to lands that are held open for mixed use, there will be substantial impacts to the State and local government's potential liability on public lands. Guidance from this Court is needed so that public landowners like the State can correctly assess the risks and viability of providing public recreational opportunities on the many public lands where recreation may not be the sole public use.

A further complication for the State is the question of whether the "authority to close" test would bar state agencies from the protection of the recreational immunity statute when the agency is compelled, in one way or another, to keep public lands open for public outdoor recreation.[5] The question of whether a state agency like State Parks has "authority" to close public lands to the public is a complicated one. State agencies may have the authority to temporarily close public lands for administrative reasons—such as public safety, construction, and maintenance—but cannot simply decide to categorically close state-owned lands to the recreating public in the way that a private landowner could.

V. CONCLUSION

Because Division II's ruling conflicts with other decisions, presents issues of substantial public interest, and raises questions about the proper interpretation and application of *Camicia*, this Court should grant review.

[5] State Parks, for example, exists for the mission of holding lands open to the public for outdoor recreation. RCW 79A.05.030(3).

RESPECTFULLY SUBMITTED this 4th day of August, 2017.

ROBERT W. FERGUSON
Attorney General

s/ ANDY WOO
Andy Woo
Assistant Attorney General
WSBA No. 46741
1125 Washington Street SE
Olympia, WA 98504
(360)586-4034

FISH, WILDLIFE, & PARKS DIVISION - ATTORNEY GENERAL'S OFFICE

August 04, 2017 - 4:21 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	94643-4
Appellate Court Case Title:	Margie Lockner v. Pierce County, et al.
Superior Court Case Number:	15-2-05353-7

The following documents have been uploaded:

- 946434_Briefs_20170804161304SC958195_1168.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was AmicusBrief-Final-WDFW.pdf
- 946434_Cert_of_Service_20170804161304SC958195_1109.pdf
  This File Contains:
  Certificate of Service
  The Original File Name was CertificateOfSvc-WDFW.pdf
- 946434_Motion_20170804161304SC958195_8159.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was AmicusMotion-Final-WDFW.pdf

A copy of the uploaded files will be sent to:

- Casey@hesterlawgroup.com
- leeann@hesterlawgroup.com
- msommer@co.pierce.wa.us
- pcpatvecf@co.pierce.wa.us
- seand@wsba.org

Comments:

Sender Name: Hang Nguyen-Le - Email: hangn@atg.wa.gov
Filing on Behalf of: Andy Woo - Email: andyw@atg.wa.gov (Alternate Email:)

Address:
1125 Washington Street SE
PO Box 40100
Olympia, WA, 98504
Phone: (360) 753-2498

Note: The Filing Id is 20170804161304SC958195