

No. 48659-8-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

MARGIE M. LOCKNER, a single woman,

Appellant,

vs.

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

Respondents.

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
Cause No. 15-2-05353-7

REPLY BRIEF OF APPELLANT

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I. STATEMENT OF THE CASE

Ms. Lockner will rely on the statement of the case previously set forth in her opening brief.

II. ARGUMENT

Respondents' brief is void of analysis from cases in support of its positions and appears to only argue that (1) Camicia v. Wright Construction Co., 179 Wn.2d 684, 317 P.3d 987 (2014) is distinguishable from this case and (2) this Court should prefer its version of the facts. Where both arguments fail, this Court should, respectfully, reverse the trial court.

Respondents contend that "the questions of material fact that existed in Camicia do not present themselves here." BOR at 3. However, the Court in Camicia went to great lengths to emphasize that landowners who open their land to the public for purposes other than recreation could not utilize recreational immunity as a defense. In particular, the Court went so far as to address the many cases cited by the defendants in that case, rejecting each where the land served purposes beyond solely recreation. For example, the Court stated:

We reject the City's view that recreational immunity follows from the mere presence of incidental recreational use of land that is open to the public. See Gaeta v. Seattle City Light, 54 Wn.App. 603, 608, 774 P.2d 1255 (1989) (distinguishing between a road "built and maintained primarily for commercial use," which could not benefit from recreational use immunity, and the one at issue, which was "not a thoroughfare" but instead led only to land "left open ... to the public for recreational use"). In support of its view, the City cites to several cases that do not address the question presented here. In McCarver v. Manson Park & Recreation District, 92 Wn.2d 370, 597 P.2d 1362 (1979), 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 v. Johnson, 81 Wn.App. 110, 111-12, 912 P.2d 1095 (1996), where a private company opened its forest land to the public exclusively for recreational purposes and posted signs stating, "

'The Forest Land Behind This Sign Is Open For RECREATIONAL USE ONLY'" on " 'virtually all entrances to its logging roads.'" 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 " [e]very reasonable person would also believe that [the company] had opened the [roads] for recreational use." Id. at 114; see also Gaeta, 54 Wn.App. at 607 (holding that so long as Seattle City Light opened up the Diablo Dam to the public for recreation, immunity applied despite a contractual provision compelling it to open land for public recreational purposes).

In Chamberlain v. Department of Transportation, 79 Wn.App. 212, 214, 901 P.2d 344 (1995), 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. See Id. at 216; RCW 4.24.210 (defining " outdoor recreation" to include " viewing or enjoying ... scenic [sites]").

Finally, the City cites Riksem v. City of Seattle, 47 Wn.App. 506, 508, 736 P.2d 275 (1987), 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. Id. at 511-13. 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. It did, however, recognize that " [t]he manifest object of the recreational use statute is to provide free recreational areas to the public on land and in water areas that might not otherwise be open to the public." Id. at 511 (emphasis added).

Camicia v. Howard S. Wright Constr. Co., 179 Wn.2d 684, 317 P.3d 987 (2014).

In other words, the Court in Camicia was very clear that landowners who open their land for purposes beyond solely recreational use could not insulate themselves from liability under RCW 4.24.210. The Court even hinted that had the plaintiff in Riksem raised the issue of the Burke-Gilman trail's transportation purpose, the outcome of his appeal might have been different. Where a clear issue of fact exists as to whether the Foothills Trail was open solely for recreational use, it was improper to dismiss the case on summary judgment.

Respondents further allege that Ms. Lockner has failed to provide evidence of respondents' negligence, however, this argument should be rejected for several reasons.

First, the trial court dismissed the case under the recreational immunity statute, not because Ms. Lockner failed to make a prima facie case of negligence.

Second, where facts are viewed in the light most favorable to Ms. Lockner, she has shown that Ms. Smith was driving the lawnmower fast, she rode by Ms. Lockner and caused debris to be "thrown into the path" and swirl up into her eyes and that that conduct caused her to fall. She has also shown evidence that Ms. Smith's manner of driving was inconsistent with her training that she even went so far as to write a second and somewhat different report of the incident – raising at least an inference that she knew she made a mistake.

This Court should apply the facts presented in the light most favorable to Ms. Lockner and reject the respondents' argument that that they can avoid any liability for any acts that occur on the Foothills Trail because some users recreate on the land.

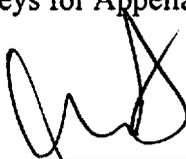
III. CONCLUSION

For these reasons, in addition to those raised in her opening brief, Ms. Lockner respectfully requests that this Court reverse the trial court's summary judgment dismissal of her case under RCW 2.24.210.

DATED THIS 20th day of July, 2016.

HESTER LAW GROUP, INC., P.S.
Attorneys for Appellant

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 of appellant to be served on the following in the manner indicated below:

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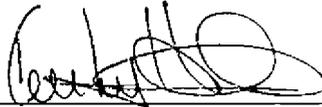
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Kathy Herbstler

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