

NO. 48659-8-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

MARGIE M. LOCKNER, a single woman, Appellant

v.

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

**BRIEF OF RESPONDENTS PIERCE COUNTY
AND BLAIR SMITH**

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I. COUNTER STATEMENT OF THE ISSUES

- a. Did the trial court correctly rule that Defendants/Respondents Pierce County and Blair Smith are immune from suit under Washington's Recreational Use Statute, RCW 4.24.210.
- b. Even in the absence of immunity, did Plaintiff/Appellant Margie Lockner present a sufficient factual basis to establish negligence.

II. COUNTER STATEMENT OF THE CASE

This case arises from injuries Lockner suffered while riding her bicycle on the Orting Foothills Trail. Lockner, an inexperienced, random bicycle rider, chose to ride through a dust cloud she could observe from approximately 100 feet away. CP 35, 39, 46. While approaching the rear of a riding lawnmower to her right, she removed her hand from the handlebars to shield her eyes from dust and fell. CP 25.

The area of the Orting Foothills Trail where Lockner fell is open to the public for recreation between the hours of 8 a.m. and 5 p.m. CP 103-110. The trail was designed and is currently maintained for recreation. *Id.* Lockner does not dispute, and therefore concedes, that the Orting Foothills Trail has a recreational purpose. Instead, Lockner argues that if the Orting Foothills Trail also has a transportation purpose, then the immunity of RCW 4.24.210 does not apply. Lockner's Opening Brief at 9.

III. STANDARD OF REVIEW

An appellate court conducts the same inquiry as the trial court when reviewing a motion for summary judgment. *Howland v. Grout*, 123 Wn. App. 6, 9, 94 P.3d 332 (2004). Summary judgment is appropriate where the evidence, viewed in the light most favorable to the nonmoving party, demonstrates there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56; *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994). An issue of material fact is one upon which the outcome of the litigation depends. *Atherton Condo Ass'n v. Blume Development Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990).

A nonmoving party must produce specific, admissible evidence to sufficiently rebut the moving party's contentions and support all necessary elements of the party's claims. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). Argumentative assertions, unsupported speculation, suspicions, beliefs, and conclusions, as well as inadmissible evidence that unresolved factual issues remain are insufficient to create a genuine issue of fact. *Id.* at 9; *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Where reasonable minds can reach only one conclusion based on the facts, summary judgment should be granted. *LaMon v. Butler*, 112 Wn.2d 193, 199, 770 P.2d 1027 (1989).

IV. ARGUMENT

RCW 4.24.210 provides immunity to any landowner who opens their land to members of the public for recreation. The record firmly establishes that the portion of the Orting Foothills Trail used by Lockner is open for a recreational purpose. CP 103-110. Further, Lockner was using the trail for its recreational purpose at the time of the accident. CP 22.

A. The Questions of Material Fact That Existed in *Carmicia* Do Not Present Themselves Here

The court in *Carmicia v. Howard S. Wright Const. Co.*, 179 Wash.2d 684, 317 P.3d 987 (2014), remanded for two distinct reasons: (1) A question of fact existed as to whether the landowner could close the section along Interstate 90 where the accident occurred; and (2) The landowner needed to prove that the portion of Interstate 90 it owned was opened to the public for recreation. *Id.* at 701. Here, Lockner has not and cannot challenge the fact that the trail was opened for recreation and that she was using the trail for recreation. CP 22, 103-110. Instead, the evidence offered by Lockner further establishes the recreational purpose of the trail, alleging that it is part of a trail system, "for recreation and transportation" and to "provide opportunities for appreciation of nature" CP 66. This is the complete opposite of what occurred in *Carmicia*, where the Interstate 90 bike lane was deeded to the landowner solely for

"road/street purposes." *Carmicia*, 179 Wash.2d 684, 696. The record is clear that the Orting Foothills Trail was formed and maintained with a clear recreational purpose.

Further cementing the recreational purpose, the record here establishes that the portion of the trail where the accident occurred was only open to the public between 8 a.m. and 5 p.m. CP 103-110.

B. The Record Is Absent of Evidence That Pierce County and Blair Smith Acted Negligently

The mere occurrence of an accident and an injury does not necessarily infer negligence. *Tinder v. Nordstrom, Inc.*, 84 Wn. App. 787, 792-3 (1997). Lockner fell off of her bike after deciding to ride up behind a riding lawnmower. CP 24-26, 117. The record does not contain any evidence that Smith operated the lawnmower in a negligent manner.

Lockner's niece, riding with Lockner, states that Smith was operating the lawnmower in a "normal manner" on the grass off of the paved trail. CP 42. Ms. Jennes also notes that she and Lockner were traveling faster than the mower as they approached from the rear, preparing to overtake it. CP 41.

Further, Smith's supervisor describes his expectations of lawnmower operators as, "Be aware of their surroundings the best they can while trying to watch where [they] are mowing." CP 115. Lockner's

allegations lack any articulable standard of care from which Smith deviated while mowing the grass on the trail. The record lacks any evidence that Smith should have been more aware of the two bicycle riders approaching quickly from behind her. The only evidence is that Smith operated the lawnmower reasonably and shut off the blades. CP 116.

C. The Court Should Disregard Lockner's Improper Non-Evidentiary Assertions and Other Forms of Non-Evidence

CR 56(e) requires a party opposing summary judgment set forth "facts as would be admissible in evidence." *See also Smith v. Showalter*, 47 Wn.App. 245, 248, 734 P.2d 928 (1987). Pierce County and Blair Smith properly objected to Lockner's attempt to introduce improper character evidence of prior unrelated, dissimilar accidents involving Smith at the trial level. CP 101. Pierce County and Smith reassert those the same objections under ER 403 and ER 404.

Additionally, Lockner's unsworn, unsubstantiated claims of being pelted by rocks are not supported by the record. The sworn testimony of Lockner and her niece, who was with her at the time of the accident, is that they chose to ride into a cloud of dust. Lockner's niece rode past the cloud without incident; Lockner took her hand off her handlebars and fell. CP 30-31, 38.

V. CONCLUSION

Based on the record and the above-cited facts, authorities, and analysis, it is respectfully requested that the trial court's dismissal on summary judgment be affirmed.

DATED this 6th day of July, 2016.

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CERTIFICATE OF SERVICE

On July 6, 2016, I hereby certify that I electronically filed the foregoing BRIEF OF RESPONDENTS PIERCE COUNTY AND BLAIR SMITH with the Clerk of the Court and I delivered a true and accurate copy via the Judicial Information System's electronic filing page for the Court of Appeals, Division II to the following:

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