

# WASHINGTON CASE UPDATE

## Recreational Immunity Applies Only if Land is Held Open to Public Solely for Recreational Use

**From the desk of Kyle Riley:** Washington's recreational immunity statute protects landowners from liability if they hold out their land to the public for recreational use. What analysis does a court use to determine whether immunity applies? Read on to find out.

**Claims Pointer:** In this case arising out of a fall on a trail open for public use, the Court of Appeals held that summary judgment was inappropriate where material issues of fact existed as to whether the land was held open to the public solely for recreational use. The case provides clear guidelines for determining whether recreational immunity will apply, an important consideration for landowners (and their insurers) who allow the public to use their lands for recreation.

Lockner v. Pierce County, No. 48659-II, Washington Court of Appeals, Div. II (May 9, 2017)

Margie Lockner ("Lockner") and her niece were riding their bicycles on the Foothills Trail in Pierce County when they approached a riding lawnmower from the rear. The lawnmower was operated by a Pierce County (the "County") Parks and Recreation employee, who was mowing grass on the right side of the trail and moving in the same direction as Lockner and her niece. As they passed the lawnmower, Lockner raised her left hand from the handlebars to shield her eyes from debris in the air from the lawnmower. She then clipped her niece's bike and fell, injuring herself. She sued the County and the employee operating the mower.

The County moved for summary judgment, arguing that Washington's recreational immunity statute immunized the County from Lockner's claims. The trial court agreed with the County and dismissed Lockner's claims. Lockner appealed, arguing that her case should not have been dismissed on summary judgment because issues of material fact existed as to the trail's use for transportation purposes. Lockner also argued that the recreational immunity statute did not apply to her negligence claim, only to premises liability claims.

Washington's recreational immunity statute was enacted to encourage landowners to allow public use of their land for outdoor recreation by providing landowners with immunity from

most injuries that might be sustained through the public's use. To be immune under the statute, the landowner must establish that the land in question was open to members of the public for recreational purposes and that no fee of any kind was charged for access or use of the land. Because recreational immunity is an affirmative defense, the party claiming its protection—here, the County—has the burden of establishing its application.

The Court of Appeals noted that in a prior case, *Camica v. Howard S. Wright Constr. Co.*, the Washington Supreme Court held that where the land is held open for mixed-use—such as for both recreation and transportation—then the recreational immunity statute is not available to the landowner. In that case, the Supreme Court established that whether the trail was held open for recreational purposes, thus potentially entitling the landowner to recreational immunity, depended on two considerations: first, whether the landowner could close the land in question to the public; and second, whether the land was opened to the public solely for the purpose of recreation. As the Supreme Court explained, extending immunity to a landowner who could not close the land to the public or whose land would be open to the public for another use such as public transportation would not further the purpose of encouraging landowners to open land that would not otherwise be open.

Under this rubric, the Court of Appeals accordingly analyzed first whether the County could close and open the Foothills Trail to the

case in point...



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public. The court noted that the County had presented evidence that the trail was open from 8:00 am to 5:00 pm, but the record did not identify who owned the trail or had authority to enforce the trail enclosures to the public. In fact, the County's own website stated that the trail sat atop a historic railroad bed and began in the city of Orting. The court pointed out that these statements raised a question of fact as to whether the County, the railroad, or the city of Orting owned and therefore had authority to close some or all of the trail to the public.

The Court of Appeals then examined whether the Foothills Trail was held open to the public solely for the purpose of recreation, reiterating that because the purpose of the recreational immunity statute was to create recreational areas that might not otherwise be open to the public, recreational immunity applied only when the lands would not be held open if the recreational use was removed or prohibited. The court again looked to the County's website, which described the Foothills Trail as "a popular commuter route and recreational destination." Moreover, the County had produced a "Pierce County Park, Recreation & Open Space Plan," which included a "Regional Trail Plan." The Regional Trail Plan stated that the County's vision was: to provide trails "for recreation and transportation"; to "provide a practical transportation option"; to "offer major connections to major developed areas and attractions within the County"; and to "connect the County to the greater region." Thus, a question of material fact remained as to whether the Foothills Trail was opened to the public solely for the purpose of recreational immunity.

Finally, the court briefly examined Locker's contention that the statute did not apply to her negligence claim. The court noted that the statutory language extended immunity to certain landowners for "unintentional injuries" to certain users. The court then held that by its plain language, the statutory immunity extended to negligence actions and was not

restricted to premises liability claims.

Because recreational immunity was limited to land opened to the public solely for recreational purposes and issues of material fact remained as to whether Locker was injured in an area opened to the public solely for the purpose of recreational use, summary judgment was improper. The case was reversed and remanded for further proceedings.

View full opinion at: <https://www.courts.wa.gov/opinions/pdf/D2%2048659-8-II%20Published%20Opinion.pdf>

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