Supreme Court No. 942455
Court of Appeals No. 74048-2-I
King Co. Superior Court Cause No. 07-2-29545-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SUSAN CAMICIA,

Respondent,

vs.

HOWARD S. WRIGHT CONSTRUCTION COMPANY, a Washington corporation; and CITY OF MERCER ISLAND,

Defendants,

ANDREW G. COOLEY and
KEATING, BUCKLIN & MCCORMACK, INC., P.S.,

Petitioners.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION AND IDENTITY OF RESPONDENT

On June 19, 2006, Susan Camicia ("Camicia") was riding her bicycle on the Interstate 90 Trail in the City of Mercer Island ("City"), when she came upon a construction fence footing that protruded into the trail. In attempting to steer around this obstacle, she struck an unmarked wooden bollard in the middle of the trail, flipped over, landed on her helmet, and sustained a spinal cord injury that left her quadriplegic. She subsequently brought suit against the City and others for failure to maintain the trail in a safe condition. In a prior appeal, the Court addressed the City's affirmative defense based on the recreational use immunity statute, former RCW 4.24.210. *See Camicia v. Howard S. Wright Constr. Co.*, 179 Wn. 2d 684, 317 P.3d 987 (2014). Camicia's claims against all defendants have now been settled.

This appeal involves a monetary sanction in the amount of $10,000, payable to the Legal Foundation of Washington, which was imposed by the superior court for discovery abuse by the City and its lawyers, Andrew G. Cooley and the firm of Keating, Bucklin & McCormack, Inc., P.S. ("Cooley"). The Court of Appeals affirmed the superior court's sanction. *See Camicia v. Cooley*, No. 74048-2-I

(Wn. App., Div. I, Feb. 21, 2017). From this decision, Cooley (but not the City) seeks review.

Camicia asks the Court to grant the petition for review filed on behalf of Petitioners, and to affirm the decisions below in the exercise of this Court's authority and responsibility to establish and enforce the standard of practice for lawyers, including the standard for lawyers responding to civil discovery requests. As noted in a concurring opinion in *In re Firestorm 1991,* 129 Wn. 2d 130, 152, 916 P.2d 411 (1996):

> Washington courts will not tolerate efforts by counsel to hide behind the letter of discovery rules while ignoring their spirit. The purpose of civil discovery is to disclose to the opposing party all information that is relevant, potentially relevant or reasonably calculated to lead to discovery of admissible evidence in the trial at hand. CR 26(b)(1). Counsel and parties may not unilaterally decide to withhold properly requested information on the ground it is not relevant or admissible . . . . neither should the courts stand by and permit what might be plainly relevant, and potentially extremely significant, evidence to be lost or hidden through intricate investigative plans, and a hypertechnical reading of discovery rules. The purpose of the discovery rules is to ensure trials are fair and the truth is not lost. ***We must continually affirm these principles, until litigation counsel get the unmistakable message we will apply these principles in discovery and we will sanction lawyers who do not take us at our word***.

(Talmadge, J., concurring; ellipses & emphasis added). This is an issue of substantial public interest that should be determined by this Court, warranting review under RAP 13.4(b)(4), because abuse

of the discovery process continues to plague civil litigation and undermine the "just, speedy, and inexpensive determination of every action," CR 1, despite clear guidance from this Court over the 20-plus years since issuing its decision in *Washington St. Phys. Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn. 2d 299, 858 P.2d 1054 (1993) (hereafter *Fisons*).

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the superior court abuse its discretion in imposing a modest monetary sanction on Cooley for discovery abuse, given the following ***unchallenged*** findings of fact:

    a. While interposing broad objections to Camicia's discovery requests, Cooley went on to answer the requests, leading Camicia to reasonably infer that the City had, in fact, substantively answered them notwithstanding the objections, CP 1343 (Finding 5);

    b. Cooley's answers to Camicia's discovery requests did not state that the City was withholding any responsive information or documents, CP 1343 (Finding 5);

    c. Cooley's answers to Camicia's discovery requests did not state that the City excluded fire department records from its search for responsive information, even though the fire department was known to have responsive information, CP 1343-44 (Finding 7);

    d. Cooley "strategically ignored looking at Fire Department records," in light of his extensive experience representing municipalities in cases arising from bicycle incidents, CP 1344 & 1350 (Findings 7 & 31(c));

    e. Cooley's answers to Camicia's discovery requests did not state that the City excluded tort claims files from

its search for information responsive to the requests, CP 1344 (Finding 8);

f. In answering Camicia's discovery requests, Cooley did not conduct a complete review of records of the police department, the city clerk, or the city attorney, CP 1344 (Finding 7);

g. Cooley did not seek a protective order to limit or eliminate the City's obligation to respond fully to Camicia's discovery requests, CP 1343 (Finding 6);

h. Cooley did not disclose any information or records regarding other similar bicycle accidents or any related claims or complaints of injuries or safety concerns in its responses to Camicia's discovery requests, CP 1345 (Finding 15);

i. It was later discovered that the City's tort claims files had been destroyed after Camicia's discovery requests were propounded, making it impossible to determine whether they contained responsive information, CP 1344 & 1348 (Findings 8 & 26);

j. It was later discovered that the City had information regarding a bicycle-bollard collision that occurred before Camicia was injured, CP 1344-45 (Findings 9-10);

k. It was later discovered that the City received additional information regarding bicycle-bollard collisions and related safety concerns before Cooley answered Camicia's discovery requests, CP 1345 (Findings 11-13);

l. It was later discovered that the City received information regarding bicycle-bollard collisions and related safety concerns after Camicia propounded her discovery requests, including one collision that occurred at the same location where Camicia was injured, CP 1345 & 1347 (Findings 14 & 22);

m. After the superior court ordered production of information responsive to Camicia's discovery requests, Cooley produced "hundreds" of additional responsive records, CP 1347-48 (Findings 24-25)

n. The untimely disclosure of information responsive to Camicia's discovery requests required a continuance of trial, CP 1348 (Finding 27);

o. Cooley's responses to Camicia's discovery requests were false, misleading and evasive, CP 1348 (Finding 29);

p. In the course of discovery and litigation over discovery, Cooley made false and misleading statements, CP 1347 & 1349 (Findings 8 & 31(a)-(c))[1]; and

q. To date, Cooley "shows no indication of a plan to change his conduct in the future," and is "unapologetic," CP 1349-50 (Findings 30 & 31(c)).

2. Does Cooley's post-hoc rationalization for not searching for or producing information from the City's fire department—based on the Uniform Health Care Information Act ("UHCIA"), Ch. 70.02 RCW, and privacy regulations adopted pursuant to the Health Insurance Portability and Accountability Act ("HIPAA"), 45 C.F.R. pts. 160 & 164—justify his failure to disclose his unilateral limitations on the search for and production of information responsive to Camicia's discovery requests?

[1] A copy of the superior court's sanctions order, including the cited findings of fact, is reproduced in the Appendix to this answer to Cooley's petition for review.

III. STATEMENT OF THE CASE

A. Cooley, an experienced lawyer who specializes in representing municipalities in connection with bicycle injury claims, was retained by the City of Mercer Island the day after Camicia was injured.

On June 20, 2006, the day after Camicia was injured, Cooley was retained to defend the City of Mercer Island against anticipated personal injury claims, more than a year before Camicia filed suit. CP 1486. Cooley has defended municipalities from bicycle injury claims for 30 years and has handled several hundred cases similar to Camicia's. CP 218. In his words, "I have substantial and possibly unique qualifications for a bicycle accident case involving claims of facility design liability" and "I have been an attorney of record in most of the important road design cases at the Washington Supreme Court." CP 1986.

B. Cooley answered Camicia's discovery requests without providing any information about similar incidents or related safety issues.

On October 30, 2007, Cooley submitted answers to Camicia's discovery requests seeking information about similar incidents and related safety issues. Specifically, Cooley provided the following answer to Interrogatory 14:

> 14. Have you or your agents, investigators, lawyers or anyone else investigated any incidents involving danger, injury or death to bicyclists or pedestrians because of fences, bollards

> or other obstructions or defects in any sidewalk, path or public right-of-way in the City of Mercer Island, either before or after this incident? If so, please identify or describe all such investigations and accident locations, the name, address, telephone number and job title of each person who reported or investigated each accident, the date of each accident, the name and number of each incident report and investigation report, and the name, address, telephone number and job title of each person who has custody of the reports or investigation documents.
>
> **ANSWER**: Objection. Compound. Vague as to time. Overly broad as to location. If by "incidents" you mean accidents, there have never been any bicycle vs. bollard accidents to the City's ***institutional*** knowledge. Otherwise, the question is vague as to time, the word "incident" and "danger." Certainly there have been pedestrian incidents in the City since its incorporation.
>
> There was one bike accident in October 2007, where a bicyclist turning around fell off a bicycle and partially struck a cement post on EMW. See police report.

CP 116 (emphasis added). At the time this answer was served, City records reflected at least one other bicycle-bollard collision. CP 304 & 942-49. Some, but not all, of the records regarding this collision were kept by the city fire department. The superior court found that "[t]he qualification of 'institutional' knowledge appears to be a term designed to insulate the city from making full disclosure." CP 1349 (Finding 31(a); brackets added). The court found that Cooley "strategically ignored" fire department records, which were known to contain responsive records. CP 1344 (Finding 7). The court further found that Cooley failed to conduct a "complete review" of

records in other departments such as the police department, the city clerk, and the city attorney. *Id.*

Next, Cooley provided the following answer to Interrogatory 15:

> 15. Are you aware of any notices, reports, complaints, claims or other communications from any source about safety concerns to pedestrians or bicyclists from fences, bollards or other obstructions or defects in any sidewalk, path or public right-of-way in the City of Mercer Island, either before or after this incident? If so, please identify or describe the dates and details of all such notices, reports or complaints, the names, addresses and telephone numbers of all persons who made and received them, all documents electronic communications or tangible things concerning them, and all decisions or actions taken in response to such notices, reports or complaints.
>
> **ANSWER**: Objection. Vague as to time. Vague as to what is meant by "notice" or "other communications," and "other obstructions or defects." During construction of the I-90 freeway and LID, there were areas of the bike path that were closed or subject to disruption from construction. This was in the '80s to early '90s. We believe those complaints were registered with WSDOT. Plaintiff's is the only claim or lawsuit involving a bicycle vs. bollard. There were concerns about mixed use between pedestrians and bicycles both during construction and as built. See right-of-way permit file and plan file.

CP 116-17. At the time this answer was served, City records reflected a number of "notices, reports, complaints" and "other communications" involving bicycle-bollard safety concerns. CP 1345 (Findings 11-13). None of these records were kept by the City fire department. *Id.* The superior court found that Cooley

unilaterally rephrased the interrogatory, without disclosing that fact, in order to avoid disclosing responsive information. CP 1349 (Finding 31(b)). Specifically, he rephrased the interrogatory from "right of way[s] in the City of Mercer Island" to "Mercer Island right-of ways," so as to avoid disclosing incidents on state right of ways controlled by the City, such as the one on which Camicia was injured. *Id.*

Lastly, Cooley provided the following answer to Request for Production 11:

> Please produce . . . .
>
> 11. All incident reports, investigative reports or other documents, drawings, computer data, photos, movies, videos or other depictions relating to other bicycling and pedestrian accidents and related safety concerns as referenced in Interrogatory Nos. 14 and 15
>
> **ANSWER**: See documents previously attached.

CP 118-19 (ellipses added). The attachments did not include any documents regarding similar incidents or safety concerns except one police report about a bicyclist who turned around and fell off his bicycle. CP 1343 (Finding 4). Cooley certified that the foregoing answers to Camicia's discovery requests were submitted in compliance with CR 26(g). CP 126.

C. Camicia discovered that records of similar incidents and related safety concerns had not been produced, and filed a motion to compel.

Follow up discovery revealed three city emails alerting Camicia to the fact that she had not received documents responsive to her earlier discovery request. The first email, from City Development Director Manny Ocampo to Pedestrian-Bicycle Facilities Consultant Connie Reckford, appeared to indicate that the City was trying to conceal information about problems with bollards on its bicycle trails, stating:

> at the staff level and with direction from the City Attorney's Office and the City manager, we concluded that we didn't want to draw ANY attention to bollards and/or bollard maintenance in the Agenda Bill or revised Plan.

CP 150 (capitalization in original). The second email, between City Police Department Commander Alan Lacy and City Parks Director Peter Mayer, revealed the existence of a bicycle-bollard collision that occurred prior to Camicia's injury. CP 134-36. The third email, between Parks Director Mayer and City Police Department Commander Alan Lacy, noted that records of bicycle incidents are kept by the City fire department. CP 304. After being told that no more records would be forthcoming from the City because "[d]iscovery is closed" and, for the first time, that information in the

possession of the fire department is "medical information," CP 152 (brackets added), Camicia filed a motion to compel, CP 186-200.

D. The superior court granted Camicia's motion to compel, continued the trial, and sanctioned Cooley.

The superior court granted Camicia's motion to compel, and ordered the City to produce responsive documents, or certify that no such documents exist after conducting a reasonable inquiry. CP 420-21. While the superior court's order prompted the production of hundreds of documents that had previously been withheld, the City did not fully or timely comply with the order, and it became apparent that potentially responsive documents in the City's tort claims files had been destroyed, leading Camicia to file a motion to enforce the order, CP 1796-1800, as well as a motion for discovery sanctions, CP 1648-59.[2] The superior court continued the trial date so that Camicia could review the newly produced information with her experts, CP 850, and imposed a monetary sanction of $10,000 on the City and Cooley, jointly and severally, payable to the Legal Foundation of Washington, CP 1340-56. Cooley (but not the City) appealed, and the Court of Appeals affirmed.

[2] Cooley incorrectly states, without citation to the record, that "the City met the trial court's order." Pet. for Rev., at 2.

IV. LIMITATIONS ON THE SCOPE OF REVIEW

A. Because Cooley has not assigned error to the superior court's findings, they are verities on appeal.

"A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number." RAP 10.2(g). "The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto." *Id.* Unchallenged findings of fact are deemed to be verities on appeal, as the Court of Appeals below correctly noted. *See* slip op., at 8 n.7 & 16.

Cooley has not assigned error to the findings of fact entered by the superior court, and his failure to do so should preclude a challenge to the lower court's findings before this Court. *See* App. Br., at 2-3. Nonetheless, he appears to be attempting to reargue the factual basis for the superior court's order. For example, the superior court found that he "strategically ignored looking at Fire Department records," CP 1344 (Finding 7), but Cooley argues that "[c]ontrary to the trial court's assertion, this was not a matter of 'studied ignorance' [sic]," Pet. for Rev., at 5. As another example, the superior court found that his answers to Camicia's discovery

requests were false, misleading and evasive, and that he made false and misleading statements, CP 1347-49 (Findings 8, 29 & 31), but Cooley argues that his "actions were objectively reasonable and in good faith," Pet. for Rev., at 11. The Court should reject Cooley's attempt to reargue the facts and limit its review to the legal consequences that follow from the lower court's findings.[3]

B. The superior court's order is subject to review only for abuse of discretion.

The award of sanctions for discovery abuse is subject to review only for abuse of discretion. *See Fisons,* 122 Wn. 2d at 338-39. This standard of review recognizes that deference is owed to the superior court, which is in the best position to decide the issue. *See id.* at 339. It also reflects the fact that the sanction rules are "designed to confer wide latitude and discretion upon the trial judge to determine what sanctions are proper in a given case and to reduce the reluctance of courts to impose sanctions." *Id.* at 339 (quotation omitted). While paying lip service to the abuse of discretion standard of review, Cooley's attempt to reargue the facts does not reflect the proper deference.

[3] If the Court is inclined to permit Cooley to reargue the facts at this stage of the proceedings, notwithstanding the lack of any assignment of error to the superior court's findings, the Court should require Cooley to specifically identify the findings that he challenges and permit Camicia to submit overlength supplemental briefing to fully address these necessarily record-intensive issues.

V. ARGUMENT

A. Review should be granted to emphasize that adversarial considerations are subordinate to the cooperative exchange of information in the discovery process.

Cooley does not identify any conflict between the decision below and any decision of this Court or any other decision of the Court of Appeals, as required for review under RAP 13.4(b)(1) or (2). Neither does he contend that a significant question of constitutional law is involved, as required for review under RAP 13.4(b)(3). For the most part, Cooley simply argues that the Court of Appeals erred in affirming the superior court's sanctions order, although this does not independently justify review. Nonetheless, the parties appear to agree that review is warranted under RAP 13.4(b)(4). *See* Pet. for Rev., at 15, 17 & 20. The conflicting views of the civil discovery process represented by the parties to this case present an issue of substantial public interest that should be determined by this Court.

The difference between the parties in this case relates to the relationship between "spirit of cooperation and forthrightness during the discovery process," which the Court has recognized "is necessary for the proper functioning of modern trials," *see Fisons*, 122 Wn. 2d at 342; and permissible "fair and reasoned resistance to

discovery," *see id.* at 346. Camicia contends that the cooperative exchange of information must take precedence over adversarial considerations to promote the efficient and prompt resolution of meritorious claims and the efficient elimination of meritless claims. *See Lowy v. PeaceHealth,* 174 Wn. 2d 769, 777, 280 P.3d 1078 (2012). Adversariness in the discovery process undermines the truth-seeking function of litigation and brings the civil justice system into disrepute. *See Fisons*, at 341-42.

Camicia further contends that fair and reasoned resistance to discovery is limited to those procedures provided by the discovery rules. If there is uncertainty about the meaning of a discovery request or a legitimate objection to the information requested, then the parties can clarify or limit the request in the context of a discovery conference under CR 26(i). If the parties cannot agree regarding the proper scope of discovery, the party resisting disclosure can seek a protective order under CR 26(c), or the party requesting discovery can file a motion to compel under CR 37. However, when a party responding to discovery unilaterally withholds or limits its search for information responsive to discovery requests on the basis of stated or unstated objections, the requesting party has no way of knowing what was not produced.

Cooley's petition for review does not acknowledge the spirit of cooperation and forthrightness that is supposed to govern the discovery process, but instead exalts "fair and reasoned resistance to discovery" and argues that the discovery responses in this case were justified, and even required, by adversarial considerations. *See* Pet. for Rev., at 6-7. If by exalting resistance to discovery Cooley intends to suggest that adversarial considerations have ***equal weight*** as cooperation and forthrightness in the discovery process, review is warranted to address how these competing concerns should be balanced when they come into conflict. If Cooley intends to suggest that adversarial considerations ***trump*** cooperation and forthrightness in certain circumstances, review is warranted to clarify what those circumstances are and when they arise.

If, however, experienced and prominent counsel still fail to recognize that adversarial considerations are subordinate to cooperation and forthrightness in the discovery process more than 20 years after *Fisons*, and that fair and reasoned resistance to discovery is limited to the procedures provided by the discovery rules, review is warranted to eliminate persistent confusion among the bar.

1. The Court should emphasize that the constitutional right of access to courts entails a broad right to discovery of information that is potentially relevant to the subject matter of the action.

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." CR 26(b)(1). "It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* Relevance for purposes of discovery is much broader than it is for purposes of admissibility at trial under ER 401-402, encompassing all information that is ***potentially relevant***. *See Barfield v. Seattle,* 100 Wn. 2d 878, 886, 676 P.2d 438 (1984). Potential relevance is determined with reference to "the general subject matter of the action," rather than "the precise issues raised by the pleadings; and inquiry as to any matter which is ***or may become relevant*** to the subject matter of the action should be allowed, subject only to the objection of privilege." *Bushman v. New Holland Div. of Sperry Rand Corp.*, 83 Wn. 2d 429, 434, 518 P.2d 1078 (1974). The availability of such discovery is grounded in the constitutional right of access to courts

under Wash. Const. Art. I, § 10. *See, e.g., Lowy v. PeaceHealth,* 174 Wn. 2d 769, 776-77, 280 P.3d 1078 (2012).

Cooley appears to take a different view, arguing that the information sought by Camicia is merely irrelevant, as opposed to not "reasonably calculated to lead to the discovery of admissible evidence" or not potentially relevant to the subject matter of the action.[4]

2. The Court should emphasize that a lawyer responding to discovery cannot unilaterally limit the scope of a request, and all requested information must be produced in the absence of an objection or agreement.

A lawyer responding to discovery cannot unilaterally limit the scope of a request. *See Gammon v. Clark Equip. Co.,* 38 Wn. App. 274, 281, 686 P.2d 1102 (1984), *aff'd on other grounds,* 104 Wn. 2d 613, 707 P.2d 685 (1985); *Fisons*, 122 Wn. 2d at 342

[4] In the superior court, Camicia explained that discovery of similar incidents was potentially relevant to at least six different issues: "(1) to the City's pre-incident notice of its bike path obstruction hazards; (2) to the City's knowledge of the serious danger and harm associated with bike-bollard and other bike-obstruction collisions; (3) to refute the City's false interrogatory answer and misrepresentations of its Parks Director and City Engineer that 'there have never been any bicycle vs. bollard accidents to the City's institutional knowledge'; (4) to prevent the City from using its nondisclosure of other bicycle-obstruction collisions and injuries to unfairly and falsely single out Susan Camicia as the only bicyclist who ever hit a bollard; (5) to the City's unofficial policy directed by its City Manager and City Attorney of not 'want[ing] to draw ANY attention to bollards and/or [perform] bollard maintenance'; and (6) to the City's misuse of the recreational use immunity statute, RCW 4.24.210, to attempt to eliminate the legal and financial consequences of its unofficial policy of disregarding its duty to maintain the I-90 trail in a reasonably safe condition for bicycle travel." CP 360 (citation omitted).

(approving *Gammon* Court of Appeals decision); *Magaña v. Hyundai Motor Am.*, 167 Wn. 2d 570, 577, 220 P.3d 191 (2009) (affirming default as discovery sanction where lawyer unilaterally "reworded and limited" the scope of discovery). In the absence of an objection or an agreement to limit the scope of discovery under CR 26(i), "the rules are clear that a party must ***fully*** answer all interrogatories and all requests for production[.]" *Fisons,* 122 Wn. 2d at 353-54 (emphasis in original); *accord Lowy*, 174 Wn. 2d at 789 (quoting *Fisons* for this proposition).

Cooley appears to take a different view, unilaterally rewording and limiting the scope of Camicia's discovery requests, and withholding and limiting the search for responsive information based on unstated objections under the UHCIA and HIPAA.

3. The Court should emphasize that a lawyer responding to discovery must search for responsive information where it is likely to be found.

A lawyer searching for information responsive to discovery requests must perform "a reasonable inquiry." CR 26(g). This means that the lawyer must look where responsive information is known to be or likely to be found. *See Magaña,* 167 Wn. 2d at 585 (stating "[a] corporation must search ***all of its departments***, not just its legal department, when a party requests information about

other claims during discovery"; emphasis added); *Fisons,* 122 Wn. 2d at 347 & 353 (imposing sanctions against defendant that failed to produce records from different files); *Fellows v. Moynihan,* 175 Wn. 2d 641, 657, 285 P.3d 864 (2012) (stating "this court has held that a party is not required to specify the exact file in which certain records are held"); *see also Lybbert v. Grant County,* 141 Wn. 2d 29, 37-38, 1 P.3d 1124 (2000) (holding that municipalities are subject to the same standard as private parties with respect to litigation conduct).

Cooley appears to take a different view, contending that he did not have an obligation to look for responsive information in tort claims files or the fire department, even though they were known to have responsive information.

4. The Court should emphasize that privileges cannot be used to avoid disclosure of factual information that is otherwise responsive to a discovery request.

The existence of a privilege does not relieve a lawyer responding to discovery from the obligation to consult allegedly privileged information to determine whether they contain or reveal otherwise discoverable information. *See Lowy,* 174 Wn. 2d at 781 (stating "statutory privileges in general ... are not to be used as a

mechanism to conceal from discovery otherwise discoverable information"; ellipses added).

Cooley acknowledges this point, but contends that it is limited to the hospital quality improvement committee context. *See* Pet. for Rev., at 14. This contention is contrary to the language of *Lowy*, and the normal rule a privilege "does not shield facts from discovery." *Newman v. Highland Sch. Dist.*, 186 Wn. 2d 769, 778, 381 P.3d 1188 (2016) (attorney-client privilege).[5]

5. The Court should emphasize that a lawyer objecting to discovery must specify whether responsive information has been withheld or the search for responsive information has been limited on the basis of the objection.

A lawyer responding to discovery must specify whether responsive information has been withheld or the search for responsive information has been limited on the basis of an objection. *See Fisons,* 122 Wn. 2d at 352 (stating responses to discovery did not comply with the spirit or letter of the discovery rules because "objections did not specify that certain documents

[5] Cooley's objections based on the UHCIA and HIPAA were not asserted in answer to Camicia's discovery requests, but only after she filed a motion to compel. These objections are limited to records of the City fire department, and are not alleged to cover other information withheld by Cooley. While some records of the fire department may be subject to the UHCIA or HIPAA, Cooley does not cite any provision of the UHCIA or HIPAA that provides ***all*** information in the possession of the fire department is covered by these laws. As the Court of Appeals noted, "[a] search of accident records in the Fire Department may well have produced responsive information concerning whether and where accidents occurred without disclosing protected 'health care information.'" Slip op., at 11.

were not being produced"). Otherwise, the requesting party is in the dark, does not know whether information has been withheld, and is deprived of the opportunity to confer under CR 26(i), and, if necessary, file a motion to compel under CR 37.

Cooley appears to take a different view, contending that he did not have an obligation to disclose limitations on the search he performed. It was later learned that he excluded tort claims files and the fire department from his search, and it is unknown whether any other City files or departments were excluded. In the meantime, tort claims files were destroyed and the trial had to be continued as a result of Cooley's failure to disclose.

6. The Court should emphasize that a lawyer objecting to discovery has the burden to seek a protective order if the parties cannot agree to limit the scope of a request.

"[T]he burden of disclosure is upon the party who is requested to disclose." *Lowy*, 174 Wn. 2d at 789. If the parties cannot agree to limit the scope of a request, the lawyer asserting an objection has the obligation to file a motion to compel. *See Fisons,* 122 Wn. 2d at 354 (stating "[i]f the drug company did not agree with the scope of production or did not want to respond, then it was required to move for a protective order"; brackets added); *Lowy,* 174 Wn. 2d at 789 (stating "[i]t is up to the [responding party] to

move for a protective order if it '[does] not agree with the scope of production or [does] not want to respond'"; quoting *Fisons,* 122 Wn. 2d at 354; alterations in original); *Magaña,* 167 Wn. 2d at 584 (affirming sanctions against a party who did not seek a protective order and merely asserted that the requests were overbroad and irrelevant).

Cooley acknowledges this point, but complains that a motion for a protective order is invariably required. *See* Pet. for Rev., at 14-15 & 17. The complaint ignores the duty to confer under CR 26(i), which eliminates the need for a motion in most cases. If the requesting party is unreasonable, terms are available under CR 26(c). In the final analysis, however, this Court has already placed the burden of obtaining a protective order on the party responding to discovery.

7. The Court should emphasize that a lawyer's obligations in responding to discovery are not contingent upon a motion to compel.

A lawyer's obligations in responding to discovery do not hinge upon the requesting party filing a motion to compel. *See Magaña,* 167 Wn. 2d at 588 (stating "[the requesting party] should not have needed to file a motion for an order to compel [the responding party] to produce the documents [the responding party]

was required to produce by the discovery requests themselves, nor does this opinion rest on the existence of a discovery order"; brackets added). As a practical matter, the requesting party will often be unaware of whether or not the responding party has fully satisfied their obligations.

Cooley appears to take a different view, criticizing Camicia for not filing a motion to compel at an earlier time. *See* Pet. for Rev., at 1-3.

VI. CONCLUSION

The Court should grant review, and affirm the Court of Appeals.

Respectfully submitted this 10th day of April, 2017.

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On the date set forth below, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

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Signed at Moses Lake, Washington on April 10, 2017.

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APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

SUSAN CAMICIA,

Plaintiff,

v.

CITY OF MERCER ISLAND,

Defendant.

No. 07-2-29545-3 SEA

ORDER ON MOTION FOR SANCTIONS/ADMITTING EVIDENCE OF OTHER ACCIDENTS

This matter comes before the Court on two distinct, but interrelated issues: Plaintiff's motion to admit other accident evidence and Plaintiff's motion for sanctions resulting from asserted discovery violations. To the extent other accident evidence would not be admissible under traditional evidentiary analysis, Plaintiff asks the court to allow it as a sanction. The Court has reviewed the files and records herein, including:

1. Plaintiff's Second Motion to Compel Discovery from Defendant City of Mercer Island with supporting Declaration of John Budlong with exhibits and plaintiff's reply memo;
2. Defendant City's Response to Plaintiff's Second Motion to Compel with supporting
Declarations of Steve Heitman, David Jokinen, Ryan Parr, and Andrew Cooley with exhibits;
3. Plaintiff's Motion for a Default Judgment with supporting Declaration of John Budlong with exhibits;
4. Plaintiff's Motion to Enforce Court's May 6, 2015 Discovery Order with supporting Declaration of Tara Eubanks with exhibits;
5. Defendant's CR26(g) Certification;
6. Plaintiff's Response to Defendant's CR26(g) Certification
7. Declaration of Andrew Cooley in Opposition to Discovery Sanctions;
8. Declaration of Karin Roberts, Deputy City Clerk
9. Plaintiff's Offer of Proof to Admit other relevant bicycle accidents with supporting Declaration of John Budlong with exhibits ;
10. Declaration of Richard Gill;
11. Declaration of Edward M. Stevens;
12. Declaration of Susan Camicia;
13. Declaration of David Dornbush;

14. Declaration of Coryn Gjerdrum;
15. Declaration of Paul R. Plein;
16. Defendant's Response to Offer of Proof with supporting Declaration of Andrew Cooley with exhibits;
17. Declaration of Gerald P. Bretting Regarding Group Riding Dynamics;
18. Declaration of Richard Conrad;
19. Declaration of Police Officer Bob Delashmutt;
20. Declaration of Firefighter Darrel Gordon;
21. Declaration of Bowen Hucks;
22. Declaration of MIPD Officer Hyderkhan;
23. Declaration of Beth Kearny;
24. Declaration of Jason Kintner;
25. Declaration of Trevor Kissel;
26. Declaration of Chris Martindale;
27. Declaration of Steve McCoy;
28. Declaration of Mercer Island Detective Joe Morris;
29. Declaration of Jamie Schoenborn;
30. Supplemental Declaration of Paul Plein; and
31. Plaintiff's Reply Memorandum on Offer of Proof to admit other relevant bicycle accident and on motion for default or evidentiary sanctions with supplemental Declaration of John Budlong with exhibits.

The Court having heard oral argument and deeming itself fully advised, it is hereby ORDERED that Plaintiff's Motion for Discovery Sanctions against defendant City of Mercer Island is granted and denied in part, pursuant to the following Findings and Conclusions:

FINDINGS

1. On June 19, 2006, plaintiff Susan Camicia sustained a spinal cord injury in a bicycle-bollard collision on the I-90 Trail in Mercer Island near the intersection of 81st Ave. SE and North Mercer way.

2. On that date, Mercer Island Police Officer Ryan Parr responded to plaintiff's accident and took photos of the conditions at the accident scene.

3. The day following the accident, the City of Mercer Island retained attorney Andrew Cooley to defend it against potential personal injury claims arising from Plaintiff's accident. Since that time, he has continued to be the lead attorney for the City in this

litigation. He is an experienced attorney in the area of municipality defense, and has been practicing law for 30 years. He has been integrally involved, directing the strategy and themes of the case, including taking and defending depositions, overseeing discovery, conducting witness interviews and site investigation, working with experts and consultants, preparing for, and arguing motions. From June 20, 2006 until 2015, Mr. Cooley coordinated the City's defense against plaintiff's claims with Mercer Island City Attorney Katie Knight[1].

4. Plaintiff commenced this lawsuit in August, 2007 and served her first discovery requests on the Defendant City in October, 2007. Relevant questions and the October 30, 2007 answers to those requests are as follows:

Int. 14: Have you or your agents, investigators, lawyers or anyone else investigated any incidents involving danger, injury or death to bicyclists or pedestrians because of fences, bollards or other obstructions or defects in any sidewalk, path or public right-of-way in the City of Mercer Island, either before or after this incident? If so, please identify or describe all such investigations and accident locations, the name, address, telephone number and job title of each person who reported or investigated each accident; the date of each accident, the name and number of each incident report and investigation report, and the name, address, telephone number and job title of each person who has custody of the reports or investigation documents.

ANSWER: Objection. Compound. Vague as to time. Overly broad as to location. If by "incidents you mean accidents, there have never been any bicycle vs. bollard accidents to the City's institutional knowledge. Otherwise, the question is vague as to time, the word "incident" and "danger". Certainly there have been pedestrian incidents in the City since its incorporation.

There was one bike accident in October 2007, where a bicyclist turning around fell off a bicycle and partially struck a cement post on EMW. See police report.

Int. 15. Are you aware of any notices, reports, complaints, claims or other communications from any source about safety concerns to pedestrians or bicyclists from fences, bollards or other obstructions or defects in any sidewalk, path or public right-of-way in the City of Mercer Island, either before or after this incident? If so, please identify or describe the dates and details of all such notices, reports or complaints, the names, addresses and telephone numbers of all persons who made and received them, all

[1] In 2015 Knight left the City's employment.

documents electronic communications or tangible things concerning them, and all decisions or actions taken in response to such notices, reports or complaints.

ANSWER: Objection. Compound. Vague as to what is meant by "notice" or "other communications" and "other obstructions or defects." ...

Int 20. Do you, your representatives, agents or attorneys have any photographs, movies, videos, diagrams, models, surveillance photography or videos or any other depictions concerning the physical facts or scene of the incident, the plaintiff, plaintiff's injuries, or any other potentially relevant object, matter or issue in this case? If so, please identify the subject, date and person preparing each such representation, the nature of the representation (whether map, diagram, model, photograph, movie, etc.), and the name and address of the present custodian.

ANSWER: Yes, see attached.

Please produce genuine, authentic originals or copies of the following documents and things:

11. All incident reports, investigative reports or other documents, drawings, computer data, photos, movies, videos or other depictions relating to other bicycling and pedestrian accidents and related safety concerns as referenced in Interrogatory Nos. 14 and 15.

RESPONSE: See documents previously attached. [The City produced a 2007 police report about a bicyclist who turned around and fell off his bicycle]

15. All photographs, movies, videos, diagrams, models, etc. as referenced in Interrogatory No. 20.

RESPONSE: See attached.

5. Although the City noted broad objections, it went on to answer the questions. The City's responses did not indicate that it was withholding any information or documents responsive to Plaintiff's discovery requests. A reader would reasonably infer the City had substantively answered the interrogatories in question.

6. The City did not seek a protective order to limit or eliminate its obligation to respond fully to Plaintiff's discovery requests,

7. City officials have known since before Plaintiff's accident that records of bicycle accidents, (including bike-collard collisions) are kept by its Fire Department.[2] Neither

the City nor Mr. Cooley searched for records of other bicycle accidents responsive to Plaintiff's discovery requests in the City's Fire Department. Cooley strategically ignored looking at Fire Department records. Nor was a complete review made of the Police Department, City Clerk's or City Attorney's files, or records where they knew or should have known that responsive information might be located.

8. After Plaintiff's first discovery requests were propounded, the City destroyed claims and complaints that were potentially responsive to Plaintiff's discovery requests, causing such records preceding Plaintiff's accident to be lost. During the course of litigating the discovery issues in May, 2015, it was disclosed that the City had not searched its "claims for damages" forms for records responsive to the discovery requests. When ordered to do so, it was revealed that all claims for damages forms and records relating to claims for damages generated before the Plaintiff's accident had been destroyed.[3]

9. Prior to Plaintiff's accident, on July 16, 2005, Paul Pleine was injured in a bicycle-bollard collision on a portion of the I-90 Trail located on Washington Department of Transportation right of way within Mercer Island to which Mercer Island Fire Department personnel responded and arranged for Pleine to be taken to Swedish Hospital. Fire Department personnel prepared a report of the Pleine incident.

10. On August 22, 2005, City Parks Director Peter Mayer reported a recent "cyclist-bollard post collision" in an email to City Engineer Patrick Yamashita, which was copied to City Traffic Engineer Nancy Fairchild and other City personnel. Since there has been no evidence produced of any other cyclist-bollard collision in that time-frame, the only

[2] April, 2005 email from Police Department Commander Lacy to Parks Director Mayer.
[3] Pursuant to the Declaration of Karin Roberts, Deputy City Clerk, this destruction was in accordance with the general retention schedule for local agency records as set forth by the Washington State Archives, which provides these records are retained for a period of six years after the claim is closed.

reasonable inference is that Mayer was referring to the Pleine incident. This email was not produced in initial responses to discovery.

11. A week after Plaintiff's accident, David Smith complained to the City that the wood bollard posts on the I-90 trail were dangerous to bicyclists. The City Clerk documented the Smith complaint in City records.

12. Between February and June 2007, John Duggan made a series of complaints to the City that the wood bollard posts on the I-90 trail were dangerous to bicyclists. City Attorney Katie Knight communicated with Mr. Duggan numerous times about his complaints. City Traffic Engineer Nancy Fairchild and City Attorney Katie Knight documented the Duggan complaints in City records.

13. In August 2007, Rebecca Slivka of the Bicycle Watchdog group complained to the City that the wood bollard posts on the I-90 trail were dangerous to bicyclists. City Attorney Katie Knight was informed of Slivka's bollard complaint. City employees referred the Slivka complaint to City Attorney Katie Knight.

14. In August 2009, Joshua Putnam complained to the City that the wood bollard posts on the I-90 trail were dangerous to bicyclists. City Development Director Steve Lancaster documented the Putnam complaint in City records.

15. The Defendant City and attorney Cooley did not disclose any information or records regarding other bicycle accidents or any related claims or complaints of injuries or safety concerns in its responses to plaintiff's first discovery requests.

16. After writing his August 22, 2005 email identifying a recent bike-bollard collision, City Parks Director Peter Mayer testified in his February 2009 deposition that no one "had

ever notified him that there was some danger with regard to wooden bollards used in park bike path settings."

17. After receiving Mayer's August 22, 2005 email identifying a recent bike-bollard collision, City Engineer Patrick Yamashita testified at his deposition in July 2008 that to his knowledge the City of Mercer Island had not received any complaints about bollards before plaintiff's accident.

18. The photos the City produced in October, 2007 did not include the photos Mercer Island Police Officer Ryan Parr took of the accident scene on June 19, 2006. Mr. Cooley did not produce Officer Parr's June 19, 2006 accident scene photos until May 6, 2009, which was after he had taken two depositions of the plaintiff and had deposed all but one of her expert witnesses.

19. Officer Parr's photos were relevant because they showed the scene conditions soon after the accident, including lighting conditions and construction signs in Plaintiff's lane of travel on the I-90 Trail. It deprived Plaintiff of the opportunity to refresh her recollection of existing conditions before her depositions and deprived her expert witnesses of that evidence before their depositions.

20. Mr. Cooley does not have an explanation why Officer Parr's accident scene photos were not produced to plaintiff for 18 months after he answered plaintiff's first discovery requests in October, 2007.

21. The evidence does not support a finding that the City and Mr. Cooley deliberately concealed Officer Parr's June 19, 2006 accident scene photos to obtain a tactical advantage over plaintiff in this litigation. The photos were referenced in a police report evidence inventory, which was provided to Plaintiff in initial discovery responses. The

photographs showed construction signs in the travelled pathway purportedly placed in the pathway by the agent of a co-defendant, the disclosure and existence of which would be helpful to the City's case in shifting liability, to the extent it existed, to the co-defendant Howard S. Wright Construction. Further, there is no evidence this late disclosure has resulted in prejudice to Plaintiff.

22. On June 28, 2014, the City was informed of Coryn Gjerdrum's bicycle pitch-over accident which occurred on that day on the same unmarked bollard that Susan Camicia hit.

23. On April 23, 2015, Mercer Island's defense counsel represented to Plaintiff's counsel in writing "there are zero reports (of accidents) connected to plaintiff's accident site", despite the City's knowledge of Gjerdrum's June, 2014 collision, as documented in the Mercer Island Police Department incident report.

24. On May 6, 2015, as a result of concerns that came to light that the City had not been responsive to initial discovery requests, including the fact it had not searched Fire Department records, the Court entered a broad discovery order designed to ensure all records which could lead to potentially relevant evidence were provided to Plaintiff. The order required the City produce to Plaintiff by May 7, 2015 "All of its records of other bicycle accidents, including bike bollard collisions, on its streets and bicycle trails for the period from 1997-2014."

25. Between May 11 and May 14, 2015, the City produced hundreds of records of other bicycle accidents, claims, complaints and related safety concerns that were responsive to plaintiff's October 2007 discovery requests and the May 6, 2015 order, including records

of 5 other bicycle bollard collision incidents– the Pleine, Gjerdrum, Petty, Elmer and Easton collisions.

26. The City's destruction of all pre-incident records of claims and complaints about bicycle accidents and injuries while Plaintiff's discovery requests were pending resulted in spoliation of potentially relevant evidence, and may have prevented Plaintiff from proving whether Mercer Island had prior notice of bicyclists being injured on bollards or other obstruction hazards, except for the Plein bike-bollard collision. It is acknowledged that some, or all, of these incidents would have also been disclosed in the (late) disclosed Fire Department records, Police Department records, or lawsuits. We will never know. The City is not entitled to a favorable inference, as the destruction of these records was wholly within its control.

27. Plaintiff did not discover records of the other bicycle accidents[4] and other bike-bollard collisions until Defendant City produced them pursuant to the court's May 6, 2015 discovery order. Plaintiff was unable to provide evidence to her expert witnesses in time to determine the similarity and relevancy of other bicycle accidents and prepare their testimony for trial on May 11, 2015, requiring a trial continuance to October 19, 2015.

28. The City's failure to respond fully to discovery was willful, as it was without reasonable excuse or justification.

29. The City's and its defense counsel's responses to Plaintiff's first discovery requests were false, misleading and evasive.

[4] The court recognizes that many of the bike accidents did not fall under the initial discovery request, and were produced pursuant to the court's broader order of May 6, 2015 which was issued due to the City's previous misleading and incomplete initial responses.

30. To date, Defense counsel shows no indication of a plan to change his conduct in the future. Defense counsel is unapologetic, defensive, and refuses to admit that he or the City violated discovery obligations.

31. Throughout the course of discovery and litigation surrounding it in this proceeding, counsel has made comments that are misleading. Examples include:

a. In responding to Interrogatory 14, the City answered: "*If by 'incidents you mean accidents, there have never been any bicycle vs. bollard accidents to the City's* ***institutional*** *knowledge.'*" (Emphasis added.) The qualification of "institutional" knowledge appears to be a term designed to insulate the city from making full disclosure.

b. Interrogatory 15 sought information about incidents "in any sidewalk, path or public right-of-way in the City of Mercer Island, either before or after this incident?" In attempting to justify the failure to disclose the Plein accident, defense counsel rephrased the question in his own pleadings to change the meaning of the question, by using the term "Mercer Island right-of-way". He then argued that since the Plein accident occurred in WSDOT right-of-way, there was no need for the city to disclose the incident – regardless of the fact it occurred on right-of-way within the City of Mercer Island, the City's own Fire Department responded to the incident, and a city department head referenced the incident in an email one month after it happened. The Court's experience with defense counsel has demonstrated that he is extremely well-spoken and talented with words. The court can only assume this re-phrase was intentional.

c. To this date, Defense counsel argues that reports of accidents maintained within the City's Fire department are not subject to disclosure due to "HIPPA". In his 4/29/15 Declaration he writes "I do not believe that it occurred to anybody that Plaintiff was also

seeking *medical records* prepared by the Fire Department." The fact of the matter is that Plaintiff never asked for medical records. In oral argument Mr. Cooley acknowledged that he has never searched Fire Department records for responses to discovery in past cases, and suggests no intent to change that practice. Given the fact that defense counsel's law practice focuses primarily on municipalities, it is highly likely this issue will come up in the future.

CONCLUSIONS

The court is guided by the analysis of discovery sanctions set out in *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 220 P.3d 191 (2009). Quoting *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 356 (1993), 858 P.2d 1054, the Supreme Court reiterated: "The purposes of sanctions orders are to deter, to punish, to compensate and to educate." 167 Wash.2d at 584. The *Magana* court provides further direction to the trial court when determining sanctions:

> A court should issue sanctions appropriate to advancing the purposes of discovery. *Burnet*, 131 Wash.2d at 497, 933 P.2d 1036. The discovery sanction should be proportional to the discovery violation and the circumstances of the case. Id. at 496-97, 933 P.2d 1036. "[T]he least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed. The sanction must not be so minimal, however, that it undermines the purpose of discovery. The sanction should insure that the wrongdoer does not profit from the wrong." *Fisons*, 122 Wash.2d at 355B56, 858 P.2d 1054 (footnote omitted).

167 Wash.2d at 590.

The defendant City and its defense counsel willfully violated the discovery rules by not conducting a reasonable search for its records; by not seeking a protective order if they wished to narrow the scope of discovery; by not disclosing the City's records of complaints; by falsely representing to Plaintiff "*there have never been any bicycle vs. bollard accidents to the City's institutional knowledge*"; and by not supplementing its discovery responses with correct responses when it knew the response was incorrect when made.

Plaintiff argues that "lesser sanctions" such as a monetary fine, a continuance, and striking the City's fault apportionment defense, are insufficient sanctions to impose. Plaintiff specifically does not request any of those sanctions. Plaintiff argues that the only appropriate sanction[5] is for the court to admit evidence of all or some of other bicycle accidents and related claims and complaints. The court addresses each of those potential sanctions:

1. **Default.** Default is reserved as the most severe sanction, when no lesser sanction will suffice. The Court finds imposition of all the lesser sanctions addressed hereafter will adequately deter, punish, compensate, and education, and denies the motion for default.

2. **Continuance.** As a result of the City's delay in producing responsive records, the court has allowed two continuances. One was from May 11 to May 26, 2015, the purpose of which was to determine what records had not been disclosed by the City. The other was from May 26 to October 19, 2015. The purpose of the second continuance was to allow Plaintiff's experts to review the newly disclosed discovery from the City, and to determine what, if any, was relevant to incorporate into their opinions. The continuance alone is an insufficient remedy and has not adequately addressed the prejudice to the plaintiff or the judicial system. It was granted on the day trial was set to begin, disrupting trial preparation and the court's schedule. Further, to the extent liability exists, compensation to the Plaintiff will be delayed, and the defendant will be rewarded by such a delay.

3. **Striking the fault apportionment defense.** This potential sanction has not been addressed by either party, and therefore the court declines to address it.

4. **Monetary sanctions.** Plaintiff argues that her fee agreement with counsel provides that to the extent monetary sanctions are awarded, they would go to Plaintiff's counsel, rather than Plaintiff, and thus an award of monetary sanctions would be of no

[5] Plaintiff's initial position was that she should be awarded a default as a sanction, and she has preserved this request.

benefit to Plaintiff. This argument is not persuasive to the court. Monetary sanctions would serve to compensate Plaintiff's counsel for their time expended in pursuing this late disclosed discovery. Further, there would be nothing to preclude counsel from discounting their final fee, should they choose, to take into account sanctions received. Additionally, it is highly likely that the additional work Plaintiff's experts did to review the additional records, and incorporate that review into updated reports and opinions was an expense for which compensation is in order. Finally, to the extent monetary sanctions serve as a punishment, it is irrelevant as to whom the sanctions are directed.

5. **Fine.** To the extent Plaintiff is not requesting monetary sanctions, a substantial monetary fine is necessary to deter future discovery violations, and to punish for the violations. Given the magnitude of potential damages, the cost to the Plaintiff and to the Court for the resources devoted to these issues, and continuing the trial on the date scheduled, a substantial fine is in order. The Court finds that $10,000 is a conservative figure to accomplish the goals of discovery sanctions. The Court orders as a joint and several obligation the City and Defense Counsel to pay a total fine of $10,000 to the Legal Foundation of Washington by October 19, 2015 for the provision of legal services to those with financial need.[6]

6. **Evidentiary rulings as a sanction.** Granting a continuance and imposing monetary sanctions will only partially achieve the purpose of sanctions in this case. Neither will bring back potential relevant evidence which was destroyed after the City was served with Plaintiff's discovery requests. Should liability be determined against the City, the potential damage verdict is in the multi-millions dollar range. To the extent there is evidence missing, its destruction was in the control of the City. For purposes of determining sanctions, the court must infer that its existence would have strengthened the Plaintiff's case. As a result, the court is left with having to fashion an order that would,

[6] This payment shall be in addition to any budgetary appropriation the City would have made or Defense counsel would have donated to this fund.

in effect, strengthen the Plaintiff's case. As a discovery sanction, in considering the admissibility of evidence of prior accidents, the court's application of its discretion will weigh heavily in favor of admissibility. In doing so, the court will not allow evidence which has no relevance, which will cause undue delay, waste time, or confuse the issues. In that regard, the Court rules as follows:

a. **Plein.** There is some out of state authority to suggest the "substantial similarity" standard is relaxed for prior accidents when offered on the issue of notice rather than dangerousness. This standard has not been addressed in Washington. Plaintiff offers the 2005 Paul Plein bicycle-bollard collision under the relaxed "substantial similarity" test. As a discovery sanction, the court will apply the "relaxed standard" and allow evidence of the Plein accident on the issue of notice to the City of a collision incident with a similar bollard.[7]

b. **Gjerdrum.** Coryn Gjerdrum's 2014 collision and plaintiff's 2006 collision with the same unmarked, undelineated, unreflectorized bollard were substantially similar, and the Gjerdrum accident is therefore relevant and admissible on whether the bollard was inherently dangerous.

c. **Bike accidents at the intersection of 81st Ave. SE and I-90 trail.** Pursuant to ER 702, Plaintiff's experts Gill and Stephens may testify to bike accidents which have occurred at the intersection of 81st Ave. SE and the I-90 trial (Hammond, Shankland, Amadon, Powell, Rudolph, and Lee) to the extent they are a basis for their opinions.[8] The accidents are not independently admissible. Such opinions are not dependent upon who was at fault in the accident, and therefore, the parties shall not be allowed to litigate that issue. Although Defendant may cross-

[7] The fact the City may not have had the legal authority to make corrections to the Plein bollard is not relevant. The accident was responded to by the MI Fire Department personnel, both of whom (Trevor Kissel & Darrel Gordon), declared that had they had any concerns regarding the bollard, they would have communicated them to the City Parks or Public Works departments. 6/30/15 Dec of Kissel, 6/27/15 Dec of Gordon.

[8] In so ruling, the court is not addressing each of the five theories of liability Plaintiff asserts the experts will be opining on. That will be dependent upon how the evidence develops at trial.

examine the experts on their knowledge of the accidents, Defendant shall not be allowed to introduce extrinsic evidence of the accidents.

It is premature to rule on whether the accidents are admissible for purposes of impeaching Defendant's expert(s). The court recognizes Washington authority on whether "dissimilar" accidents may be admitted when relevant to the witness's credibility is unclear[9]. Although the court is inclined to apply a relaxed standard in this case as a discovery sanction, a nexus between the accident and the defense expert's opinion is necessary. This will ultimately be determined at trial.

d. **Bike Accidents near the Park &Ride Entrance**. The Patton accident occurred near the Park and Ride entrance. The court finds no relevance to this accident, and no evidence of it shall be elicited.

e. **O'Campo email**. The court declines to admit the O'Campo email as a sanction, maintaining its prior ruling

f. **Post-accidents complaints**. The court declines to admit evidence of post-accident complaints about the bollard as a sanction (Smith, Duggan, Slivka and Putnam), maintaining its prior ruling.

Spoliation of Evidence Jury Instruction. The court will favorably consider a spoliation of evidence jury instruction relating to the destroyed claims, should one be offered.

New issues raised in Plaintiff's Reply. The court declines to consider new issues raised in Plaintiff's Reply materials, as procedurally improper.

Done this ____ day of September, 2015.

JUDGE LAURA C. INVEEN

[9] In violation of GR 14.1, Defendant City cites to an unpublished case on this subject. *Boileau v. Sang Ryong Yoo*, 170 Wash. App. 1022(2012).

King County Superior Court
Judicial Electronic Signature Page

Case Number: 07-2-29545-3
Case Title: CAMICIA VS WRIGHT CONST CO HOWARD S ET ANO

Document Title: ORDER ON SANCTIONS/EVIDENCE

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Date: 9/14/2015 3:48:17 PM

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