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NO. 96263-4

SUPREME COURT OF THE STATE OF WASHINGTON

CARL W. SCHWARTZ and SHERRY SCHWARTZ, individually
And the marital community composed thereof,

Appellants,

v.

KING COUNTY, a local government entity and
municipal corporation within the State of Washington,

Respondent.

KING COUNTY'S RESPONSE BRIEF

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I. INTRODUCTION

Appellants want this Court to see a conflict between *Lockner*¹ and *Camicia*² that does not exist. At the same time, they *do not* want the Court to see a bollard that exists in plain sight – as conclusively established by a photograph in Appellants’ own complaint. The Superior Court, by granting King County’s motion for summary judgment, recognized the obvious: (1) under the plain language of RCW 4.24.210, recreational use immunity is appropriate because the county allows members of the public to use its park trails “for the purposes of outdoor recreation,” and (2) a bollard that can be readily photographed is not “latent.” Although Mr. Schwartz’s accident was tragic, King County cannot be held liable for his injuries. The Superior Court should be affirmed.

II. FACTS

Through its parks department, King County operates a 175 mile trail system. CP 304, 357, 1836. It manages the trails as park facilities. CP 1836. These trails enhance the natural environment and encourage healthy lifestyles. CP 2243. Regional trails are recreation destinations in

¹ *Lockner v. Pierce Cty.*, 190 Wn.2d 526, 415 P.3d 246 (2018).

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

and of themselves. CP 1285. They also provide alternative routes for commuting. CP 1441. Indeed, as Appellants freely acknowledge in their complaint, “[t]he trails are intended for use by the public for recreational and non-recreational purposes.” CP 2, 5.

In fact, King County’s regional trails are non-motorized facilities used for bicycling, walking, jogging, skating, horseback riding, and other activities. CP 1440. The trails were originally intended to provide recreational opportunities and linear parks. CP 1441. While they continue to provide extensive recreational opportunities, they also provide active transportation opportunities, as well as social and cultural venues. CP 1441. For some users, these purposes are inextricably linked because trails combine the healthy recreational benefits of cycling, walking and other means of self-locomotion with the necessities of a regular commute. CP 1441. Many trips on regional trails effectively combine aspects of recreation and commuting. *See* CP 1721.

The Green River Trail (GRT) is one of the trails in King County’s trail system. It winds south more than 19 miles from industrial lands near the Duwamish River to Cecil Moses Park near Tukwila to Foster Park in Kent. CP 304. As with all trails in the system, the GRT includes many bollards, which are posts that protect trail users by preventing cars and trucks from driving on the trail. CP 304, 348.

One such bollard is located on the GRT at the northern entrance to Cecil Moses Park. CP 305. King County owns Cecil Moses Park, the entrance bollard, and the portion of the GRT that approaches the park from the North. CP 974; 2952. The entrance bollard is located in the middle of the trail so that bicycles, strollers, runners and walkers can easily pass, but not cars. *See* CP 974 (Entrance bollard installed to prevent motorized vehicles from entering the park.). The four-inch wide bollard is white with a red reflectorized button on each side of it for northbound and southbound users of the trail. CP 348-349.

The existence of the entrance bollard and its location are not in dispute. Appellants' complaint states that there is a single bollard in the middle of the trail at the northern entrance to Cecil Moses park. CP 12.

The complaint includes a photograph of the bollard:



CP 12. It shows what a trail user heading southbound on the GRT would see as they enter the park from the North. The complaint represents that this is a photo “of the bollard *as it existed on the date of the occurrence.*” *Id.* (emphasis added).

Appellants’ engineering expert, Mr. Sobek, also presented a photo of the bollard as it appeared to a person traveling southbound on the GRT on the date of the occurrence:



CP 1078. Acting as Appellants’ expert, Mr. Sobek purposely took his photo of the entrance bollard to replicate conditions on the date of the occurrence consistent with the claims made in Appellants’ complaint. *Id.* at 1082. He matched both the angle of the sun and weather conditions. *Id.*

The “occurrence” in this case was Appellant Carl Schwartz’s bicycle accident on the morning of March 13, 2017, which left him severely disabled. The complaint alleges that Mr. Schwartz, who describes himself as a very experienced cyclist, struck the entrance bollard. CP 14. He was riding his black and white, titanium, Specialized Roubaix SL3 bicycle. CP 968. He rode his bike several thousand miles

each year, even through rain and snow. CP 967. He estimated that he has ridden the Green River Trail “a few dozen times or more” since 2010. CP 968.

Although there is no dispute that Mr. Schwartz crashed his bicycle, the record is silent on the circumstances of his accident.³ Mr. Schwartz presented *no declaration testimony* establishing how his accident happened, the role of the bollard in the accident (if any), what caused him to lose situational awareness, whether he saw the bollard, whether he was familiar with it from his many prior trips on the GRT, or how he managed to strike a four-inch entrance bollard in the middle of a twelve-foot wide trail (if he did). There were no witnesses to the accident and no video. The record contains only a single statement from Mr. Schwartz, where he tells his own human factors expert, Ms. Gill, that he has “no memory of the actual impact with the bollard.” CP 1064. She speculates that he must have hit the bollard because, in her understanding, “Mr. Schwartz’s usual practice was to ride in the middle of the trail.”⁴

³ Appellants cite only their own bare complaint allegations for the circumstances of the accident.

⁴ It would be odd for any bicyclist, much less a highly experienced rider, to ride a bike down the middle of a twelve-foot wide trail. Traffic laws require bicyclists to stay to the right, unless passing someone. *See* RCW 46.61.755(1) (traffic laws apply to persons riding bicycles); RCW 46.61.100 (requiring vehicles to be driven “on the right half of the

Nevertheless, Appellants sued King County for Mr. Schwartz's accident. CP 1. King County claimed immunity under the Recreational Use Statute (RCW 4.24.210), which provides that a landowner who allows the public to use his or her land "for the purposes of outdoor recreation" without a fee is free from liability for unintentional injuries sustained on the land. CP 32. King County also denied causing Mr. Schwartz's accident. CP 31.

Appellants quickly moved for summary judgment on the immunity question. Their motion was based on the theory that dismissal of King County's recreational use immunity defense "*is necessary* because the County cannot show that its bicycle trail used by Plaintiff Carl W. Schwartz *was intended solely for recreational use.*" CP 36 (emphasis added). Citing the Court of Appeals decision in *Lockner v. Pierce County*, 198 Wn.App. 907, 396 P.3d 389 (2017), Appellants argued that "recreational use immunity can only apply if the land in question is held open to the public solely for recreational use." CP 56 (emphasis in original). The trial court denied appellants' motion without prejudice. CP 926-28.

roadway" subject to exceptions that do not apply here). *See also* CP 1023 (Posted trail rules requiring users to "Pass on the left; use bell or voice.").

After this Court issued its 2018 decision in *Lockner v. Pierce County*, 190 Wn.2d 526, 415 P.3d 246 (2018) – which *reversed* the Court of Appeals and rejected the reasoning relied upon by Appellants in their motion for summary judgment – King County filed its own motion for summary judgment on recreational use immunity. In accord with this Court’s *Lockner* decision, the Superior Court granted King County’s motion.

Appellants filed a timely notice of appeal and now seek direct review.

III. ISSUES

A. Is King County entitled to recreational use immunity under RCW 4.24.210 when it allows members of the public to use its park trails for the purposes of outdoor recreation?

B. Is a park entrance bollard a known dangerous artificial latent condition when its placement and location in the middle of the trail is readily apparent to recreational users according to photographs incorporated into Appellants’ own complaint and confirmed by their own expert?

IV. LEGAL ARGUMENT

This Court reviews summary judgment orders de novo, engaging in the same inquiry as the trial court. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 206, 11 P.3d 762 (2000). Summary judgment is appropriate when the pleadings, admissions, answers to interrogatories and affidavits, if any, “show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c); *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080, 1086 (2015). “A material fact is one that affects the outcome of the litigation.” *Id.* at n.8. Here, none of Appellants’ voluminous factual record is material to the straightforward inquiry required for recreational use immunity under RCW 4.24.210.

A. KING COUNTY IS ENTITLED TO RECREATIONAL USE IMMUNITY UNDER RCW 4.24.210 BECAUSE IT ALLOWS THE PUBLIC TO USE ITS TRAILS FOR THE PURPOSES OF OUTDOOR RECREATION WITHOUT CHARGE.

Recreational use immunity exists in Washington to encourage land owners to make land “available to the public for recreational purposes” by limiting the landowner’s liability exposure for such use of their lands. RCW 4.24.200. The statute provides that landowners, or those who control land, “who allow members of the public to use them for the purposes of outdoor recreation . . . without charging a fee of any kind

therefor, shall not be liable for unintentional injuries to such users.” RCW 4.24.210(1). An exception applies and the landowner may still be liable when there is a “known dangerous artificial latent condition for which warning signs have not been conspicuously posted.” RCW 4.24.210(4)(a).

In the recent *Lockner* decision, this Court determined that RCW 4.24.210 is “clear and unambiguous.” 190 Wn.2d at 532. As such, the language of the Legislature is both the starting and ending point: “When the plain language is unambiguous—that is, when the statutory language admits of only one meaning—the legislative intent is apparent, and we will not construe the statute otherwise.” *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318, 320 (2003). It is a “fundamental principle of statutory construction” that this Court “will not construe unambiguous language in a statute.” *Harris v. State, Dep’t of Labor & Indus.*, 120 Wn.2d 461, 472 n.7, 843 P.2d 1056, 1062 (1993).

Under the plain language of RCW 4.24.210(1), in order to qualify for immunity, “the landowner must establish that the land at issue was (1) open to members of the public (2) for recreational purposes and that (3) no fee was charged.” *Lockner*, 190 Wn.2d at 532; *Camicia*, 179 Wash.2d at 695-96. As argued below, King County meets those requirements. There is no room, under a plain language reading of RCW 4.24.210(1), for Appellants’ proposal to judicially amend this statute by adding a

“predominantly used for nonrecreational purposes” exception to recreational use immunity. *E.g.* Opening Brf. at 1.

1. King County Owns The Portion of the GRT Where Mr. Schwartz Crashed His Bicycle and has Opened it for Public Use.

As to the first criteria, there is no dispute that the GRT is open to the public. Appellants acknowledge that the GRT and other regional trails are “intended for use by the public.” CP 2.

Appellants instead question King County’s authority to close the trail, which is a judicially added requirement to the plain language of RCW 4.24.210. They claim that King County cannot close the trail because it does not own the GRT.⁵ The record does not support Appellant’s arguments.

In arguing ownership, Appellants ignore the section of the trail where the accident happened and instead address a separate trail section owned by Seattle Public Utilities (“SPU”) that is *unrelated to the accident*. Opening Brf. at 35-37. Appellants themselves admit that the SPU section is 360 feet south of where Mr. Schwartz crashed his bicycle. Opening Brf. at 20. As such, Appellants’ lengthy discussion of the SPU section is

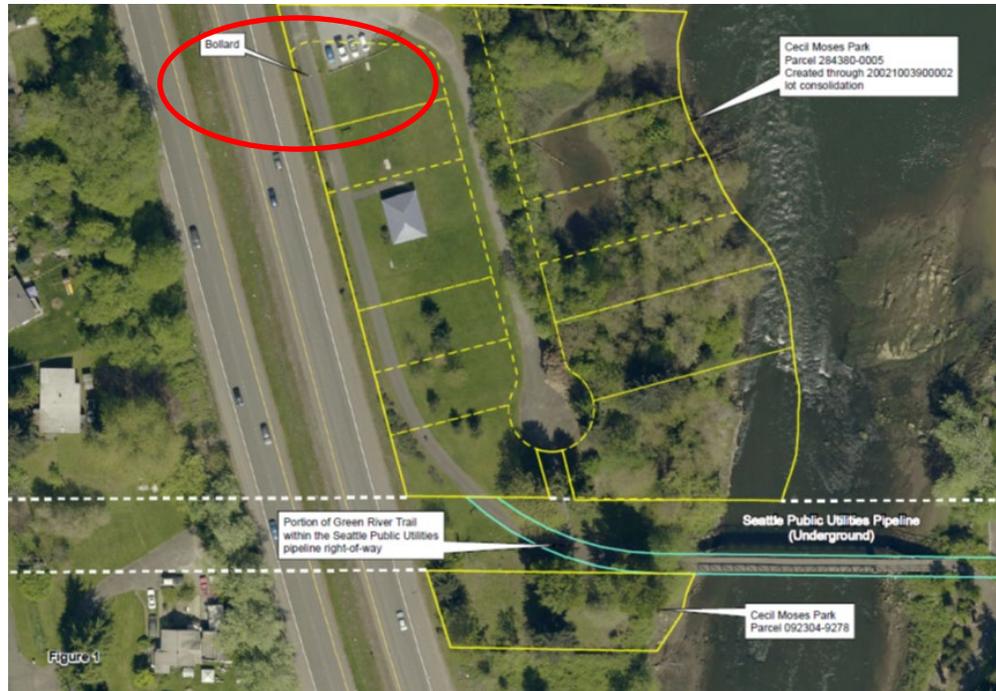
⁵ Of course, if King County did not own and control the trail, there would have been no reason to sue it. Appellants’ ownership argument, if it had any merit, would necessarily require dismissal of their lawsuit.

inapposite. Under *Lockner*, the correct focus is on King County's right to close the section of the trail where the accident occurred, not other sections elsewhere along the 19-mile path.⁶ See 190 Wn.2d at 536 ("The *section of the trail* where Lockner was injured is maintained and operated by the County. The County exercised its authority to open and close the trail by setting hours for recreation, from 8 AM to 5 PM.").

The record fully supports King County's ownership of the section of the trail at Cecil Moses Park where Mr. Schwartz crashed his bicycle. CP 2949-2954. As noted in the complaint and Appellants' own expert reports, Mr. Schwartz's accident happened at the northern entrance bollard to Cecil Moses Park. *E.g.* CP 1076-1077 (satellite view with location of accident marked at Northern park entrance). The unopposed Declaration of Robert Nunnenkamp points out that King County acquired Cecil Moses Park through 14 parcels and road vacations. CP 2949-2950.

⁶ Even if the SPU section were relevant King County has full authority to stop operating the portion of the GRT that passes over SPU property. Nothing in this agreement obligates, or could obligate, King County to fund the GRT in perpetuity out of its general fund and discretionary park levy.

The parcels owned by King County include the accident site:



CP 2952 (Emphasis added – entrance bollard circled in red). The SPU portion of the trail is marked in green/blue at the bottom of the above graphic.

The boundaries of King County’s ownership are further confirmed in an official survey, which is attached to the Declaration of Trevor Clay. *See* CP 1024. In his declaration, Mr. Clay confirms that the park entrance bollard is located on property “owned by King County, and . . . entirely within the boundary of the Cecil Moses Park.” *Id.*

Against this testimony establishing ownership, Appellants provide nothing. They point to a document where King County says it “stewards

some 175 miles” of trails and then claim that using a variation of the word “steward” necessarily refutes ownership of the trail system. Opening Brf. at 36 (citing CP 178). But this argument is far-fetched and certainly does not counter the specific declaratory evidence of King County’s ownership of the GRT at the Cecil Moses park.

Appellants next claim that King County was obligated to prove its ownership by deed, but this is not a quiet title action and two declarations stating ownership are legally sufficient to establish this fact. Once King County proved ownership with its declarations,⁷ the burden then shifted to Appellants, who were the nonmoving party, to set forth facts showing that there is a genuine issue of material fact.” *Hash by Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 915, 757 P.2d 507, 509 (1988). By failing to submit *any* counter evidence, the fact of King County’s ownership of the trail where Mr. Schwartz crashed his bike is conclusively established for purposes of summary judgment.⁸

⁷ Appellants did not move to strike any declarations submitted by King County.

⁸ Citing CP 2770, Appellants claim that the “County believed that under federal law it had to keep the trail open at all times for transportation purposes; the trail had to be open during the day to comply with the Federal Highway Administration’s regulatory requirements for the Puget Sound Regional Council’s transportation plan.” Opening Brf. at 36. This is a grossly inaccurate paraphrase of the record. First, the email cited at CP 2770 concerns the East Lake Sammamish Trail (“ELST”) and possible restrictions on funds used for that trail, not the GRT, which was already

With Appellants' ownership arguments out of the way, there can be little doubt that King County has the authority to close the section of the trail where Mr. Schwartz injured himself. King County's Parks Department has the ability to close its parks under park rules. CP 1836. The Parks Department can set hours of operation (*see* KCC 7.12.0300), and designate certain areas off limits. KCC 7.12.035. The Parks Department routinely closes regional trails for redevelopment. CP 1838. Moreover, King County parks are funded through general fund appropriations and a discretionary parks levy. Appellants can point to nothing that would require the GRT at Cecil Moses park to remain perpetually open in the face of more pressing budgetary needs.

Under KCC 7.12.295(F), trail hours and other restrictions "may be posted at park entrances, trailheads, or, in some cases, on individual trails." CP 957. At the north end of Cecil Moses Park, there is a sign adjacent to the Green River Trail. CP 1018. Among other things, it provides that "Trail is closed one-half hour after sunset and opens one-half hour before sunrise." CP 1018. The Cecil Moses Park and the segment of

built. CP 2770. Second, the email mentions neither the Federal Highway Administration, nor the Puget Sound Regional Council. *Id.* Finally, the email represents the informal beliefs of a former King County employee, not King County's beliefs. *Id.*

the Green River Trail running through it are open to the public during its hours of operation at no cost. CP 1018.

Although Appellants claim that recreational use immunity requires “legal authority to permanently close the trail,” this Court’s decision in *Lockner* rejects such an absolutist position. The record in *Lockner* demonstrated only that “[t]his section [where Lockner was injured] is open for recreation between 8:00 and 5:00 p.m.” 190 Wn.2d at 530. This Court concluded that establishing hours of operation was sufficient to meet the first prong of the recreational use immunity test:

Here, the record demonstrates that the County intended and had authority to open the land in question for recreational purposes. The section of the trail where Lockner was injured is maintained and operated by the County. The County exercised its authority to open and close the trail by setting hours for recreation, from 8 AM to 5 PM.

190 Wn.2d at 536. With the facts in this case identical, or even stronger for King County, this holding controls and supports affirmance of the Superior Court’s summary judgment ruling.

Although King County easily satisfies the “authority to close” test, this inquiry represents an inappropriate judicial supplementation of a plain language statute. The authority to close test is not derived from the plain language of RCW 4.24.210, but from a judicial determination that this additional inquiry is desirable to avoid “extending immunity” when it

“would not further the purpose behind the act.” *Tennyson v. Plum Creek Timber Co., L.P.*, 73 Wn. App. 550, 558, 872 P.2d 524, 529 (1994).

In the face of plain and unambiguous statutory language, however, adding this requirement exceeds the proper role of our judicial branch. *See Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283, 1288 (2010) (“[W]e ‘must not add words where the legislature has chosen not to include them,’ and we must ‘construe statutes such that all of the language is given effect.’”). Adding a limiting test that is not supported by the plain language of an unambiguous statute raises obvious separation of powers concerns. *See Five Corners Family Farmers v. State*, 173 Wn.2d 296, 311, 268 P.3d 892, 900 (2011) (noting “separation of powers concerns” when a court adds words to a plain meaning statute that were not adopted by the Legislature).

In order to preserve the appropriate separation of powers between the judicial and legislative branches, this Court should abandon the authority to close overlay on the plain language of RCW 4.24.210. Although violation of the separation of powers by any branch of government is inherently harmful to our tripartite system of government, it is not necessary to overturn *Camicia* in order to correct the judicial overreach of the authority to close test. Rather, the “critical” fact in *Camicia* was the language of a deed transferring the trail to Mercer Island

for “road/street purposes only” and conditioning other uses on obtaining permission from the Washington Department of Transportation (“WSDOT”). *Lockner*, 190 Wn.2d at 534. As such, the “*holding* in *Camicia* is clear: where evidence conflicts regarding whether the land is open for recreational use, the case must go before a finder of fact.” *Id.* Because this clear holding has nothing to do with the authority to close test, this Court can disavow authority to close *dicta* from *Camicia* without overruling *Camicia* itself or limiting its holding.⁹

2. The GRT is Available for Recreational Purposes.

Nowhere is the plain language of RCW 4.24.210 more important than in determining whether some artificial level of recreational use is necessary to afford recreational use immunity to King County. Appellants claim that King County must show “predominant” recreational use, but the Legislature did not condition a grant of recreational use immunity on a certain quantum of recreation use. To the contrary, under the plain

⁹ Even if this Court adheres to the *Camicia dicta* adopting the *Tennyson* authority to close test, this test is too narrow to serve the purposes of RCW 4.24.210. The prospect of recreational use immunity not only encourages a landowner to keep a facility open to the public but also to build that facility in the first place and recondition it to improve recreational opportunities. An authority to close test ignores both the initial and continuing investment that landowners make in reliance upon the promise of recreational use immunity. Fewer recreational facilities would be built or expanded if the exclusive inquiry is the authority to close such a facility.

language of RCW 4.24.210, a landowner qualifies for recreational use immunity when a landowner simply “allows members of the public to use them for the purposes of outdoor recreation.” Thus, it is the bare fact of opening one’s property to recreational use, not the comparative number of recreational users who show up to use it, that determines a grant of immunity under the statute.¹⁰

In their complaint, Appellants admit that “[t]he trails are intended for use by the public for recreational and non-recreational purposes.” CP 2, 5. By itself, this admission satisfies the language of RCW 4.24.210(1). *See Mukilteo Ret. Apartments, L.L.C. v. Mukilteo Inv'rs L.P.*, 176 Wn. App. 244, 257 n.8, 310 P.3d 814, 821 (2013) (Factual statements in pleadings constitute “judicial admissions.”). So long as the trail is used for *both* recreational and non-recreational purposes – which any reading of this record easily supports – the recreational use immunity statute applies.

¹⁰ Appellants’ proposed test would negate the benefits of RCW 4.24.210 by sending every case to trial to determine predominant use. Immunity is of limited benefit when it can be perfected only after the rigors and expense of a full trial. Such an approach would likely discourage landowners from allowing the use of their property for recreational purposes by making the assertion of immunity both uncertain and unduly expensive. Moreover, a trial focused on counting up trail users and somehow polling them to determine their predominant usage is an exercise in statistical machination unworthy of valuable judicial resources.

The strong recreational component of the King County trail system, including the GRT, is well-supported by the summary judgment record. The trails, which are managed by the parks department, have always been regarded as primarily recreational. In the early 1990s, the King County Non-Motorized Transportation Plan recognized that “[c]learly, recreation does represent the reason most bicycle trips are taken in King County.” CP 1207. This remains true today. In its 2016 Comprehensive Plan, the County reiterated that the primary purpose of its Regional Trails is recreation. CP 1441. The same is true of the Green River Trail. Its primary purpose is recreation, although it is also used for non-motorized commuting. CP 304.

The Regional Trails System is a major element of the County’s greater open space system. CP 1440. People use the trails for recreation and non-motorized transportation, and its corridors are often used by wildlife. CP 1440.

By urging a “predominant use” test over the statute’s flat recreational use inquiry, Appellants seek to insert additional language into RCW 4.24.210 that does not exist and that is far outside the legislative enactment. Appellants cite no authority for this proposition.¹¹ From the

¹¹ Appellants claim that a “predominant use” test is necessary to preserve liability for the use of roads is overwrought. “It is well established that a

beginning of this case, King County has readily admitted that the trail has dual purposes, which does not preclude recreational use immunity under this Court's *Lockner* decision.

In *Lockner*, this Court rejected the argument that sole recreational use was a prerequisite to immunity under RCW 4.24.210. Instead, the focus was on the plain language of the statute. *Lockner*, 190 Wn.2d at 531 (“[W]e conclude that neither the plain language of RCW 4.24.210 nor our opinion in *Camicia* preconditions recreational use immunity on land being used solely for recreational purposes.”). “Because RCW 4.24.210 does not restrict recreational use immunity to land used solely for recreation, this court will not “read into a statute matters that are not in it.” *Id.* at 532. As a result, evidence tending to establish both recreational and non-recreational uses creates “no issue of material fact in dispute.” *Id.* at 532. As this Court determined, “[c]learly, mixed public and other uses do not defeat immunity.” *Id.* at 532–33. *See also State ex rel. Anderson v. Chapman*, 86 Wn.2d 189, 191, 543 P.2d 229, 230 (1975) (When language is “clear and unambiguous, interpretation by the courts is improper.”).

municipality has the duty ‘to maintain its roadways in a condition safe for ordinary travel.’” *Wuthrich v. King Cty.*, 185 Wn.2d 19, 25, 366 P.3d 926, 929 (2016). There no indication in the road statutes or the case law that RCW 4.24.210 has any application to roads or streets.

Appellants' claim that *Lockner* conflicts with *Camicia* fails to note the crucial factual differences between these cases. As *Lockner* points out, there is no conflict with *Camicia*:

Nothing we have said in Camicia contradicts the plain language of RCW 4.24.210. In Camicia, a bicyclist sustained severe injuries while riding along the Interstate 90 (I-90) trail located in the city of Mercer Island. 179 Wash.2d at 687-88, 317 P.3d 987. The bicyclist brought a negligence suit against the city, which the trial court dismissed on summary judgment based on recreational use immunity. On appeal, this court determined that summary judgment was improper because there were factual disputes as to whether the I-90 trail was open for recreation at all or solely for transportation purposes. Critical to our holding was a deed transferring ownership of the I-90 trail to the city. See id. at 690, 317 P.3d 987. The deed specifically provided that the trail could be used for "road/street purposes only" with other uses allowed upon written approval of the transferrer. Id. (emphasis omitted). Viewed in a light most favorable to the plaintiff, the deed suggested the city could not close the trail to transportation and a fact finder could infer the trail would be open for transportation regardless of any recreational use. Id. at 700, 317 P.3d 987. Whether the trail could be used for recreation was a disputed fact that consequently precluded determining the legal question of whether recreational use immunity was applicable. We remanded the case to the trial court. Our holding in Camicia is clear: where evidence conflicts regarding whether the land is open for recreational use, the case must go before a finder of fact. Id. at 700-01, 317 P.3d 987.

Lockner v. Pierce Cty., 190 Wn.2d 526, 534, 415 P.3d 246, 251 (2018) (emphasis added).

Thus, the unique "road/street purposes only" deed that was before the Court in *Camicia* created a factual question on whether the trail could be used for recreational purposes at all, consistent with the strict deed

restrictions. Appellants' claim of a conflict between *Lockner* and *Camicia* cannot be sustained because the "critical" fact of the "road/street purposes only" deed was not present in the *Lockner* case. It is also worth noting that the author of the *Camicia* opinion, Justice Stephens, and all concurring Justices (including Justice González, the author of *Lockner*) joined the *Lockner* majority. It is untenable for Appellants to claim any conflict between these two decisions, especially when *Lockner* explained the circumstances and holding of *Camicia*.

In the end, the dual recreational and non-recreational uses of Pierce County's Foothills Trail in *Lockner* bears a close family resemblance to the dual uses of the GRT. Similar to King County, Pierce County promoted its Foothills Trail as a "popular commuter route and recreational destination for bicyclists." *Lockner*, 190 Wn.2d at 529. As in *Lockner*, the record in this case contains no deed designating the GRT at the location of Mr. Schwartz's accident as a road or street; it is just a trail.¹² Because King County's operation of the GRT at Cecil Moses Park is

¹² To the extent Appellants' argument relies on the receipt of federal grant funds, it is undisputed that federal funding was not used for the GRT at Cecil Moses Park. CP 1752 - 55. According to King County Parks planner Robert Foxworthy (CP 1639), the Green River Trail received two federal transportation grants for the *southern* portion of the trail, but neither were used. CP 1739. References to possible grant funding of portions of the ELST—a different trail—are irrelevant.

indistinguishable from Pierce County's operation of the Foothills Trail, the Superior Court correctly granted King County's motion for summary judgment on this point.

3. The GRT May Be Used Without a Fee.

No fee is charged for the public to use Cecil Moses Park or the GRT within it. CP 349. Certainly, there is no suggestion in the record that Mr. Schwartz paid any fee to ride his bike into Cecil Moses Park on the GRT the morning of his accident. Application of the recreational use immunity statute is appropriate because King County allows the public to use the trail system "without charging a fee of any kind therefor." RCW 4.24.210.

Appellants claim that King County is barred from immunity under RCW 4.24.210 because "the County periodically rents out the GRT for races, charging a fee for its use." Opening Brf. at 38 (citing testimony of Sam Whitman at CP 2841-42). Appellants, however, again misstate the record. In his deposition, Mr. Whitman testified that he was aware of only one circumstance a few years ago where a private party obtained "a permit from our scheduling office to have – hold an event on our property." CP 2841-42. Mr. Whitman indicated his belief that private parties are generally charged a fee for such a permit, but also pointed out that fees were "waived" for "certain groups." *Id.* at 2842. Mr. Whitman provided

no testimony about whether a fee was actually paid for the permit for the single event he recalled that utilized a portion of the GRT.

Even if a single group a few years ago paid a fee for a permit, Appellants cite nothing to show that a group permit fee constitutes a rental charge for the use of the trail. *See Jones v. United States*, 693 F.2d 1299 (9th Cir.1982) (Inner tube rental fee does not eliminate recreational use immunity under RCW 4.24.210 related to free use of land for sledding.). At the very worst, this testimony establishes an isolated event, not a regular practice of charging Mr. Schwartz and others like him for use of the GRT. It is undisputed that King County does not regularly charge a fee to users of the trail and has charged no one a fee for anything related to the GRT for several years. CP 1018. A single charge for an uncertain purpose of undefined scope, years ago, to one group, does not operate to vitiate recreational use immunity for all time.

The Court of Appeals cases cited by Appellants do not support their broad claims. In *Plano v. City of Renton*, 103 Wn. App. 910, 912, 14 P.3d 871, 873 (2000), the City charged a moorage fee for all persons using its boat docks for moorage outside the hours of 8 a.m. to 6 p.m. Although Plaintiff did not comply with the fee payment, she moored her boat overnight two nights in a row. *Id.* at 913. She then returned to the dock after 6 p.m. the following day to retrieve her boat and slipped, breaking

her leg. *Id.* Because Renton regularly charged moorage fees to people “for such use,” the court ruled that the recreational use immunity statute did not apply. *Id.* at 915-16. The *Plano* case does not support Appellants’ position because King County does not regularly charge trail users, including Mr. Schwartz, for use of the GRT.

Even less support for Appellants’ position is found in *Hively v. Port of Skamania Cty.*, 193 Wn. App. 11, 13, 372 P.3d 781, 782 (2016), *review denied* 186 Wn.2d 1004 (2016). In *Hively*, the Port did not charge individual users for the use of park facilities, but it did “occasionally” rent the park “to private parties for a fee” while still keeping the park open to individual users. *Id.* It was undisputed that plaintiff was outside the class of users (private parties) that might pay a fee. Under these circumstances, the Court of Appeals affirmed a grant of summary judgment based on recreational use immunity for the Port. *Id.* at 17.

The evidence cited by Appellants, when read accurately, is that there was a single event on the GRT where a portion of the trail was used for a long-distance bike ride and where a fee may or may not have been charged for some type of permit. During this event several years ago, the trail remained open to the public at no charge. *See* CP 1018 (trail is open to public use during hours of operation). It is further established on this record, that King County has never charged an individual like Mr.

Schwartz for use of the GRT, nor has it charged anyone for anything related to the GRT for many years. Taken together, these facts do not establish a regular fee that might defeat King County’s assertion of recreational use immunity.

B. NO EXCEPTION TO RECREATIONAL USE IMMUNITY UNDER RCW 4.24.210 APPLIES IN THIS CASE BECAUSE THE ENTRANCE BOLLARD WAS NOT A KNOWN DANGEROUS ARTIFICIAL LATENT CONDITION.

There are two exceptions to the recreational use statute: (1) when injuries are intentionally caused; or (2) when injuries are caused by a “known dangerous artificial latent condition” for which warning signs have not been conspicuously posted. *See* RCW 4.24.210; *Riksem v. City of Seattle*, 47 Wn. App. 506, 510, 736 P.2d 275 (1987); *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 846 P.2d 522 (1993). Appellants do not claim that King County intentionally injured Mr. Schwartz. Rather, they claim that the entrance bollard at Cecil Moses Park was a “known dangerous artificial latent condition.” The bollard, which is not inherently dangerous and is easily photographed, does not satisfy this standard.

The “known dangerous artificial latent condition” exception to recreational use immunity is inapplicable in this case. Each of these terms—known, dangerous, artificial and latent—modify the term condition, not one another. *Jewels v. City of Bellingham*, 183 Wn.2d 388,

390, 353 P.3d 388 (2015) (citing *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 46, 846 P.2d 522 (1993)). Each condition must be present before a landowner's duty to post a warning arises. *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 920, 969 P.2d 75 (1999) (citing *Tabek v. State*, 73 Wn. App. 691, 695, 870 P.2d 1014 (1994)). All of the elements (known, dangerous, artificial, latent) must be independently present in the injury-causing condition for liability to attach to the landowner. *Davis v. State*, 144 Wn.2d 612, 616, 30 P.3d 460 (2001).

1. King County Had No Notice That The Bollard Was A Known Condition Requiring Additional Warnings.

“For liability to attach to a landowner under Washington’s recreational land use statute, the defendant must have actual knowledge that the condition *exists... .*” *Jewels*, 183 Wn.2d at 401. King County had no reports of any park patrons who were injured in a collision with the park entrance bollard prior to Mr. Schwartz’s accident. CP 1018; 1028-29.

Appellants submit complaints about bollards on the ELST and other trails, *see* Opening Brf. at 8 n.2, but nothing related to the entrance bollard at Cecil Moses Park. They also submit a Google photo from 2009 where it appears that someone marked “Post” on the ground before and after the entrance bollard. Opening Brf. at 5. Appellants claim that this

was created by a “concerned citizen” as a “warning” to others because “someone had likely hit the bollard,” but this is sheer speculation, not evidence relevant to a summary judgment motion. *Id.* Moreover, there is no indication in the record that King County knew of the Google photo, even if Appellants’ spin on the photo is correct.

The requirement that a landowner actually know that the condition exists before requiring the additional warning only makes sense. Why would King County install additional warning measures for an alleged condition on the GRT at Cecil Moses Park which, over an extensive period of time, had never been reported as a danger to anyone? A flat, wide asphalt trail entering into a park that had been used by thousands of cyclists in the past – including Mr. Schwartz – without any reported incidents, does not support a finding that the County had actual knowledge of a condition warranting additional signage. Mr. Schwartz’s inability to establish King County’s actual knowledge of a condition requiring additional warnings at this location means immunity applies under the recreational use statute.

2. The Bollard Is Not A Dangerous Condition.

“Dangerous” is not defined in RCW 4.24.210, but is instead defined in the common law as a condition that poses an *unreasonable* risk of harm. *See Gaeta v. Seattle City Light*, 54 Wn. App. 603, 609, 774 P.2d

1255 (1989) (citing W. Prosser, *Law of Torts* § 31 (4th ed. 1971)).¹³ To define “dangerous” as meaning any lesser hazard would increase the potential liability of the landowner. *Id.*

There is nothing about a bollard that poses an unreasonable risk of harm. The purpose of a bollard is to protect trail users – parents pushing strollers, walkers, and bicyclists – from cars and trucks that might attempt to use the trail. Given the protective function of bollards, they do not present an *unreasonable* risk of harm. See *Bice v. Home Depot U.S.A., Inc.*, 210 So. 3d 315, 320 (La. Ct. App. 2016) (After considering the risk-utility factors, a bollard does not present an unreasonable risk of harm); *Ramsey v. Home Depot U.S.A., Inc.*, 124 So. 3d 415, 417 (Fla. Dist. Ct. App. 2013) (A wheel stop placed in the center of a parking space presents no unreasonable risk of harm.); *Puma v. City of New York*, 36 A.D.3d 517, 828 N.Y.S.2d 367, 368 (N.Y. App. Div. 2007) (A bollard does not present a triable issue as to the existence of a dangerous condition).

3. A Bollard Is Not A Latent Condition.

"Latent," as used in RCW 4.24.210, means not readily apparent to the recreational user. *Van Dinter v Kennewick*, 121 Wn.2d 38, 45, 846 P.2d

¹³ The Westlaw service red flags *Gaeta* as “abrogated” by *Jewels*, but this is incorrect. The *Jewels* analysis of *Gaeta* is fully discussed below, with *Jewels* relying on *Gaeta* to distill principles of latency.

522 (1993). The condition itself, not the danger it poses, must be latent. *Tennyson v. Plum Creek Timber Co.*, 73 Wn. App. 550, 554, 872 P.2d 524 review denied, 124 Wn.2d 1029, 883 P.2d 327 (1994). The dispositive question on latency is whether the condition is readily apparent to the general class of recreational users, not whether one user might fail to discover it. *Chamberlain v. Dept. of Transp.*, 79 Wn. App. 212, 219, 901 P.2d 344 (1995). In other words, what one “particular user sees or does not see is immaterial.” *Widman v. Johnson*, 81 Wn. App. 110, 114-115, 912 P.2d 1095 (1996). It is an objective inquiry.

This Court examined the issue of latency under RCW 4.24.210 in *Jewels v. City of Bellingham*, 183 Wn.2d 388, 353 P.3d 204 (2015). In *Jewels*, a bicyclist was injured when he tried to bypass a speed bump in a public park, but instead encountered an asphalt berm and lost control of his bike. *Id.* The asphalt berm was not painted and appeared to plaintiff “to be ‘bare, flat pavement.’” *Id.* at 391. Plaintiff also presented expert opinion that berms should be appropriately marked. *Id.* at 398. These claims, however, were of no moment. This Court determined that Bellingham was entitled to recreational use immunity because “the condition in this case was obvious – that is, not latent.” *Id.*

In deciding *Jewels*, this Court reviewed Washington case law concerning latency, deriving important principles from these cases. First,

in *Gaeta v. Seattle City Light*, 54 Wn.App. 603, 774 P.2d 1255 (1989), the Court of Appeals affirmed summary judgment for the defendant on the issue of latency where a motorcyclist was injured when his wheel got stuck in a mule groove next to railroad tracks. *Jewels*, 183 Wn.2d at 398. The lower appellate court held that the injury-causing condition (the mule groove next to the tracks) was not latent because it was obvious. *Id.* (omitted).

Second, in *Van Dinter*, 121 Wn.2d at 38, the Supreme Court affirmed summary judgment for the city where it defined the injury-causing condition as the proximity of a caterpillar-shaped playground apparatus in relation to the grassy area of the park and found it was not latent. *Id.* at 398-99 (citations omitted). As this Court noted in *Van Dinter*:

The caterpillar as well as its injury-causing aspect – its proximity to the grassy area – were obvious. The condition that caused Van Dinter's injury was not latent. Admittedly, it may not have occurred to Van Dinter that he could injure himself in the way he did, but this does not show the injury-causing condition – the caterpillar's placement – was latent. At most, it shows that the present situation is one in which a patent condition posed a latent, or unobvious danger. *RCW 4.24.210 does not hold landowners potentially liable for patent conditions with latent dangers. The condition itself must be latent.*

121 Wn.2d at 46 (emphasis added).

Third, in *Jewels*, this Court reviewed *Tennyson v. Plum Creek Timber Co.*, 73 Wn.App. at 555-56, where the Court of Appeals affirmed summary judgment for a timber company where a motorcyclist was injured when he drove over a large mound but could not see from his perspective that half of the back side of the mound had been removed. The court held the condition was not latent because "the excavation was in plain view and readily apparent to anyone who examined the gravel mound as a whole." *Id.* at 399 (citations omitted).

Finally, in *Swinehart v. City of Spokane*, 145 Wn. App. 836, 187 P.3d 345 (2008), the Court of Appeals affirmed summary judgment for the city on the issue of latency where the plaintiff slid down a "Red Wagon" slide and injured his back at the bottom because the wood chips meant to cushion his landing had become displaced. The plaintiff introduced a photograph of the injury-causing condition (the lack of wood chips). The court relied on the photo in its opinion, noting that it "seemingly acknowledge[s] that the condition of the wood chips was visible and obvious at the time of the accident or such a condition could not have been captured by a photograph. An obvious defect cannot be latent." *Id.* at 400 (citations omitted).

After reviewing the above cases, this Court derived the following principles on latency:

if an ordinary recreational user *standing near the injury-causing condition* could see it by observation, *without the need to uncover or manipulate the surrounding area*, the condition is obvious (not latent) as a matter of law. *The latency of the condition is not based on the particular activity the recreational user is engaged in* or the particular user's experience with the area from earlier visits or expertise in the specific recreational activity.

Jewels, 183 Wn.2d at 400 (emphasis added).

In applying these principles to the *Jewels* case, this Court found that the water diverter berm was obvious, not latent, under RCW 4.24.210, even though it matched the surrounding pavement. This Court found no relevance in plaintiff's assertion "that the ground appeared to him to be bare and flat," because "latency is viewed objectively, and what a particular recreational user saw, believed, or thought he saw is immaterial." *Id.* at 400. Importantly, latency was not judged from the vantage point of a bicycle rider. What was important was "that any person could stand near the water diverter and see it." *Id.* In determining that the condition was obvious, this Court noted:

that the City was able to walk up to the area and photograph it without any need to unclose or uncover the condition. Like *Swinehart*, ***the fact that the condition can be easily photographed is an acknowledgment that the condition is obvious.***

Id. at 401 (emphasis added). The City's post-accident decision to paint the berm made the condition "more obvious," but it still was not latent before and summary judgment was appropriately entered for the City. *Id.*

Appellants make no effort to distinguish *Jewels*, which controls disposition of the latency issue and cannot be reasonable differentiated from the current case. This Court's analysis in *Jewels* completely ruins the materiality of Appellants' theories – put forward by their experts – that the visibility of the entrance bollard should be evaluated from the standpoint of a bicyclist. The experts' observations are immaterial because the obviousness of the bollard is properly evaluated by a person standing near it. Moreover, because the entrance bollard can be readily photographed, it is not latent as a matter of law.

Instead of confronting *Jewels* head on, which they cannot, Appellants suggest that it was wrongly decided because it supposedly conflicts with *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 966 P.2d 75 (1999). The differences between these two cases, however, are as obvious as the entrance bollard.

The *Ravenscroft* case addressed whether tree stumps submerged in a lake reservoir were latent conditions, and not surprisingly, found that they were. Appellants desire to ignore *Jewels*, a biking case, in favor of *Ravenscroft*, a boating case, but this approach cannot be sustained. Consistent with the *Jewels* principles on latency, an underwater tree stump is hidden beneath the surface of the water and no one can “stand” next to it to observe the condition. Moreover, an underwater tree stump cannot be

readily photographed from the surface absent “uncover[ing] or manipulate[ing] the surrounding area” by lowering the reservoir level. *See Jewels*, 183 Wn.2d at 400. In short, a person can easily see a bollard sticking up three feet in the middle of a trail, but a stump hidden under “murky” lake waters is a different story. *See Ravenscroft*, 136 Wn.2d at 916 (lake described as “somewhat murky”).

In the current case, the alleged injury-causing condition was not latent. The white bollard with a reflectorized red button for southbound cyclists like Mr. Schwartz was readily apparent. The photographs contained in the complaint and Appellants’ expert report demonstrate that the bollard was present and obvious at the park entrance. There is nothing “latent” about this bollard.

IV. CONCLUSION

For the foregoing reasons, the Court should affirm the grant of summary judgment for King County. As a matter of law, King County is entitled to recreational use immunity under the facts of this case.

RESPECTFULLY SUBMITTED this 14th day of March, 2019.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on March 14, 2019, I electronically filed the following document **King County's Response Brief** with the Clerk of the Court in Supreme Court Cause No. 96263-4, which will send notification of such filing to the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 14th day of March, 2019.



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