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CASE NO. 63787-8-I
(King County Superior Court No. 07-2-29545-3 SEA)

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

SUSAN CAMICIA,

Appellant,

v.

THE CITY OF MERCER ISLAND,

Respondent.

RESPONDENT'S BRIEF

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ORIGINAL

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I. INTRODUCTION

Plaintiff-Appellant, Susan Camicia, was injured while riding her bicycle on the I-90 bike trail when she collided with a large wooden bollard. She brought suit against Defendant-Respondent, the City of Mercer Island (“the City”), alleging various negligence theories. Because the I-90 bike trail is, by definition, land used for “bicycling”—and thus, explicitly protected by the recreational use immunity statute—the City moved for summary judgment. This straightforward application of law was well-taken by the Honorable Laura Inveen, who dismissed the case.

Now, on appeal, Camicia raises a plethora of novel legal arguments and confusing policy discussions—many for the first time—in hopes of resisting the conclusion dictated by the plain language of RCW 4.24.210. After taking a number of liberties with the record,¹ Camicia’s brief boils down to three overarching legal arguments:

- (1) the I-90 bike trail is not actually a bike trail because it can be used by bike-commuters;
- (2) state tort law is preempted by a third-party highway funding determination; and
- (3) the City does not actually own or control the trail.

¹ The City has prepared a chart to clarify some of the more significant misrepresentations. *See* Appendix, Exhibit A.

None of these theories are supported by the record, nor by any fair reading of the case law. Accordingly, Camicia’s invitation to rewrite settled law should be declined.

Perhaps sensing as much, Camicia generates a number of new arguments on appeal. For example, despite having never before suggested that City charged “a fee” for use of the I-90 trail, she argues as much now in what she terms a “related issue” (presumably, as opposed to an “assignment of error”). The Court should not indulge this new factual argument—which cannot be developed or fully responded to here—but to the extent that it does, it ultimately lacks merit.

Tragic facts do not justify ignoring the law. To the contrary, they require adherence to the law with even more rigor. If sympathetic plaintiffs are permitted to sidestep recreational immunity, rational landowners will not hesitate to close their land to the recreating public, thereby defeating the very purpose of the statute.

Consistent with the language and intent of RCW 4.24.200 and .210, Judge Inveen’s order of dismissal should stand.

II. STATEMENT OF THE CASE

A. Factual Background

1. THE I-90 BIKE TRAIL IS A BIKE TRAIL AND HAS ALWAYS BEEN CONSIDERED A RECREATIONAL AREA BY THE CITY

At the time of the accident, Camicia was riding along a section of the I-90 bicycle trail owned by the City of Mercer Island. CP 4. She does not allege that she was charged a fee for its use, nor was one ever assessed to any cyclist using the trail.²

While the I-90 bike path generally follows the north side of the I-90 freeway, there are places where it diverges from City streets altogether, and runs through grassy landscapes, such as Luther Burbank and Lid Parks. CP 158.

It was originally built by the Washington Department of Transportation in the mid to late 1980's. CP 157. The path was, then, part of I-90's limited access right of way, specifically, the "SR 90 North Mercer Connection." *Id.* This project included design and construction of a "bike path," as it was referred to. *Id.*

The original plan sheets reflect construction of a "bike path." CP 158; CP 161-66. At one point, the contractor specially ordered curb cuts for ramps onto the "bike path." CP 158; CP 170-72. And a local environmental assessment refers to the area as a "bike trail," as did State Department of Transportation plans. CP 158; CP 173-75; CP 167-69.

But more importantly, the City *itself* always referred to its property as a bike path. The location of Camicia's accident is located within—and

² Because this issue was never argued before the trial court, there is little to substantiate this fact except common sense. It is not expected that Camicia will challenge it.

designated as *part of*—the linear park system. CP 159; CP 688.³ In the City’s Comprehensive Park, Recreation, Open Space, Arts & Trail Plan, major park elements are identified. CP 159.

It refers to the I-90 trail and Linear Park as “regional parks.” *Id.*

The City’s Comprehensive Plan states:

I-90 Trails and Linear Park

Primarily located along the north side of I-90, a multipurpose pedestrian/bicycle regional trail will connect the East Channel and Floating Bridges in 1992. Spur connections across the lids and overpasses will also be provided, tying together both sides of the 8-lane freeway. *In total there will be 8 miles of trails in the corridor. Both sides of I-90 and portions of the lids and overpasses will be heavily landscaped and used as park lands.* The linear park also includes 90.5 acres along the freeway. The major portion of this park will buffer the central business district from the freeway.

CP 159; CP 178 (emphasis added). The Mercer Island Parks Guide, too, refers to the location as a “regional trail.” CP 160; CP 181-82.

Indeed, by Ordinance, the City must treat the I-90 bike path differently than a road or transportation facility. CP 688. For example, while adult entertainment would be permissible next to transportation facility—such as a road or sidewalk—it must be kept at least 600 feet from the recreational I-90 bike trail. CP 688-89.

³ This designation is consistent with planning documents and records dating back to 1973. CP 688.

Furthermore, the design of the path is inconsistent with anything *except* a bike path. The path has a width of 8-10 feet and asphalt construction. CP 158. Had it served some other purpose, such as a sidewalk, the width and construction would make no sense. CP 159. Its use by bicyclists, walkers, runners, and other “wheeled users” was specifically anticipated. *Id.* Narrower sidewalks, in contrast, are designed for exclusive use by pedestrians. *Id.*

This is the very reason that bollards were used. Bollards are large wooden posts, unique to pathways that are expected to accommodate bicycle traffic. CP 143-45; CP 158. Because these paths are wider, it would be easy for a vehicle to mistake them for a roadway and attempt to enter them. *Id.* Accordingly, the bollards serve to distinguish the street system from the pathway—thereby separating vehicle traffic from bicycle traffic. *Id.*

2. CITY OFFICIALS, YAMASHITA AND LANCASTER, TESTIFIED THAT THE CITY-OWNED PORTION OF THE I-90 BIKE TRAIL IS CONSIDERED RECREATIONAL AND COULD BE CLOSED DOWN, IF NEEDED

In her brief, Camicia implies that—despite the above evidence—the City still does not “own” or “control” the bike path. To get there, she relies heavily on excerpts from the deposition transcripts of Messrs.

Yamishita and Lancaster. The City must correct the record, as it did at the trial court level.

First, Steve Lancaster is the Director of Development Services for the City. CP 687. He was designated as the City's CR 30(b)(6) witness and asked to investigate a finite number of topics. But what he *was not* asked to do was research whether the City "had authority to close off the entire I-90 trail." CP 581. Yet, at his deposition, that is what he was asked about. *Id.* Counsel for the City objected and the following colloquy ensued:

The City: ... this is a 30(b)(6) deposition and you're now suggesting that he's gonna be giving answers to questions that would somehow be statements of the City of Mercer Island when he's been given no opportunity to investigate these matters.... My intent here is today was to try to respond fully and completely to the notice as given and not to amendments that are being made as we are underway...

Camicia: ... Does the City have an objection to Mr. Lancaster testifying to what he knows on his – from personal knowledge at the deposition?

The City: ... I have no objection today, to when this deposition of the 30(b)(6) is concluded, we'll tee up a second dep, ask him any other questions you want, but this one, in my opinion, is a special dep... there are legal consequences to that.

Camicia: Okay. Fair enough.

CP 581-82. By agreement, Mr. Lancaster gave a brief deposition based upon his admittedly minimal personal knowledge. CP 783-84. In it, he

repeatedly couched his responses in terms his uncertainty. *See id.* (“I’m not sure about that”); *id.* (“To my knowledge...”); *id.* (“I assume...”). When asked whether the City could “close off [*the entire*] I-90 trail, he suggested that it *probably* could not.” CP 685.

At the trial court level—like here—Camicia represented to the Court that “30(b)(6) witness Mr. Lancaster testified” that the City “lacked authority to close the I-90 trail.” *Appellant’s Br.* at 10.

Not only is this statement *not* from a CR 30(b)(6) deposition, but it is deeply misleading as well. While it is true that the City could not close off the “entire I-90 trail”—that is, the parts it did not own—Mr. Lancaster actually testified that the City owned the accident site and WSDOT had *no authority over that section*. CP 677; CP 680. *See also* Appendix B (Supplemental Declaration of Steve Lancaster) (citing CP 675-86).

Mr. Yamashita, the City Engineer, was similarly misquoted. A review of the deposition transcript cited to by Camicia tells a different story than her brief suggests. Mr. Yamashita testified:

Q: Could the City of Mercer Island shut off the I-90 trail without the permission of the Washington State Department of Transportation?

A: In any location across Mercer Island?

Q: Yes. To permanently – well, let me just ask it this way: All the way across Mercer Island from the East Channel Bridge to the floating bridge, could Mercer Island shut off

the I-90 trail permanently across the island without the permission of the Washington Department of Transportation?

A: I don't know for sure. It may be mentioned in the turnback agreement, but I would assume the answer would be no.

CP 778 (portions omitted from Camicia's brief emphasized). Mr. Yamashita's testimony is similar to Mr. Lancaster's insofar as they agree the City cannot shut down the *entire I-90 trail*.

But also like Mr. Lancaster, Mr. Yamashita specifically rejected the claim that WSDOT somehow retains jurisdiction over the accident site. CP 608; CP 645-46. Not only *could* the City shut down its portion of the bike path without permission, it *did so* at various times during the construction of the Park-and-Ride. CP 609; *see also* Appendix C.

Indeed, *even* WSDOT denies that it has "controlling authority" over the accident site, which it does not own (CP 606-07). When asked, WSDOT representative, Paul Kruger, explained:

Q: Okay. Does the State of Washington Department of Transportation have any authority, to your knowledge, to regulate transportation on any lands it does not own?

A: I'm not aware of a circumstance, no.

CP 504 (Objections omitted).

These misrepresentations did not go unnoticed by Judge Inveen. In her memorandum order, she wrote:

Plaintiff argues that the deposition testimony of city employees Lancaster and Yamashita stands for the proposition that the city does not have control over the portion of the trail on which Plaintiff's accident occurred. However, a closer reading of that testimony in context does not stand for such...

CP 865 (emphasis in original). Given the reprimand she received from the trial court, it is surprising that Camicia would make the same misrepresentations to this Court.

3. THE FEDERAL GOVERNMENT MADE AN INDEPENDENT DETERMINATION, WHICH THE CITY NEVER CONCURRED TO OR SUPPORTED

Camicia also relies heavily on Section 4(f) determination, which was referred to in the record. As discussed later in this brief, *infra* Section III, F, this was a determination made by the U.S. Department of Transportation, for purposes of highway funding. CP 752-53.

First, as Judge Inveen pointed out, this determination did not even involve the City-owned portions of the bike path. CP 940-41. Even the author of WSDOT's evaluation, Paul Kruger, acknowledged this. CP 504. Despite several suggestive and leading questions, he testified (repeatedly) that the accident site outside its scope:

Q: Okay. And it's your understanding that the EIS pertained to the Park-and-Ride lot; correct?

A: No. My recollection is that the EIS did not address the effects of the Park-and-Ride or did not have any effect to the Park-and-Ride.

Q: Okay. Did the EIS address the shared-use path adjacent to the Park-and-Ride?

A: I don't recall that we did.

Q: Okay. You don't recall whether the EIS did?

A: My recollection is that we did not consider that.

Q: No, but that wasn't the question I asked. I was asking if it was your recollection that the Environmental Impact Statement addressed the path on I-90.

A: My recollection is that we did not address the path on I-90 by the Park-and-Ride.

CP 504 (Objections omitted).

Nor did the City "concur" to any Section 4(f) determination. The first document relied upon by Camicia is a "Finding of No Significant Impact" prepared by the U.S. Department of Transportation. It states that the City "had reviewed preliminary versions of the [Environmental Assessment]." CP 769. There is nothing that suggests agreement or concurrence.

The second document is that Environmental Assessment. It provides that a number of Mercer Island staff and appointed officials "were consulted"—largely on unrelated issues. *See* CP 775. City Engineer Yamashita, for example, was consulted on a "drainage analysis."

Id. Others were consulted on “site design.” *Id.* Again, there is nothing indicating “concurrence” that the accident site was not for recreation.

Camicia’s claim that a highway funding determination—made by a third party—somehow controlled our case was soundly rejected by Judge Inveen. CP 878-79.

4. THE ACCIDENT OCCURRED BECAUSE CAMICIA WAS NOT LOOKING WHERE SHE WAS BICYCLING

On the afternoon of June 19, 2006, Camicia, like many others, was riding her bike recreationally⁴ on the I-90 bike path in Mercer Island. CP 4; CP 566. It is undisputed that she was not charged a fee to use the bike path.

While riding with a companion, Camicia failed to account for the wooden bollard in the middle of the bike path near North Mercer Way. CP 4. She testified that a construction footing—placed by co-defendant, Howard S. Wright—caught her attention. CP 568.

Camicia does not claim that the bollard was invisible, or even difficult to see. Rather, she admits that she was “focusing on the footing,” and not looking in the direction she was going. CP 568. She further

⁴ Though Camicia rests her appeal on the notion that she was a “vocational commuter,” her deposition transcript tells a different story. It is apparent that she road home from work, met a friend, and proceeded to bicycle around Mercer Island for recreational purposes. CP 566. However, for the reasons set forth in this brief, any disagreement about Camicia’s subjective intentions are not material to the outcome of this appeal.

conceded that, had she looked up, she would have seen the bollard in front of her. CP 567.

Unfortunately, she collided with it and was thrown from her bike. CP 5. She brought suit against the City and Howard S. Wright Construction, alleging various negligence theories. CP 3.

B. Procedural Posture

1. THE OUTCOME OF THE FIRST SUMMARY JUDGMENT HEARING WAS DICTATED BY THE OPEN QUESTION OF “OWNERSHIP”—WHICH CAMICIA ACKNOWLEDGED WOULD ULTIMATELY BE RESOLVED BY THE COURT

Camicia implies that the different outcomes at the two summary judgment were just “luck,” with one judge accepting an argument that another judge would not. It was certainly not that arbitrary. The first hearing before Judge McBroom involved a record in which “ownership” and “authority” over the I-90 trail were not resolved.

This was so, because at the time the City brought its first motion, it had no reason to believe ownership would be disputed. In Camicia’s own Complaint, she alleged that the City “owned, occupied, maintained and controlled” the accident site. CP 4. The City, in its Answer, “admitted” that it was a City right-of-way. CP 16-17. This, the City believed,

conclusively resolved the issue of ownership and control.⁵ The issues were therefore not developed in the City's moving papers.

Yet, disregarding her own Complaint and the judicial admissions on file, Camicia's opposition to summary judgment focused almost *exclusively* on ownership. CP 303; CP 310-318.

Camicia also misrepresented the testimony of Messrs. Yamashita and Lancaster, as she did here. CP 311-12. *See supra*, Section A.

Given the short time it had to file a reply brief—and prohibitions against new evidence in reply—the City could not adequately respond to Camicia's surprising arguments and claims. The City did the best it could, but noted in its reply that, at most, its motion should be denied “without prejudice,” so that an adequate record could be developed. CP 497 (Note 6).

At the hearing, Judge McBroom found a question of fact. With respect to ownership, all parties agreed that this would ultimately have to be resolved by a court.

The Court: First off, ownership has to be a question of law. That can't be a jury question, can it? Maybe there isn't sufficient evidence to prove it in this motion for summary judgment. But sooner or later, somebody is going to figure out who owns that land.

⁵ Facts admitted in pleadings are withdrawn from contest and may be taken as established. *Neilson v. Vashon Island Sch. Dist.*, 87 Wn.2d 955, 958, 558 P.2d 167 (1976).

Camicia: I think you're right.... I'm saying there is an issue of fact on ownership because we've shown you the documents which say the state owns it and they don't know...

RP 47. On the record before Judge McBroom, it was indeed unclear whether the City owned and controlled the land. RP 53-54. He therefore denied summary judgment "without prejudice." CP 545-46.⁶

Shortly after this ruling, Judge McBroom retired and the case was reassigned to the Honorable Laura Inveen.

2. THE SUMMARY JUDGMENT PROCEEDING BEFORE JUDGE INVEEN INVOLVED A COMPLETE—AND FACTUALLY UNDISPUTED—RECORD ON BOTH OWNERSHIP AND RECREATIONAL USE IMMUNITY

After the hearing before Judge McBroom, the City conducted a title search and retained a surveyor to confirm its ownership of the accident site. CP 606-07. Consistent with its long-time understanding and belief, it had been the fee simple owner of the bike trail where Camicia's accident occurred since 2000. *Id*; CP 610-41 (quitclaim deed and survey).

In addition, the City worked with Mr. Yamashita and Mr. Lancaster to prepare supplemental declarations. The City expected that Camicia would attempt to, again, misquote their testimony. Accordingly, thus, the individuals prepared detailed declarations, attaching the cited

⁶ This is not the decision being appealed. Accordingly, Camicia's reliance on colloquy from the hearing as "authority" and "admissions" is misplaced.

portions of their depositions. *See* CP 606-47 (Yamashita); CP 675-686 (Lancaster).

With a complete factual record, the City renewed its summary judgment motion. Camicia opposed on two grounds, namely, that the City did not have legal authority to close the trail (CP 713) and the City “viewed” the trail as a public transportation route (CP 716).

The City’s motion was granted by Judge Inveen. After reviewing the record and case law, she issued a thoughtful memorandum opinion thoroughly addressing—and rejecting—Camicia’s two arguments. CP 872-79.

Soon after, Camicia sought and received permission to pursue this interlocutory appeal under CR 54(b). CP 962.

3. THE SCOPE OF THIS APPEAL IS MORE LIMITED THAN CAMICIA SUGGESTS

The Court is certainly free to review the memorandum in opposition to summary judgment that Camicia submitted to Judge Inveen. CP 699-722. As stated above, she argued *two grounds*: (1) legal authority to open and close the trail and (2) the City’s viewpoint. Indeed, even the trial court reiterated that these were the “two grounds” before it. CP 875.

Camicia *did not* argue:

A. That she was owed a “contractual duty”;

- B. That the City charged a fee for use of the bike trail;
- C. That the bike trail involved “patchwork immunity”;

These, rather, are all new arguments on appeal, never raised or argued, at the trial court level. Judge Inveen never had an opportunity to rule on them, nor did the City have an opportunity to factually develop them.

III. AUTHORITY AND ARGUMENT

A. Standard Of Review

An order granting summary judgment is reviewed *de novo*. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007). The admissibility of evidence considered in rendering such an order is reviewed for an abuse of discretion. *Holbrook v. Weyerhauser Co.*, 118 Wn.2d 306, 314-15, 822 P.2d 271 (1992) (denial of a motion to strike declarations).

B. Summary Of Argument

In her brief, Camicia asks the Court to disregard plain statutory language and on-point case law, in favor of unrelated federal determinations and esoteric policy claims. Such legal gymnastics are unnecessary. This was a bicycle accident, occurring on a City-owned bicycle path. Because the Legislature explicitly included “bicycling” within the ambit of recreational immunity, the analysis should end there.

Camicia resists this straightforward logic, first insisting that the presence of “bicycle commuters” renders the bike path non-recreational. This is just flat-out wrong. Even assuming the I-90 bike path is used by commuters, this has never been relevant to recreational use immunity:

The statute applies equally to everyone who enters a recreational area. If an individual is commuting from one point to another, by either walking, running, or bicycling, said individual is at least secondarily gaining the benefits of recreation even though his primary goal may be the actual act of commuting.

Riksem v. City of Seattle, 47 Wn. App. 506, 512, 736 P.2d 275 (1987) (citing *McCarver v. Manson Park & Rec. Dist.*, 92 Wn.2d 370, 377, 597 P.2d 1362 (1979) (declining to limit recreational immunity statute based upon primary and secondary uses of the land). Indeed, the statute has been repeatedly applied to accidents *on roads and bridges*, where there is an overwhelming “transportation use.” Declining to do so here—on a bike path—would represent an extraordinary deviation from precedent.

“In determining whether the statute applies, the courts look to the purpose of the landowner.” DeWolf and Allen, WASHINGTON PRACTICE, § 17.18 (3d. Ed. 2009). Though the City’s recreational purpose (*i.e.*, that the I-90 bike path be operated as a bike path) is well established in the record, Camicia insists that this is actually a lie or pretext. To get there, she badly misquotes the testimony of two city officials—for the third time, now—

and points to an independent federal determination, conducted for the purpose of highway funding. Judge Inveen saw through these misrepresentations, as Court this should, too. *See* Appendix A. Furthermore, there is no principled reason to rewrite the state's tort law, based upon third-party highway funding determinations. Quite the opposite, in fact, if courts begin stripping landowners of immunity based upon third-party actions which cannot be predicted or controlled, this uncertainty will deter rational landowners from opening their land. Camicia's suggestion that immunity should hinge on something other than the landowner is not only contrary to settled law, but frustrates the purpose of the statute.

Finally, Camicia's newly-minted appellate arguments are being unfairly raised for the first time on appeal. Parties may not sandbag each other with new factual arguments on appeal, as the closed-record precludes any fair response. *See* RAP 2.5(a). Furthermore, here, in addition to being procedurally barred, these arguments ultimately lack substantive merit—perhaps explaining why they were not raised before.

For the reasons more fully set forth below, Judge Inveen's order granting summary judgment should be affirmed.

C. Because RCW 4.24.200 and .210 Are Unambiguous, They Are Not Subject To “Interpretation.” But Even If They Were, Recreational Use Immunity Must Be Construed In A Manner That Effectuates—Not Defeats—The Legislature’s Intent

Before addressing Camicia’s arguments, some background is appropriate. The purpose of recreational use immunity is well-established. It is a mechanism to encourage landowners to open their land to the recreating public. RCW 4.24.200; *Nauroth v. Spokane County*, 121 Wn. App. 389, 392, 88 P.3d 996 (2004). As such, landowners are not generally liable for unintentional injuries on recreational land. *Id.*

In her brief, Camicia attempts to subvert the purpose of the statute under the guise of “interpretation.” She argues that immunity represents a departure to the common law, and thus, the statute should be “construed narrowly.” While perhaps true in a vacuum,⁷ Camicia points to no part of the statute that is actually ambiguous or needs “interpretation.” A clear statute—as this one is—is not “construed.” *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

Moreover, a properly-enacted statute *is* public policy. *Riksem v. City of Seattle*, 47 Wn. App. 506, 511, 736 P.2d 275 (1987); *see also*

⁷ This “narrow construction” maxim has come under fire in recent years. Henry Campbell Black, the author of Black’s Law Dictionary, criticized it as “no longer supported by reason.” Henry Campbell Black, M.A., “Handbook on the Construction and Interpretation of the Laws,” at 240 (2008). Justice Scalia, more pointedly, referred to it as a “sheer judicial power grab.” Antonin Scalia, “A Matter of Interpretation: Federal Courts and the Law,” at 29 (1997).

Brewer v. Copeland, 86 Wn.2d 58, 62, 542 P.2d 445 (1975) (legislature is not bound by the common law). The Legislature set forth its policy objective in RCW 4.24.200:

The purpose of RCW 4.24.200 and 4.24.210 is to encourage owners or others in lawful possession and control of land and water areas or channels to make them available to the public for recreational purposes by limiting their liability toward persons entering thereon and toward persons who may be injured or otherwise damaged by the acts or omissions of persons entering thereon.

RCW 4.24.200; *see also Ochampaugh v. City of Seattle*, 91 Wn.2d 514, 523, 588 P.2d 1351 (1979) (“it is apparent that this statute was enacted because of a greatly expanding need and demand for outdoor recreational opportunities”).

Even assuming some ambiguity were present, this statute—like any other statute—must be construed in a manner that effectuates the Legislature’s intent. *Riksem*, 47 Wn. App. at 511. Accordingly, a reading of the statute that would *discourage* landowners from opening their land must be rejected.

D. The Plain Language Of The Recreational Immunity Statute Dictates Summary Judgment In Favor Of The City

The statute provides, in pertinent part, that:

... any public or private landowners or others in lawful possession and control of any lands whether designated resource, rural, or urban, or water areas or channels and lands adjacent to such areas or channels, who allow

members of the public to use them for the purposes of outdoor recreation, which term includes, but is not limited to... *bicycling*, skateboarding or other nonmotorized wheel-based activities... without charging a fee of any kind therefor, *shall not be liable for unintentional injuries to such users*.

RCW 4.24.210 (emphasis added). In *Riksem v. City of Seattle*, 47 Wn. App. 506, 510-11, 736 P.2d 275 (1987), the plaintiff was riding his bicycle along the Burke Gilman bicycle trail when he fell and was injured. He—like Camicia—made several arguments in opposition to recreational use immunity.⁸ The court summarily rejected all of them, concluding that immunity applied to the bike trail. *Id.* at 513.

The Court can end its analysis there. Like Riksem, Camicia was bicycling on a bike path—reaping the very benefit that recreational immunity affords—at the time of her accident. Though certainly sympathetic, such accidents are exactly the reason that the Legislature enacted RCW 4.24.200 and .210. Where, as here, the landowner voluntarily holds a bike path open to the public for recreational use, immunity must apply. *Id.*

⁸ Plaintiff Riksem opposed recreational immunity on the following grounds, many of which are strikingly similar to Camicia’s appeal: (1) the statute must be read in conjunction with other statutes, (2) the City did not “open up” property not otherwise available for recreational use, (3) the statute violates public policy, (4) the City knew of the existence of a dangerous artificial latent condition, (5) the City’s conduct was willful and/or wanton. *Riksem*, 47 Wn. App. at 510. All of the arguments were rejected. *Id.*

As Judge Inveen recognized, everything beyond this point represents a distraction. *See* CP 864 (“Plaintiff [argues] the Recreational Use Immunity statute does not apply on two grounds... Both arguments fail.”)

E. The Authorities Uniformly Reject Camicia’s Suggestion That A Particular User’s “Subjective Purpose” Has Any Bearing On The Recreational Immunity Analysis

Despite the language of the statute—and its plain applicability to bicycling—Camicia claims that she was a “vocational commuter,” and therefore, treated differently under the statute. *Appellant’s Br.* at 23.

This argument is contrary to overwhelming authority. To determine whether the statute applies, the Court views the circumstances from the *standpoint of the landowner*. *Cultee v. City of Tacoma*, 95 Wn. App. 505, 514, 977 P.2d 15 (1999) (citing *Gaeta v. Seattle City Light*, 54 Wn. App. 603, 608, 774 P.2d 1255 (1989)). If the landowner has brought himself within the terms of the statute, it applies irrespective of the user’s purpose in coming onto the land. *Id.*

In *Gaeta*, a motorcyclist was injured while riding across Diablo Dam when he was injured on a railroad track. *Id.* at 605. Like Camicia, he attempted to circumvent immunity by claiming that he had a “commercial purpose” for using the land. *Id.* at 608. The court emphatically rejected the argument:

We find the proper approach in deciding whether or not the recreational use act applies is to view it from the standpoint of the landowner or occupier. If he has brought himself within the terms of the statute, then it is not significant that a person coming onto the property may have some commercial purpose in mind. By opening up the lands for recreational use without a fee, [landowner] has brought itself under the protection of the immunity statute...

Id. at 608-09 (emphasis added). This has since been the recognized approach to applying RCW 4.24.210. See DeWolf and Allen, WASHINGTON PRACTICE, § 17.18 (3d. Ed. 2009) (“In determining whether the statute applies, the courts look to the purpose of the landowner rather than the purpose of the visitor at the time of the entry upon the land.”).

And having been applied for decades, it is, for all intents and purposes, part of the statute. Where the Legislature refuses to clarify its intent following a judicial interpretation of a statute, acquiescence is presumed. *Buchanan v. Int'l Bhd. of Teamsters*, 94 Wn.2d 508, 511, 617 P.2d 1004 (1980). In such circumstances, the courts should not “change their mind” as to what a statute means. See *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004).

Consistent with longstanding precedent and legislative acquiescence, the City’s recreational intent for the bike path controls Camicia’s subjective purpose for using it is immaterial.

F. Camicia’s Claim That The I-90 Bike Path Is A “Transportation Facility” Is Factually Unsupported And Legally Irrelevant

Camicia responds to the wealth of evidence of the City's intent with a blithe accusation that "it is all a pretext." She argues that the I-90 bike path is, in actuality, a transportation facility because it can be used by commuters. As is evident upon review of her citations, the factual record does not support her. *See* Appendix A. Nor does Section 4(f). And the ultimate irony is that the case law would afford recreational immunity irrespective of this factual dispute.

**1. THERE IS NO BASIS TO PREEMPT STATE TORT LAW
WITH AN UNRELATED FEDERAL TRANSPORTATION
FUNDING STATUTE**

Though Camicia quotes at length from the Section 4(f) determination, it is telling that almost no background or legal context is offered. She simply proceeds by assertion. Some clarification is in order.

Section 4(f) is a *transportation funds statute*. Its purpose is to ensure that federally-funded roads do not encroach on park land if prudent and feasible alternatives exist. 49 U.S.C. § 303(c)(1). Where the community has already decided a park should exist, Section 4(f) will limit installation of roads by withholding funds. *See Sierra Club v. Department of Transportation*, 948 F.2d 568, 574 (9th Cir. 1991).

Important—though omitted from Camicia's brief—is the fact that Section 4(f) is, by definition, a *federal* decision, not local. The U.S.

Supreme Court has went so far as to *require* the Secretary of the Department of Transportation to go beyond the information supplied by state and local officials and reach “his own independent judgment” as to Section 4(f). *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 412, n. 28 (1971), *abrogated on other grounds*, 430 U.S. 99, 105 (1977). The Fifth Circuit explained:

Congress in enacting [Section] 4(f) clearly did not intend to leave the decision whether federal funds would be used to build highways through parks of local significance up to the city councils across the nation. Similarly, we find that the national policy to preserve... wildlife and waterfowl refuges would be frustrated by vesting in state or local officials having jurisdiction over publicly owned lands to be used for a federally funded highway the authority to make a final and binding determination of local significance. Section 4(f) is a determination for the Secretary of Transportation, not the locality.

National Wildlife Federation v. Coleman, 529 F.2d 359, 268-69 (5th Cir. 1976) (internal citations omitted) (emphasis added). The U.S. Department of Transportation’s determination controls. The beliefs of the local jurisdiction do not.

To be sure, these regulations make sense in its proper context. But that is not to say that Section 4(f) has *anything* to do with state tort law. In fact, there is a “strong presumption” that it does not. *See Engine Mfrs. Ass’n v. South Coast Air Quality Management Dist.*, 498 F.3d 1031, 1040-41 (9th Cir. 2007) (“The historic police powers of the States are not to be superseded by the Federal Act *unless that was the clear and manifest*

purpose of Congress.”) (internal citations omitted) (emphasis added). Here, there is nothing in the federal statute indicating *any* intent to alter or affect state tort liability on “recreational land.”

Indeed, Section 4(f) is not only inapposite, but would actually subvert state law. As discussed above, Washington courts have uniformly concluded that the only thing that matters is *the landowner’s* reasonable perspective on its recreational land. *See, e.g., Cultee v. City of Tacoma*, 95 Wn. App. 505, 514, 977 P.2d 15 (1999). And as a practical matter, this makes sense. It is the landowner who must have incentive—or at least protection—to make his or her land available. *See* RCW 2.24.200 (purpose to encourage landowners to open their land). However, if that protection can be suddenly lost, based upon the “independent judgment” of a third party, the landowner is left with only risk and uncertainty. Against this backdrop, no rational landowner would open land.

It also bears emphasis that the agencies making the Section 4(f) determination have wholly different interests. In fact, the term “recreational land,” as it is used in the federal regulations, is a term of art.

To illustrate, it is interesting to consider what would have happened if the Secretary of Transportation concluded that the I-90 bike path *was* “recreational land.” It would have been a disaster.

The State then would have been required to find an “alternative” to the road adjacent to the bike path—that is, the I-90 *freeway*—because of the effect of fast-moving traffic. *See Adler v. Lewis*, 675 F.2d 1085, 1091-92 (9th Cir. 1982); *see also Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1449-55 (9th Cir. 1984) (alternative required unless it would require “extraordinary magnitudes”). This, in turn, would have probably halted development and maintenance of the freeway and other state roads adjacent to the I-90 bike path. 49 U.S.C. § 303(c).

The agency concluded that the I-90 bike path was a “transportation facility”⁹ out of pragmatism. Any other determination would have put funding and the freeway in jeopardy. Suffice to say, there was no intent to alter Washington tort law in the process.

To summarize, this federal highway funding does not rewrite tort law. No court has said that, nor do existing decisions imply it. If anything, that result would only serve to inject uncertainty into the application recreational immunity, thereby discouraging property-owners from opening their land. Camicia’s attempt to confuse a predictable and well-established body of law should be rejected.

⁹ Again, it is anything but clear that this determination even extends to the City’s property. WSDOT does not believe it does. CP 505.

2. THE CITY HAS NOT “ADMITTED” THAT IT LACKED CONTROLLING AUTHORITY OVER THE ACCIDENT SITE, NOR DID IT CONCUR TO A NON-RECREATIONAL USE OF THE BIKE PATH

At least tacitly, Camicia acknowledges that Section 4(f) was not the City’s determination to make. Thus, she takes the fall-back position that the City “concurred to it.” *Appellant’s Br.* at 12-13. In support, she points to misquoted (and at times made up) facts in the record. Judge Inveen rejected this—refusing to strike the explanatory declarations of Messrs. Yamshita and Lancaster. *See* Appendix B and C. In doing so, she did not abuse her discretion.

The Court is encouraged to review the Clerk’s Papers cited in Camicia’s brief, as well as the City’s Appendix. The deposition testimony relied upon by Camicia is simply not present. *See* Appendix A. Not only are the City’s witnesses truthful and accurate, but their testimony is actually consistent with WSDOT’s beliefs that: (1) the Section 4(f) did not reach the City’s bike path; and (2) WSDOT does not have any authority to regulate City-owned portions of the I-90 bike path. CP 504-05.

The City offered overwhelming evidence that it owned the land at the accident site, considered it to be recreational, and could close it if needed. CP 606-09; CP 648-51; CP 675-78; CP 687-89.

Camicia asked Judge Inveen to strike this evidence on the ground that it was “inconsistent” with their (misquoted) deposition testimony. CP 721. Judge Inveen refused, pointing out that the testimony was not inconsistent, but actually established important facts. CP 876. In declining to adopt Camicia’s inaccurate claims, she did not abuse her discretion. *See Holbrook*, 118 Wn.2d at 314-15.

3. THE PRESENCE OF COMMUTERS ON A BIKE PATH IS ENTIRELY IRRELEVANT TO RECREATIONAL IMMUNITY

Lastly, and perhaps the ultimate irony in this line of argument, is that the case law squarely rejects the unstated but faulty premise underlying Camicia’s appeal. She argues that because bike-commuters may use the I-90 bike trail to get into Seattle, this “transportation” element precludes immunity. The case law specifically (and repeatedly) rejects this. So long as the landowner has brought him or herself within the terms of the statute, the primary or secondary nature of recreation is not relevant.

In *McCarver v. Manson Park & Recreation Dist.*, 92 Wn.2d 370, 377-78, 597 P.2d 1362 (1979), the plaintiff urged the court to limit applicability of the statute based upon the extent of the recreational use.¹⁰

The Supreme Court refused to do so in the absence of legislative guidance:

¹⁰ Interestingly, there, the plaintiff was urging the court to limit application of immunity where the defendant-landowner had land that was “exclusively” for recreational use. *Id.* The court not only rejected that argument, but went on to generally clarify that recreational immunity will not turn on the “extent” of recreation that can be derived from the land.

We decline to impose a limiting construction upon the statute differentiating land classifications based upon primary and secondary uses where the legislature did not. Arguments to achieve such a result should appropriately be addressed to the legislature.

Id.

This reasoning has subsequently been applied to accidents on roads, where the “transportation use” is far greater than any bike path. *Widman v. Johnson*, 81 Wn. App. 110, 114, 912 P.2d 1095 (1996), the plaintiff was driving along an old logging road which intersected a highway, SR 407. At the intersection—which was missing a stop sign—she collided with a pickup truck which was using the highway.

In opposition to recreational immunity, the plaintiff made an argument analytically identical to Camicia’s. She claimed that the site of her accident “was not recreational land within the meaning of the statute.” *Id.* at 114. The court summarily dispensed with the argument, concluding that any “other purposes” the road could have been used for “lack[ed] legal significance.” *Id.* (emphasis added).¹¹ Summary judgment was affirmed. *Id.* at 115.

Similarly, in *Chamberlain v. Dept. of Transp.*, 79 Wn. App. 212, 901 P.2d 344 (1995), the plaintiff was hit and killed by a vehicle while

¹¹ *Accord Gaeta v. Seattle City Light*, 54 Wn. App. 603, 608-09, 774 P.2d 1255, rev. denied, 113 Wn.2d 1020 (1989).

sightseeing on Deception Pass Bridge sightseeing. *Id.* at 214-15. The area itself was open to vehicle traffic. *Id.*

The plaintiff argued that recreational immunity should not apply to an accident on a bridge subject to vehicle traffic. The court disagreed, reasoning that “[t]he fact that ‘highway’ and ‘sidewalk’ are defined elsewhere does not require that they be excluded from the provisions of the recreational use immunity statute. *Id.* at 218. Again, summary judgment was affirmed. *Id.* at 213-14.

These cases were much closer calls, as they happened on roads with vehicle traffic. Camicia’s accident, in contrast, was on a bike path, with a fixture that is exclusive to bike paths. Even her own Section 4(f) “evidence” acknowledges that the I-90 bike path involves “recreation.” *See* CP 753 (“recreation is an important function of the path.”); CP 749 (“can be used for recreational purposes”).

The City would also submit that the distinction urged by Camicia—besides being unsupported by authority—is unworkable. Bike paths are, by their very nature “transportation.” The Legislature certainly considered this when it listed “bicycling” in RCW 4.24.210. It would make no sense to preclude immunity where bike paths involve “transportation,” but not when they involve “recreation.” *Riksem* acknowledged that bike paths involve both, and thus, are protected by the

statute. *Riksem*, 47 Wn. App. at 512 (commuters are secondarily getting benefits of recreation).

The Legislature obviously knew that bicycling is transportation. The Court should assume the Legislature meant exactly what it said and apply the statute as written. *J.P.*, 149 Wn.2d at 450.

G. Camicia’s Near-Exclusive Reliance On *Nielsen* and *Smith* Is Misplaced

Because Camicia stakes nearly her entire appeal on *Nielsen v. Port of Bellingham*, 107 Wn. App. 662, 27 P.3d 1242 (2001), and *Smith v. Southern Pac. Transp. Co. Inc.*, 467 So.2d 70 (La. Ct. App. 1985), some discussion is called for.

First, in *Smith*, the Louisiana court of appeals considered a personal injury lawsuit in which the plaintiff was driving a van along a city road, which happened to traverse a city park. *Smith*, 467 So.2d at 71. The van collided with the bottom of a railroad overpass, injuring the plaintiff. *Id.* The plaintiff sued the landowner, who defended on the ground that the road was recreational land. The court applied the Louisiana analysis—focusing on the intent of the van driver—and rejected immunity.¹² Four years later, *Smith* was limited by the Louisiana court.

¹² *Smith* stated that “where persons are allowed to use the property for purposes not associated with recreational activities, the statutes should not apply.” *Smith*, 467 So.2d at 71. This is the exact opposite of the Washington analysis, which provides that “[i]f [the landowner] has brought himself within the terms of the statute, it applies regardless of

In *Broussard v. Department of Transp.*, 539 So.2d 824 (1989) (“All *Smith* holds is that the City of New Orleans could not claim the benefit of the immunity statutes where a van-type truck struck a railroad overpass while traveling on a public street running through a city park.”).¹³

Our state’s courts have limited *Smith* as well. In *Gaeta*, the court reminded us that *Smith* involved a plaintiff driving along a roadway—which “happen[ed] to cut through a city park”—that was “built and maintained primarily for commercial use.” *Gaeta*, 54 Wn. App. at 608. It therefore did not control. *Id.* Where, as in our case, a plaintiff is using recreational land held open for public use—such as a bike path—immunity applies. *See id.*

Nielsen v. Port of Bellingham is even less apposite. *Nielsen* did not involve a street, bike path, or transportation at all. It involved a slip-and-fall at a commercial marina. *Nielsen*, 107 Wn. App. at 664. It was undisputed that fees were charged for use of the marina, but still, the Port claimed recreational immunity. *Id.* It argued that because people could also “walk around and enjoy the docks” without charge, it was

individuals’ purposes in coming onto the land.” *Cultee v. City of Tacoma*, 95 Wn. App. 505, 514, 977 P.2d 15 (1999).

¹³ The analytical weight in *Broussard*, like *Smith*, was placed on the use of the land made by land-user. This is not Washington law. *See, e.g., Plano v. City of Renton*, 103 Wn. App. 910, 913-14, 14 P.3d 871 (2000) (“the application of the statutory immunity depends on the perspective of the landowner as to the use of the land, not on the purpose of the user.”).

recreational. *Id.* at 665-66. The court did not let the Port have it both ways. *Id.* at 668-69 (finding docks were “necessary and integral” to commercial portion of land).

Our case is unlike *Nielsen* or *Smith*. Obviously, neither involved a bike path or any other enumerated use in RCW 4.24.010(a). *Smith* involved an actual roadway that “happened to” traverse a park, as well as an entirely different analysis that focused on subjective use of the land. It has also been limited by both Washington and Louisiana courts.

And *Nielsen* did not involve a road or bicycle path at all. It involved a commercial port, which, unlike the City, charged users fees. At most, *Nielsen* stands for the common-sense principle that accepting fees from recreational users is consistent with a *commercial* use of land—and the preclusive effect this has on recreational immunity cannot be rebutted by the mere say-so of the landowner.

H. Camicia’s Claims About “Source Of Funding” And “Official Designation” Not Only Read Nonexistent Language Into The Statute, But Render Existing Language Unworkable

Here, Camicia attempts to impose new requirements on landowners which are plainly absent from the statute and the case law. She argues that the Court should center its analysis on the manner and technique in which the City “officially opened” its land as recreational or look at the “source of funds.”

These arguments find no support in the statute or case law. By its own terms, the statute applies to all landowners who “allow members of the public to use them for the purposes of outdoor recreation.” RCW 4.24.210(a). Its language focuses on the “allowance” to the public, *not* some technical or legalistic opening-up process.¹⁴ The court should not assume that this was a mistake; the Legislature meant exactly what it said. *J.P.*, 149 Wn.2d at 450. New language should not be added. *See id.*

This “opening up” argument was flatly rejected in *Riksem*. There, the plaintiff argued that because the City of Seattle “inherited” the Burke Gilman Trail—as opposed to “opening it”—it should not receive immunity. *Riksem*, 47 Wn. App. at 511. The court rejected the argument as nonsensical:

[The plaintiff] is arguing that a successor in interest is not entitled to the immunity of the recreational use statute as he is not fulfilling the stated purpose of encouraging the opening of new lands for recreational use. The statute clearly states it is an encouragement for owners/possessors in control of land to make it available to the public for recreational purposes by the limiting of their liability. It would not make sense to provide immunity to only those owners who originally open up the land for recreational purposes....

Id.

¹⁴ The Legislature knows how to require municipalities to take action by ordinance. *See, e.g.*, RCW 46.55.240 (conditioning impound authority on specific ordinance). Yet, RCW 4.24.210 is devoid of such language. When language is used in one instance, but different dissimilar language is used in another, a difference in legislative intent is presumed. *Millay v. Cam*, 135 Wn.2d 193, 202, 955 P.2d 791 (1998).

Moreover, Camicia’s interpretation renders large parts of the statute unworkable. Recreational immunity protects *private* landholders, in addition to government agencies. RCW 4.24.210(a) (“any public or private landowners”). By Camicia’s logic, a private landowner—such as Weyerhaeuser—would *never* be entitled to immunity because it cannot provide council minutes, zoning, or a proclamation.

Furthermore, the bulk of the “funds” Weyerhaeuser would use to maintain its recreational land would logically come from commercial activities. Adopting Camicia’s reasoning would ultimately preclude private land owners from availing themselves to the statute. This would eviscerate the statute’s plain language and purpose.

The Court need not expend scarce time analyzing statutory factors that do not exist. Under the statute’s plain language this argument fails.

I. The Court Should Not Reach Camicia’s New Appellate Arguments, Though, Even If It Does, They Lack Substantive Merit

1. THE RULES OF APPELLATE PROCEDURE DO NOT PERMIT CAMICIA TO RAISE FACT-SENSITIVE ARGUMENTS FOR THE FIRST TIME ON APPEAL

RAP 2.5(a) provides that the Court of Appeals may refuse to review any claim of error which was not raised in the trial court first. *Martin v. Johnson*, 141 Wn. App. 611, 617, 170 P.3d 1198 (2007)

(refusing to review issue that trial court did not have opportunity to rule on first); *Re v. Tenney*, 56 Wn. App. 394, 400, 783 P.2d 632 (1989) (same).

As here, the Court is free to review Camicia's opposition to summary judgment. It will find no factual argument, nor any legal authority, suggesting that the City should be denied immunity because it "accepted a fee" for use of the I-90 bike trail. Nor will it find any claims that the City owed her a "contractual" duty. These arguments are being raised for the first time on appeal.

The City acknowledges that RAP 2.5 is a discretionary rule, and the appellate may in some cases reach new arguments. Here, it should not. These arguments are inherently factual and, had Camicia raised them in the context of summary judgment, the City surely would have responded factually. The same cannot be done now in a closed-record appeal. Camicia's failure to raise them earlier, without justification, is both unfair and prejudicial. *McPhail v. Municipality of Culebra*, 598 F.2d 603, 607 (1st Cir. 1979) ("party may not 'sandbag' his case by presenting one theory to the trial court and then arguing for another on appeal.").¹⁵

¹⁵ This is especially so in light of the relief requested. Camicia asks the Court to make an affirmative ruling that recreational immunity does not apply. *Appellant's Br.* at 41. It would surely be unfair to render such a ruling, based upon a factual record that the City could not participate in.

The City was entitled to complete the factual record, and Judge Inveen was entitled to an error-free ruling. Consistent with RAP 2.5, the Court should prudently decline to reach these new arguments.¹⁶

2. THE RECORD DOES NOT SUPPORT CAMICIA’S FEE-ARGUMENT, NOR DOES THE CASE LAW

Having stated as much, it is likely that Camicia did not offer this argument to the trial court for a very simple reason: it would not be successful. Camicia—without explicitly stating it—is actually urging this Court to strip every public and private landowner of immunity if they accept public funding into their budget. Neither the record, nor the statute, support this absurd and overreaching result.

First, Camicia’s citations to the record do not support her. As set forth in Appendix A, the clerk’s papers relied upon provide *no evidence* that the landscaping agreement was in effect at the time of the accident. The only evidence in the record is that the City owned the accident site in fee simple (*i.e.*, this land had been “turned back” already). The claim that the City was being paid to maintain its own land, based upon an agreement predating its ownership, makes no sense. *Compare* CP 606 (quitclaim

¹⁶ In reply, Camicia might argue that burying a document in the large factual record is enough to preserve her argument. If the Court is to endorse this approach to motions practice, it will be inviting unwieldy factual records, “preserving” enumerable arguments. This Court is not a second trial court, and the trial court judges are not “pigs hunting for truffles buried in briefs.” *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (*per curiam*). If an argument has merit, it should be raised specifically and distinctly prior to appeal.

deed from 2000) *with* CP 736 (1989 tumbback agreement). Unlikely speculation does not defeat summary judgment. *Seven Gables v. MGM/UA Entertainment*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

But even putting this factual problem to the side, it is equally plain that the law does not support Camicia’s new argument. A close reading of the statute demonstrates that the Legislature carefully crafted RCW 4.24.210 to specifically avoid the result Camicia seeks to bring about. The immunity language provides that landowners:

... who allow members of the public to use [their land] 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(a) (emphasis added). The Legislature could have used other language, such as “a fee of any kind *whatsoever*” or “a fee of any kind.” It did not, decidedly including the word, “therefor.”¹⁷

This word was included for a reason. It modifies the remainder of the phrase, “a fee of any kind,” by specific reference to the earlier language in the statute. If a “fee of any kind” is imposed on “members of the public [using their land] for the purposes of outdoor recreation,”

¹⁷ The Legislature certainly knows how to craft its statute in an open-ended manner. *See, e.g.*, RCW 46.70.180 (defining as an unlawful act, dissemination of misleading representations “in any manner whatsoever”); RCW 11.92.096(3) (relieving certain institutions “any liability of any nature whatsoever to any person whatsoever”). Yet, it chose *not* to use such broad, open-ended language in RCW 4.24.210. When language is used in one instance, but different dissimilar language is used in another, a difference in legislative intent is presumed. *Millay v. Cam*, 135 Wn.2d 193, 202, 955 P.2d 791 (1998).

recreational immunity does not apply. *See* RCW 4.24.210(a). This is the only way to give meaning to all of the statutory language.

Camicia's interpretation ignores the word "therefor." If that were the Legislature's intent, it would not have just said "a fee of any kind." *See Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (statutes must be interpreted so that all of the language used is given effect). A qualifying word was added to ensure that third party funds did not interfere with immunity. While assessing fees to "users" is contrary to the purpose of the statute, grants or maintenance funds are very much *consistent* with the statute's purpose. Moreover, all government landowners receive public money.

Camicia cites *Plano* and *Nielsen* for the proposition that acceptance of "any money" will destroy immunity. *Appellant's Br.* at 25. But a closer reading of those cases actually supports the City.

In both *Plano* and *Nielsen* "users" of the recreational land were charged a fee. In *Plano*, the city charged *users* a fee to moor their boats. *Plano*, 103 Wn. App. at 912. In reasoning that the statute did not apply, the court refused to parse between different types of *users*. *See id.* at 915. *Plano* did not involve a third party conferring grant money.

Neilsen v. Port of Bellingham is very similar to *Plano* in that regard. There, *users* of the Port were being charged a fee for its use.

Neilsen, 107 Wn. App. at 669. The court, following *Plano*, refused to make recreational immunity contingent on “which user” was being charged a fee. *Id.*

Here, in contrast, there is no allegation that the City charged *users* of the I-90 bike path. It is an open bike path readily available to the public. There is no facility or practical means of assessing bicyclists a fee. This distinguishes *Plano* and *Nielsen*.

Forcing landowners to choose between upkeep and limitless liability is antithetical to the purpose of the statute. *See* RCW 4.24.200 (purpose of the statute is to make recreational lands available to the public); *Riksem*, 47 Wn. App. at 511 (recreational immunity should be interpreted in a manner that effectuates the legislature’s intent).¹⁸ The Legislature likely recognized this distinction and included the word “therefor” for that very reason.

The Court should not eviscerate immunity for landowner accepting third-party money. This is contrary to the plain language of the statute and, the City would submit, an absurd result. *State v. Vela*, 100 Wn.2d 636, 641, 673 P.2d 185 (1983) (it is presumed that the Legislature does not intend to produce absurd results).

¹⁸ Had the Legislature wanted, for some reason, to discourage landowners from accepting grants money from non-users (*i.e.*, the government), it would have omitted the word “therefor,” in favor of broader reading, such as “a fee of any kind.”

3. THE FACT THAT ADJACENT PROPERTY OWNERS MADE DIFFERENT USE OF THEIR LAND IS IRRELEVANT

Camicia also argues that because the I-90 bike path is subject to differing ownership interests over its mileage, and therefore reasons that it is unfair “patchwork immunity.” *Appellant’s Br.* at 28-30. This argument, for the reasons already provided, should not be heard for the first time on appeal. But because it, too, is legally inaccurate, it does not dictate a different outcome.

Camicia, again, relies on *Plano* and *Nielsen*. Both of these cases involved accidents where the defendant owned *all* of the land at issue. *See Nielsen*, 107 Wn. App. at 664 (“Squalicum Harbor is a commercial marina owned and operated by the Port of Bellingham”); *Plano*, 103 Wn. App. at 911 (“The City of Renton owns and maintains Gene Coulon Memorial Beach Park”). What those defendants were doing, however, was attempting to shield *some* of their land with immunity, but charging a fee for use of other parts of it. The courts disallowed this scheme, reasoning that the non-fee portion was “necessary and integral” to the fee portion. *Id.* at 915.

The City, for its part, is not attempting to parse portions of its bike path so that it can charge a fee. Indeed, all of the portions of the bike path that are owned by the City are open for recreational use, without a fee.

No case cited by Camicia requires that landowners be divested of immunity because *the adjacent landowner* does not hold *their* land out for recreational use. *See State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (where no authorities are cited in support of a proposition, the court may assume that, after diligent search, counsel has found none). Indeed, at some point, all recreational land abuts non-recreational land. Camicia's reasoning precludes immunity in many—if not, all—circumstances.

Not surprisingly, the cases do not support this result. *See, e.g., Widman v. Johnson*, 81 Wn. App. 110, 114, 912 P.2d 1095 (1996) (immunity applied when accident occurred at intersection of recreational logging road and state highway); *Riksem*, 47 Wn. App. at 510 (immunity applied despite the fact that Burke Gilman trail is intersected by repeatedly roads); *see also Cultee v. City of Tacoma*, 95 Wn. App. 505, 514, 977 P.2d 15 (1999) (focus is on *the landowner's* perspective) (emphasis added).

It would completely defeat the purpose of the statute if immunity rose and fell on the actions of *neighboring* landowners. No rational landowner would open their land to the public if it could be divested, based upon on the actions of the landowners. This novel interpretation of the case law should not be accepted by the Court.

4. TRAIL USERS ARE NOT OWED A DUTY AS THIRD-PARTY BENEFICIARIES THAT OVERRIDES RECREATIONAL IMMUNITY

Lastly, and also for the first time on appeal, Camicia argues that the City actually owed her a “contractual duty.” Though this new argument, too, should not be reached it is equally deficient.

As a factual matter, this argument is unpersuasive. First, as set forth in the City’s Appendix, there is no evidence that this 1989 “agreement” was even in effect at the time of the accident, in the location of the accident.¹⁹ See Appendix A-4.

But even assuming that this agreement did control, it is a *landscaping agreement*. If the City intended to assume a safety-related duty to trail users (and waive immunity), the fact that they could delegate its obligations to “a professional landscape architect,” CP 510, would make no sense. Nor would the fact that those obligations were controlled by the “SR90 Mercer Island Landscape Plan.” *Id.*

To the extent that this contract contemplates bollards and traffic control devices, WSDOT was to remain responsible (*i.e.*, “structures”). CP 508.

¹⁹ Had this argument been raised before the trial court, the City would have offered affirmative evidence and declarations disproving Camicia’s naked factual claim. But, by virtue of the closed record, the Court is only left with the dearth of evidence Camicia can offer—which is of course leads to the same conclusion. *Seven Gables v. MGM/UA Entertainment*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986) (speculation is not competent evidence to oppose summary judgment).

Moreover, as a legal matter, even the premise of a “contractual duty” is incorrect. Nonparties to a contract can only be third party beneficiaries in limited circumstances:

If the terms of the contract *necessarily require the promisor to confer a benefit upon a third party*, then the contract, and hence the parties thereto, *contemplate a benefit to the third person...* The “intent” which is a prerequisite of the beneficiary's right to sue is 'not a desire or purpose to confer a particular benefit upon him,' nor a desire to advance his interests, but *an intent that the promisor shall assume a direct obligation to him.*

Lonsdale v. Chesterfield, 99 Wn.2d 353, 361, 662 P.2d 385 (1983) (emphasis in original). Here, the parties’ landscaping agreement does not contemplate or mention *any* third parties, let alone Camicia specifically. She is not a third party beneficiary, and cannot hold the City liable under a landscaping agreement with WSDOT.

The case relied upon by Camicia, *Kelley v. Howard S. Wright Construction Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978), was sharply limited—then subsequently rejected in subsequent holdings. Three years after it was decided, it was abrogated in *Tauscher v. Puget Sound Power & Light Co.*, 96 Wn.2d 274, 275-76, 635 P.2d 426 (1981). There, the plaintiff was employed by an independent contractor, who had entered into a contract with the defendant-homeowner to do some work. *Id.* The

plaintiff was killed in an on-the-job accident, and his estate sued the homeowner, arguing that *Kelley* imposed on it a duty of care. *Id.* at 276.

The Supreme Court refused to extend liability of a homeowner to the employee of the homeowner's contractor. *Id.* at 279. It explained that prior case law controlled, and "*Kelley* merely recognize[d] a possible exception when the owner or general contractor knows of inherent hazards of the work, and is in a position to protect against them." *Id.*; *see also Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 395-97, 391, 47 P.3d 556 (2002) (refusing to apply *Kelley* where circumstances did not demonstrate parties intended to assume "a *direct obligation* to the *intended beneficiary*" at the time of contract) (emphasis added); *Rogers v. Irving*, 85 Wn. App. 455, 465, 933 P.2d 1060 (1997) (noting that the reach of *Kelley* has been restricted; declining to impose contractual duty on homeowner to contractor's employees).

Furthermore, even assuming *arguendo* that some contractual duty to Camicia did exist, it, like any other basis for liability, would be precluded by recreational immunity. The statute provides that landowners "shall not be liable for unintentional injuries to such users." RCW 4.24.210(a). It does not differentiate between "tort liability" from "contract liability," though, the Legislature certainly knows how to do

that. *See, e.g.*, RCW 64.34.344 (Condominium Act treating immunity from tort and contract claims differently).

As this illogical distinction between one common law duty and another is absent from the statute—and not endorsed by *any* Washington case—the Court should not artificially limit RCW 4.24.210.

J. The I-90 Trail Is Well Within The Ambit Of Recreational Use Immunity, And Accordingly, The City Is Entitled To Summary Judgment

At bottom, it is factually undisputed that the City (1) owned the land at the accident site, (2) has always considered it to be recreational, (3) held it out to the public without cost to users, and (4) could exclude the public if it so chose. *See* CP 157-59; CP 606-07; CP 648-52; CP 688-89. It has undeniably brought itself within the terms of the statute. Indeed, Camicia’s brief—rife with factual misrepresentations and novel legal theories—is a testament to that very conclusion.

Recreational use immunity represents a legislative policy decision to relieve the liability burden on landowners to encourage them to open their property to the recreating public. Owners of land used for “bicycling”—such as the City—were explicitly included in RCW 4.24.210(a).

Immunity does not exist in spite of cases like this, but *because* of them. If landowners are to be stripped of immunity when they need it

most, it would be foolish to expect that their invitation to the recreating public will remain an open one.

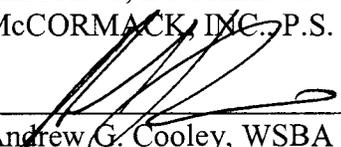
Judge Inveen correctly granted summary judgment and the City would respectfully submit that her Order should stand. Camicia may pursue recovery from co-defendant, Howard S. Wright Construction Co., to the extent that her claims are legally and factually colorable.

IV. CONCLUSION

For the foregoing reasons, the City of Mercer Island respectfully requests that the Court of Appeals affirm Judge Inveen's Order granting summary judgment.

DATED this 12th day of November 2009.

KEATING, BUCKLIN &
McCORMACK, INC., P.S.



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CASE NO. 63787-8-I
(King County Superior Court No. 07-2-29545-3 SEA)

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

SUSAN CAMICIA,

Appellant,

v.

THE CITY OF MERCER ISLAND,

Respondent.

APPENDICES

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APPENDIX A

Camicia v. City of Mercer Island
Case No. 63787-8-I
APPELLANT’S MISREPRESENTATIONS OF THE RECORD

Factual Assertion	Citation Offered	Truth
<p>“The I-90 Trail has always been a public transportation route.”</p> <p><i>Appellant’s Br.</i> at 2.</p>	<p>CP 727-728</p>	<p>CP 727 and 728 are nothing more than pictures of the accident site.</p>
<p>“[The City’s] top officials testified that the WSDOT has ‘controlling authority’ over transportation on the trail.”</p> <p><i>Appellant’s Br.</i> at 2.</p>	<p>CP 783</p>	<p>CP 783 is the cover page of Steve Lancaster’s CR 30(b)(6) deposition transcript.</p> <p>But ironically, the testimony Camicia relies upon in her brief is not even from Mr. Lancaster’s CR 30(b)(6) deposition. It is from his personal deposition—taken <i>because</i> he had no personal knowledge of “controlling authority” (and was not asked to acquire it).</p>
<p>“... <i>CR 30(b)(6) witness Steven Lancaster testified</i> the City lacks authority to close the I-90 trail to public transportation use within Mercer Island city limits:</p> <p>Q: ... Would it be accurate to say that the City of Mercer Island could not unilaterally exclude public use on the I-90 trail in the City of Mercer Island?</p> <p>A: To my knowledge, it could not....”</p> <p><i>Appellant’s Br.</i> at 10.</p>	<p>CP 844-845</p>	<p>Actual testimony:</p> <p>“Q: ... Would it be accurate to say that the City of Mercer Island could not unilaterally exclude public use on the I-90 trail in the City of Mercer Island?</p> <p>A: To my knowledge, it could not, <i>but I don’t have any specific knowledge of the regulations that are governing the use of that facility.</i>” CP 845.</p> <p>Furthermore, this is not even from Mr. Lancaster’s CR 30(b)(6) deposition. It was from his personal deposition. CP 576, 845.</p> <p><i>This same misrepresentation was offered to—and rejected by—the trial court.</i> CP 876.</p>

<p>“Mr. Lancaster testified...:</p> <p>A: ... I believe that Washington State Department of Transportation essentially acts as the controlling authority...”</p> <p><i>Appellant’s Br.</i> at 10.</p>	<p>CP 845</p>	<p>“A: <i>I’m not sure about that.</i> I believe that Washington Department of Transportation essentially acts as controlling authority.” CP 845.</p> <p>This, too, was not part of his CR 30(b)(6) deposition. This is also from his “personal” deposition. CP 576, 845.</p> <p><i>This same misrepresentation was offered to—and rejected by—the trial court.</i> CP 876.</p>
<p>“City Engineer Patrick Yamashita also testified that the City lacks independent authority to close the I-90 Trail permanently:</p> <p>Q: ... [C]ould Mercer Island shut off the I-90 trail permanently across the island without the permission of the Washington State Department of Transportation?</p> <p>A: I don’t know for sure. It may be mentioned in the Turnback Agreement, but I would assume that the answer would be no.</p> <p><i>Appellant’s Br.</i> at 11.</p>	<p>CP 778</p>	<p>Actual testimony:</p> <p><i>“Q: Could the City of Mercer Island shut off the I-90 trail without the permission of the Washington State Department of Transportation?”</i></p> <p><i>A: In any location across Mercer Island?”</i></p> <p><i>Q: Yes. To permanently – well, let me just ask it this way: All the way across Mercer Island from the East Channel Bridge to the floating bridge, could Mercer Island shut off the I-90 trail permanently across the island without the permission of the Washington Department of Transportation?”</i></p> <p>A: I don’t know for sure. It may be mentioned in the turnback agreement, but I would assume the answer would be no. CP 778.</p> <p><i>This same misrepresentation was offered to—and rejected by—the trial court.</i> CP 876.</p>

<p>Mercer Island City Manager Rich Conrad, Assistant City Manager Deb Symmonds, City Transportation Planner Nancy Fairchild, City Engineer Patrick Yamashita, City Development Services Director Richard Hart, City Associate Planner Shelley Krueger, and six City Design Commissioners were consulted <i>and concurred</i> in this NEPA determination [that the I-90 Bike Path was not recreational].</p> <p><i>Appellant's Br.</i> at 12-13 (emphasis added).</p>	<p>CP 769, 775</p>	<p>This factual claim appears to be made up. Nothing in cited papers supports it.</p> <p>In CP 769, the document states that the City “<i>had reviewed</i>” preliminary versions of the EA.”</p> <p>In CP 775, the document states that “the following Mercer Island staff and appointed officials <i>were consulted</i>,” largely on unrelated issues. Patrick Yamashita, for example, was consulted on a “drainage analysis.” Most were consulted on “site design.”</p> <p>The City’s “concurrence” never happened, explaining why it is entirely absent from the record.</p>
<p>“Lancaster confirmed that the City did not designate any portion of the I-90 Trail... as a land or facility to which RCW 4.24.210 applied.”</p> <p><i>Appellant's Br.</i> at 13-14.</p>	<p>CP 786</p>	<p>Because the statute does not <i>require</i> landowners to “officially designate” their land as subject to RCW 4.24.210, Mr. Lancaster had no idea how to answer the question. He did, however, demonstrate the City’s belief and intent with a wealth of exhibits (omitted from Plaintiff’s brief):</p> <p>A: I might need clarification of the term “officially opened.” I did find a number of documents that reflected City policy and understanding regarding the recreational nature of that facility, if that’s responsive to your question. CP 785.</p> <p>Mr. Lancaster brought 17 different exhibits to his deposition demonstrating the City’s belief that the bike trail was recreational. CP 682.</p>

<p>“The Agreement, which the City and WSDOT signed on January 28, 1987... was in effect in 2006 when the accident occurred.”</p> <p><i>Appellant’s Br.</i> at 14-15.</p>	<p>CP 740, 745, 777-778.</p>	<p>None of the citations offered by Camicia support this factual claim.</p> <p>CP 740: Pete Mayer testified that there was a “series of turnback agreements... that spell out in some complexity the responsibilities for the 76 acres” they cover.</p> <p>CP 745: Pete Mayer testified that there were “a number of agreements with WSDOT.”</p> <p>CP 777-778: When asked whether the City could shut down “the entire I-90 trail,” Patrick Yamashita testifies that ownership might be determined in the turnback agreement. He was not asked which one he was referring to.</p>
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APPENDIX B

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

SUSAN CAMICIA,

Plaintiff,

v.

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

Defendant.

No. 07-2-29545-3 SEA

SUPPLEMENTAL DECLARATION
OF STEVE LANCASTER

I, Steve Lancaster, declare as follows:

1. This declaration is intended to supplement my earlier declaration, signed July 28, 2008, which I respectfully incorporate by reference. I believe that the earlier declaration was filed with the present motion for summary judgment.
2. Last year, I was designated by the City to be its CR 30(b)(6) representative, and was deposed to that effect. Prior to the deposition, I received a notice from the Plaintiff listing several topics on which I was asked to become knowledgeable.
3. Ownership of the I-90 Trail was not included in the notice, and consequently, I did not conduct any investigation on that issue. But strangely, at the deposition, counsel for the plaintiff began questioning me on ownership and authority to close the trail. A true and correct copy of excerpts from my CR 30(b)(6) deposition is attached as **Exhibit A.**

1 4. I was admittedly unprepared to answer these questions. My attorney (and the
2 attorney representing Howard S. Wright) objected. Ultimately, they stopped the
3 deposition and requested that a separate deposition be taken with respect to my
4 "personal knowledge," as distinct from my "CR 30(b)(6)" capacity. See Exhibit A
5 (Dep. Tr. 23:13-24:2).

6 5. After my CR 30(b)(6) deposition, we immediately began a deposition with respect
7 to my personal knowledge. A true and correct copy of excerpts from my "second"
8 deposition is attached as **Exhibit B**. During this process I repeatedly expressed my
9 lack of knowledge as to ownership. Nevertheless, I was asked this line of questions.
10 For example, I was asked whether the City would have to consult with other state
11 agencies "if [it] wanted to close off **the I-90 trail on the island.**" Exhibit B (Dep.
12 Tr. 4:12-4:22). I understood this question to refer to the entire I-90 trail on the
13 island, not just the accident site. Accordingly, I indicated that the City probably
14 could not shut down the entire trail because "portions of the trail are state-owned."
15 *Id.* The accident site is not one of those portions; I would have stated as much if
16 asked.
17

18 6. A similar question was asked a minute later: whether the City could unilaterally
19 exclude public use "on the I-90 trail in the City of Mercer Island." Exhibit B (Dep.
20 Tr. 5:13-5:20). I responded the same way. *Id.* Again, I did not believe that I was
21 testifying to any specific piece of property because the question refers to the trail
22 and City as a whole.
23

24 7. As I later found out, Plaintiff's counsel badly misquoted my testimony. In his brief
25 opposing summary judgment last year, he represented that I was the CR 30(b)(6)
26

1 designee, but went on to refer to my uninvestigated personal deposition. *See Pl.'s*
2 *Opp.* August 11, 2008 at 10.

3 8. At one point, he represented that I referred to WSDOT as the "controlling authority"
4 over the trail. *Id.* at 11. That is a mischaracterization. In my deposition (based
5 upon limited personal knowledge, not as the City designee), I was referring to
6 WSDOT's authority over the portions of the trail it owns. I do not believe that it has
7 controlling authority over City-owned portions.

8
9 9. In fact, I confirmed this point in my CR 30(b)(6) deposition:

10 Q. Okay. Does the State of Washington own the I-90 trail on
11 Mercer Island?

12 A. I believe that there are portions that are owned by the State,
13 portions that are in the City right-of-way.

14 Q. All right. Did the – is the location of where Susan Camicia
15 was injured within the City right of way?

16 A. My understanding is that it is.

17 Q. All right. And is it also – does the State of Washington, to
18 your understanding, have any authority over the
19 transportation on the I-90 trail at the location where Susan
20 Camicia was injured?

21 A. Not to my knowledge.

22 Exhibit A (Dep. Tr. 17:20-18:10) (objections omitted).

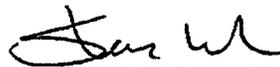
23 10. In the above colloquy, I thought I was clear in stating my belief that the site of the
24 accident was owned and controlled by the City, not the State. At no point did I
25 intend to testify or imply that the City lacked ownership or control over this
26 particular section of the bicycle path.

27 11. Hopefully this clarifies the record for the Court.

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON AND THE UNITED STATES THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 1st day of May 2009, at Mercer Island, Washington.



STEVE LANCASTER

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF KING

3 SUSAN CAMICIA,)
4)
5 Plaintiff,)

6 vs.) No. 07-2-29545-3 SEA

7 HOWARD S. WRIGHT CONSTRUCTION)
8 COMPANY, a Washington)
9 corporation; and CITY OF MERCER)
10 ISLAND, a municipal corporation,)
11 Defendants.)

12 Videotaped 30(b)(6) Deposition Upon Oral Examination

13 of

14 STEVE LANCASTER

15 Taken at 800 Fifth Avenue
16 Seattle, Washington

17
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21
22
23
24 DATE: July 24, 2008

25 REPORTED BY: Victoria E. Leckie
CCR No.: 2779

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1 dated June 2nd, 2008, from your office seeking the City to
 2 designate a CR 30(b)(6) agent, and he came prepared to
 3 testify to the topics listed in that letter. There are ten
 4 topics listed. And I'm looking at it and I'm trying to
 5 determine where there were questions about shared
 6 responsibility for those facilities.
 7 MR. BUDLONG: Well, what it relates to is
 8 item 11 in particular. It -- we asked about all WSDOT and
 9 Federal Transportation Administration orders, decrees,
 10 codes, opinions, findings, rulings, including all
 11 correspondence, memorandum, reports, which designated the
 12 subject sidewalk as a public transportation route. And
 13 basically I'm working on --
 14 MR. COOLEY: That's from the Subpoena Duces
 15 Tecum then?
 16 MR. BUDLONG: Yeah, I'm working on the
 17 foundation for that.
 18 Q. So -- and so, anyway --
 19 MR. COOLEY: Well, I'll let that go a little
 20 bit longer, but at some point -- he's not here as a speaking
 21 agent to testify to new topics. It's only to things that
 22 he's been designated on that he will testify to today. So
 23 for now I guess we can go forward on this, but we're well
 24 past what he's prepared to testify about, at least as to
 25 legal conclusions and things like that.

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1 MR. BUDLONG: Okay.
 2 Q. Mr. Lancaster --
 3 MR. BUDLONG: Could the court reporter please
 4 read back the last question so we stay on track here.
 5 (The record was read.)
 6 A. I'm not familiar with the exact boundaries between
 7 the operations of those agencies in terms of operation of
 8 that facility.
 9 Q. Okay. What is your familiarity with the
 10 relationship between the City of Mercer Island and the State
 11 of Washington as it pertains to the I-90 trail inside Mercer
 12 Island?
 13 MR. UMLAUF: Object to the form.
 14 A. My understanding is that the City of Mercer
 15 Island, through agreements and -- with the State, does
 16 maintain certain portions of the I-90 corridor through
 17 Mercer Island. There are certain agreements and documents
 18 with regard to the -- what's referred to as the lid park.
 19 There are agreements with regard to trail maintenance.
 20 Q. Okay. Does the State of Washington own the I-90
 21 trail on Mercer Island?
 22 MR. UMLAUF: Object to the form.
 23 MR. COOLEY: Join.
 24 A. I believe that there are portions that are owned
 25 by the State, portions that are in the City right-of-way.

Page 18

1 Q. All right. Did the -- is the location of where
 2 Susan Camicia was injured within the City right-of-way?
 3 A. My understanding is that it is.
 4 Q. All right. And is it also -- does the State of
 5 Washington, to your understanding, have any authority over
 6 the transportation on the I-90 trail at the location where
 7 Susan Camicia was injured?
 8 MR. COOLEY: Object to form.
 9 MR. UMLAUF: Join.
 10 A. Not to my knowledge.
 11 Q. Okay. Does the State -- I'm sorry. Does the
 12 Federal Transportation Administration or the Federal Highway
 13 Safety Administration have any authority, to your knowledge,
 14 over the I-90 trail in the City of Mercer Island?
 15 MR. COOLEY: Object to the form.
 16 MR. UMLAUF: Join.
 17 A. At a specific location, I'm not certain.
 18 Q. Don't know one way or the other?
 19 A. If you're asking about the entire trail alignment,
 20 I'm not certain.
 21 Q. Does the Washington Department of Transportation
 22 have authority to keep the I-90 trail open to public use as
 23 a regional non-motorized transportation --
 24 A. I don't know the answer to that.
 25 Q. All right. Oh, did -- I know you brought a number

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1 of documents, Mr. Lancaster, in response to the Subpoena
 2 Duces Tecum, which has been given to you as Exhibit 38. The
 3 first thing we asked for was a curriculum vitae or resume.
 4 Did you bring anything like that?
 5 A. Yes, I do have --
 6 Q. Oh, okay. If you could hand that to the court
 7 reporter, please, and we'll ask her to mark that as the next
 8 exhibit in order.
 9 (Exhibit 57 marked
 10 for identification.)
 11 Q. And, Mr. Lancaster, handing you what's been marked
 12 as Exhibit 57, can you identify that for us as a reasonably
 13 up-to-date and accurate curriculum vitae or resume of your
 14 work experience and education?
 15 A. It's up to date as of 15 months ago.
 16 Q. Okay. The next item I asked you for was all City
 17 of Mercer Island orders, proclamations, decrees,
 18 resolutions, codes, ordinance and findings which officially
 19 open the sidewalk where the plaintiff was injured for public
 20 recreational use. Did you bring anything in response to
 21 that?
 22 A. The -- the items that I have brought are
 23 everything that I could locate with assistance of other City
 24 employees responding to all of the items that were on your
 25 list.

Page 20

1 Q. Okay. Did you locate any City of Mercer Island
 2 order, proclamation, decree, resolution, code, ordinance or
 3 finding or any other official document which officially
 4 opened the sidewalk where Ms. Carnicia was injured for public
 5 recreational use?
 6 A. No, I did not.
 7 Q. Okay. The next item -- and did you and your staff
 8 search for that item, number two?
 9 A. I searched for items, yes, responding to that.
 10 Q. All right. And based on that, Mr. Lancaster,
 11 would it be your best belief, as you sit here before us
 12 today, that the City of Mercer Island did not issue any
 13 order, proclamation, decree, resolution, code, ordinance or
 14 finding that officially opened the sidewalk where
 15 Ms. Carnicia was injured to public recreational use?
 16 A. I might need clarification of the term "officially
 17 opened." I did find a number of documents that reflected
 18 City policy and understanding regarding the recreational
 19 nature of that facility, if that's responsive to your
 20 question.
 21 Q. Well, what I was getting at more was was it -- and
 22 I know you weren't working there at the time of any -- you
 23 know, before April of 2007. But was it your understanding
 24 that the I-90 trail has always been -- or was -- strike
 25 that.

Page 21

1 Is it your understanding that the I-90 trail was
 2 previously maintained as a regional transportation route by
 3 the State of Washington Department of Transportation?
 4 A. It's -- it's my understanding, based upon the
 5 documents that I've located, that the facility has since
 6 prior to its construction been considered to be a multiple
 7 use, multiple function facility, including recreational and
 8 transportation uses by the City of Mercer Island. I'm --
 9 I'm not prepared to answer with regard to the Washington
 10 State Department of Transportation.
 11 Q. Okay. And -- but what I'm getting at here, and
 12 then we'll move on, but you're not aware of anything that
 13 the I-90 trail was ever closed off to public transportation,
 14 non-motorized transportation, and that the City of Mercer
 15 Island opened it up to public non-motorized transportation?
 16 MR. COOLEY: Object to the form.
 17 A. I'm not aware of that.
 18 Q. Does the City of Mercer Island have the authority,
 19 to your understanding, to close off the Mercer -- or the
 20 I-90 trail on Mercer Island to public non-motorized
 21 transportation?
 22 MR. COOLEY: Object to form.
 23 A. I'm not aware whether the City has that authority
 24 or not.
 25 Q. What would you need to do if the City -- in the

Page 22

1 way of permitting or getting authorization or permission
 2 from other government entities if the City wanted to
 3 permanently close off the I-90 trail on Mercer Island?
 4 MR. COOLEY: Did you investigate that
 5 question?
 6 THE WITNESS: I did not.
 7 MR. COOLEY: Were you asked to investigate
 8 the question?
 9 THE WITNESS: I was not.
 10 Q. Do you know, Mr. Lancaster, if the City of Mercer
 11 Island has authority to close off the I-90 regional
 12 non-motorized transportation route trail to public use?
 13 MR. COOLEY: I am -- this is a 30(b)(6)
 14 deposition and you're now suggesting that he's gonna be
 15 giving answers to questions that would somehow be statements
 16 of the City of Mercer Island when he's been given no
 17 opportunity to investigate these matters. And so I don't
 18 have an objection to you taking a separate deposition of
 19 Steve Lancaster on whatever he might know, but when he
 20 testifies as an agent for my client, it's on topics that
 21 have been designated and nothing else because this is a
 22 managing agent deposition.
 23 So I am -- unless you have investigated that,
 24 then I'm not permitting him to answer that question because
 25 that's not been designated. I don't see it on here,

Page 23

1 Mr. Budlong. If you could show it to me, I'd be glad to try
 2 to figure out how to be responsive. My intent here today
 3 was to try to respond fully and completely to the notice as
 4 given and not to the amendments that are being made as we
 5 are underway.
 6 MR. BUDLONG: Are you instructing him not to
 7 answer?
 8 MR. COOLEY: I would ask, did you investigate
 9 that question?
 10 THE WITNESS: I did not.
 11 MR. COOLEY: Okay. Then you cannot testify
 12 about it as our managing agent.
 13 MR. BUDLONG: Okay. I know that the actual I
 14 think notice that was sent to Mr. Lancaster was -- did not
 15 designate him as a 30(b)(6). I just found that out because
 16 I looked at it this morning. Does the City have an
 17 objection to Mr. Lancaster testifying on what he knows on
 18 his -- from personal knowledge at the deposition?
 19 MR. COOLEY: I think there -- I have no
 20 objection to you taking a deposition of Steve Lancaster.
 21 And when -- in fact, I have no objection today, to when this
 22 deposition of the 30(b)(6) is concluded, we'll tee up a
 23 second dep, ask him any other questions you want, but this
 24 one, in my opinion, is a special dep that is considered the
 25 managing agent dep as to -- there are legal consequences to

Page 24

1 that.

2 MR. BUDLONG: Okay. Fair enough.

3 Q. Mr. Lancaster, the next item that I inquired about

4 on the Subpoena Duces Tecum was I asked you as the City's

5 managing agent to produce, quote, All City orders,

6 proclamations, decrees, resolutions, codes, ordinances,

7 opinions, findings, rulings, et cetera, which designated the

8 subject sidewalk where Ms. Carnicia was injured as a

9 recreational facility or recreational land under RCW

10 4.24.200. Did you search for any document that made --

11 official document that made that designation, sir?

12 A. I did search for documents making any kind of

13 declar -- designation or declaration as to the nature of the

14 facility, yes.

15 Q. Did you find any document, any city order,

16 proclamation, decree, resolution, code, ordinance, opinion,

17 finding or ruling which designated the sidewalk where

18 Ms. Carnicia was injured as a recreational facility or

19 recreational land?

20 A. Yes, I did.

21 Q. Okay. And where -- oh, and for purposes of the

22 recreational use immunity statute?

23 A. I cannot say that the documents that I located

24 specifically referenced that statute.

25 Q. All right. And, Mr. Lancaster, the court reporter

Page 25

1 has marked a number of documents that you have brought with

2 us today. Could you -- I think Exhibits 39 through 56. And

3 could you please identify which documents you believe are

4 responsive to the Request No. 3?

5 A. If I could take a few moments to go through these.

6 Q. Certainly. You may.

7 A. The first document, Exhibit 39, is the City's

8 Comprehensive Plan. It's the basic policy document for a

9 number of subject matters for the City, including land use,

10 housing, transportation, and capital facilities. Under the

11 transportation element of that document --

12 Q. And could you give us a page on that, please?

13 A. It's page transportation dash 20. And I

14 apologize. That may be a little bit difficult to find.

15 It's about --

16 Q. No, I got it. I have it here.

17 A. Okay.

18 Q. I have it, yes.

19 A. The -- at the top left-hand corner of that page,

20 it does reference bicycle and pedestrian facilities and

21 recognizes that these facilities -- talks about 56 miles of

22 such facilities on Mercer Island and recognizes these

23 facilities are used for basic transportation, recreation,

24 and other purposes.

25 MR. COOLEY: When you read, Steve, you read

Page 26

1 faster than you talk, so you'll have to slow down for the

2 court reporter's benefit.

3 THE WITNESS: Thank you.

4 MR. COOLEY: Keep going.

5 Q. And is there anything beyond the -- and are you

6 looking at -- under item C, which says bicycle and

7 pedestrian facilities?

8 A. Yes, I am.

9 Q. Okay. Is there anything that specifically

10 designates the I-90 trail as a recreational facility in this

11 document as distinct from any other sidewalks in the City of

12 Mercer Island?

13 MR. COOLEY: Do you want him to finish the

14 first question? You were asking him to identify the

15 document.

16 MR. BUDLONG: That's a good point.

17 Q. Actually, as long as we're on this, if you could

18 answer that question, and then we'll move on, Mr. Lancaster.

19 A. And your original question had to do with --

20 Q. Yeah. The original question was: Is there

21 anything that you are aware of in the Mercer Island

22 Comprehensive Plan, Exhibit No. 39, which designates the

23 I-90 trail as a -- you know, any sort of bicycle and

24 pedestrian facility in a manner distinct from any other

25 sidewalk on the City of Mercer Island?

Page 27

1 A. Yes. If I could call your attention to page land

2 use dash 21.

3 Q. Okay. Okay.

4 A. That is the Mercer Island land use plan map. And

5 it designates the I-90 corridor as a linear park, if you'll

6 look at the legend at the bottom patterning and its location

7 on the map.

8 MR. UMLAUF: What page was that?

9 THE WITNESS: That's page land use dash 21.

10 MR. UMLAUF: Thank you.

11 Q. Can you tell us if the City designated the

12 location where Ms. Carnicia was injured as being within

13 Linear Park?

14 A. This map indicates to me that it has -- that area

15 is included.

16 Q. And how far does Linear Park go?

17 A. It extends the length of the I-90 corridor across

18 Mercer Island.

19 Q. Okay. And is North Mercer Way part of Linear Park

20 in the area where Susan Carnicia was injured?

21 A. Yes, it falls within that category.

22 Q. Okay. And is the park-and-ride lot, the Puget

23 Sound Park-and-Ride lot, adjacent to where Ms. Carnicia was

24 injured a part of the Linear Park?

25 MR. UMLAUF: Object to the form.

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STARKOVICH REPORTING SERVICES
P.O BOX 22884
SEATTLE, WASHINGTON 98122
(206) 323-0919
FAX 328-0632

July 30, 2008

To: Andrew G. Cooley
Keating, Bucklin & McCormack
800 Fifth Avenue, Suite 4141
Seattle, Washington 98104

Re: Camicia vs. Howard S. Wright Construction Company and
City of Mercer Island
Deposition of: Steve Lancaster 30(b)(6)
Date Taken: July 24, 2008
Cause No.: 07-2-29545-3 SEA

PLEASE TAKE NOTICE THAT:

Enclosed are two forms: "Affidavit" and a "Correction Sheet." Instruct the deponent to review the deposition, record any corrections over his signature on the Correction Sheet, and sign the Affidavit before a Notary Public. If there are corrections, please furnish other counsel with copies. Return both forms to this office for their inclusion in the original transcript. The transcript will be forwarded to the appropriate party _____.

Thank you for your assistance in obtaining signature.

By: Victoria E. Leckie, CCR

cc: John Budlong
Roy A. Umlauf

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF KING

3 SUSAN CAMICIA,)

4 Plaintiff,)

5 vs.) No. 07-2-29545-3 SEA

6 HOWARD S. WRIGHT CONSTRUCTION)

7 COMPANY, a Washington)

8 corporation; and CITY OF MERCER)

9 ISLAND, a municipal corporation,)

10 Defendants.)

11 Deposition Upon Oral Examination

12 of

13 STEVE LANCASTER

14
15 Taken at 800 Fifth Avenue
16 Seattle, Washington

17
18
19
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23
24 DATE: July 24, 2008

25 REPORTED BY: Victoria E. Leckie
CCR No.: 2779

Page 4

1 SEATTLE, WASHINGTON; THURSDAY, JULY 24, 2008
 2 10:47 A.M.
 3 --o0o--
 4
 5 STEVE LANCASTER, deponent herein, having been
 6 first duly sworn on oath, was
 7 examined and testified as
 8 follows:
 9
 10 EXAMINATION
 11 BY MR. BUDLONG:
 12 Q. Thank you, Mr. Lancaster. I wanted to ask you,
 13 does, to your knowledge -- if the City of Mercer Island
 14 wanted to close off the I-90 trail on the island, would it
 15 have to consult with any other state -- with any state or
 16 federal agencies?
 17 A. To my knowledge, I believe it would.
 18 Q. Okay. And why do you say that, sir?
 19 A. Well, because it is my understanding portions at
 20 least of the trail are on state-owned facilities that are
 21 part of the interstate highway system, and it is designated
 22 in regional documents as a regional facility.
 23 Q. All right. So do you -- I -- would one of those
 24 agencies that you would -- the City would have to get
 25 permission to close the trail be the Washington State

Page 5

1 Department of Transportation?
 2 MR. COOLEY: Object to the form.
 3 A. I assume it would be.
 4 Q. Okay. And would the City also need to get
 5 approval of the Federal Transportation Administration to --
 6 if it wanted to close off the trail?
 7 A. I'm not sure about that. I believe that
 8 Washington State Department of Transportation essentially
 9 acts as the controlling authority, but my understanding is
 10 that they are under certain obligations to the federal
 11 government as well. They might be required to obtain that
 12 kind of approval.
 13 Q. Okay. And, to your knowledge, would it be
 14 accurate to say that the City of Mercer Island could not
 15 unilaterally exclude public use on the I-90 trail in the
 16 City of Mercer Island?
 17 MR. COOLEY: Object to form.
 18 A. To my knowledge, it could not, but I don't have
 19 specific knowledge of the regulations that are governing the
 20 use of that facility.
 21 Q. Okay. Do you believe that state statutes or
 22 regulations govern the use of the I-90 trail in the City of
 23 Mercer Island?
 24 MR. COOLEY: Object to the form.
 25 A. Certainly those portions that are not within city

Page 6

1 right-of-way, and there are significant portions, is my
 2 understanding, that are not within the city right-of-way.
 3 Q. Okay. Do you know if there are federal
 4 regulations which apply to that -- the I-90 trail within the
 5 City of Mercer Island?
 6 A. I don't have specific knowledge of that.
 7 Q. Okay. Does -- do you know which -- oh, I was
 8 gonna ask you -- do you know which portions of the I-90
 9 trail are state-owned versus city-owned?
 10 A. I don't specifically know that. I'm sure we have
 11 documents at the City that would provide that information.
 12 Q. Okay. And is it your understanding that the City
 13 of Mercer Island has, through agreements with the State,
 14 maintenance responsibility for the entire I-90 trail through
 15 the City of Mercer Island?
 16 A. I believe that to be the case.
 17 Q. Okay. Who do you interact with, if anyone, from
 18 the Washington State Department of Transportation concerning
 19 the use of the I-90 trail?
 20 A. There are a number of people that I interact with
 21 over time. I don't have -- I can't recall, frankly, the
 22 names of individuals who might be responsible specifically
 23 for trail issues. No, I don't recall the names.
 24 Q. Okay.
 25 MR. BUDLONG: I think those are all the

Page 7

1 questions I have. Thank you very much, sir.
 2
 3 EXAMINATION
 4 BY MR. COOLEY:
 5 Q. Steve, have you been involved at any of your
 6 cities where there's been an effort to close or dead end any
 7 public streets?
 8 A. Yes, as a matter of fact.
 9 Q. Puyallup?
 10 A. Actually, Tukwila.
 11 Q. Okay. And, to your knowledge, does closure of a
 12 public street require council action?
 13 A. Yes.
 14 Q. To your knowledge, does closure of a sidewalk
 15 require council action?
 16 A. I -- I'm not certain whether it does or not.
 17 Q. To your knowledge, does closure of a mixed-use
 18 trail or recreational trail require council action?
 19 A. Honestly, I'm not sure.
 20 MR. COOLEY: Okay. Thank you.
 21 MR. UMLAUF: No questions.
 22 (The deposition concluded
 23 at 10:53 a.m.)
 24 (Signature was not waived.)
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July 30, 2008

To: Andrew G. Cooley
Keating, Bucklin & McCormack
800 Fifth Avenue, Suite 4141
Seattle, Washington 98104

Re: Camicia vs. Howard S. Wright Construction Company and
City of Mercer Island
Deposition of: Steve Lancaster
Date Taken: July 24, 2008
Cause No.: 07-2-29545-3 SEA

PLEASE TAKE NOTICE THAT:

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Thank you for your assistance in obtaining signature.

By: Victoria E. Leckie, CCR

cc: John Budlong
Roy A. Umlauf

APPENDIX C

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

SUSAN CAMICIA,

Plaintiff,

v.

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

Defendant.

No. 07-2-29545-3 SEA

SUPPLEMENTAL DECLARATION
OF MERCER ISLAND CITY
ENGINEER PATRICK YAMASHITA

I, Masato (Patrick) Yamashita, declare as follows:

1. This declaration is intended to supplement my earlier April 16, 2008 declaration, which I respectfully incorporate by reference. I believe that my previous declaration has been filed with the present motion for summary judgment.

2. First, it is my understanding that the Plaintiff in this matter has challenged the City of Mercer Island's ownership and authority over the accident site (on the I-90 Trail). In response, we commissioned a professional surveyor to examine the City's Quitclaim Deed, which was granted in 2000 by the State. A true and correct copy of the deed is attached as

Exhibit A.

3. This confirmed our earlier belief. The survey plainly demonstrates that the bollards and accident site are within the deeded area. A true and correct copy of the survey is

1. attached as **Exhibit B**. Thus, any ownership rights the State may have had over the area or
2. bollards were relinquished in 2000.

3. 4. I further understand that Plaintiff's counsel misrepresented my testimony and led
4. the Court to believe that I doubted the City's ownership of the site. I would like to clarify
5. the record.

6. 5. In a supplemental declaration, Plaintiff's counsel claimed that I "[didn't] know if
7. the City owned the site where plaintiff was injured." He cited page 17, 20 of my deposition
8. transcript.

9. 6. This is a misstatement. I have included a true and correct copy of various
10. deposition excerpts as **Exhibit C** to this declaration.

11. 7. At my deposition, Plaintiff's counsel handed me a copy of the 2000 quitclaim deed
12. (Exhibit A) and asked that I interpret it on the spot. Though I was obviously without the
13. benefit of a surveyor, I attempted to do so and concluded that the area "probably includes"
14. the accident site. *See Exhibit C* (Dep. Tr. at 18:9-19:10). I actually reiterated this belief a
15. second time a few lines later. *See Exhibit C* (Dep. Tr. at 18:15-19:18).

16. 8. Then, on page 20 of my deposition, Plaintiff's counsel asked me about the City's
17. ownership of the accident site in 1991 and before the quitclaim deed in 2000. I responded
18. that I did not know. *See Exhibit C* (Dep. Tr. at 20:16-20:24). It was clear that we were
19. talking about a time long prior to Plaintiff's accident.

20. 9. I understand, however, that Plaintiff's counsel then used the above testimony
21. (regarding ownership in the 1990's) to represent generally to the Court that I "didn't know
22. if the City owned the accident site." He did not mention that the time-period referenced in
23. the testimony was many years before the accident at issue in this lawsuit. I consider this to
24. be incorrect, especially given my earlier testimony on pages 17 and 18 of my deposition.
25.
26.
27.

SUPP. DECLARATION YAMASHITA - 2

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KEATING, BUCKLIN & MCCORMACK, INC., P.S.

ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 823-6881
FAX: (206) 223-6423

1 10. Similarly, in Plaintiff's counsel's earlier declaration, he asserted that, on
2 pages 30 and 31, I testified that the City "could not shut off the I-90 Trail on Mercer
3 Island... without the permission of WSDOT." This is misleading or, at best, incorrect.

4 11. First of all, I specifically rejected the idea that WSDOT retained "jurisdiction" over
5 the accident site following the 2000 quitclaim deed. *See Exhibit C (Dep. Tr. 27:8-28:8)*. I
6 further rejected the idea that WSDOT had responsibility for the bollards at the accident site.
7 *See Exhibit C (Dep. Tr. 29:1-29:8)*. WSDOT's responsibility, if any, was limited to
8 landscape and maintenance. *Ibid.* They did not have, nor did they exercise, any
9 "controlling authority" over the accident site.

10 12. Then, Plaintiff's counsel's use of my testimony on pages 30-31 is deceiving. His
11 questioning was as follows:
12

13 Q. Okay. Let me ask you this: Could the City of Mercer Island
14 shut off the I-90 trail without the permission of the
15 Washington State Department of Transportation?

16 MR. UMLAUF: Object to the form.

17 MR. COOLEY: Object to the form.

18 A. In any location across Mercer Island?

19 Q. Yes. To permanently -- well, let me just ask it this way: All
20 the way across Mercer Island from the East Channel Bridge
21 to the floating bridge, could Mercer Island shut off the I-90
22 trail permanently across the island without the permission of
23 the Washington State Department of Transportation?

24 MR. COOLEY: Object to the form.

25 A. I don't know for sure. It may be mentioned in the turnback
26 agreement, but I would assume that the answer would be no.

27 Exhibit C (Dep. Tr. 30:8-31:1) (emphasis added).

1 13. The question specifically related to the entire I-90 Trail (spanning from East
2 Channel to the floating bridge), which the City does not necessarily own. Therefore, I
3 answered no. That is not to say that the City does not own the portion of the trail, where the
4 accident occurred. But counsel was not asking me about that, nor did I believe I was
5 testifying about it.

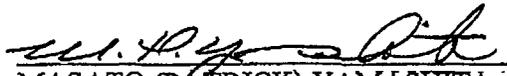
6 14. To summarize, based upon my earlier understanding and investigation—and now
7 coupled with the quitclaim and survey (Exhibits A and B)—it is a fact that the accident site
8 was owned and controlled by the City at the time of the accident.

9 15. Furthermore, I believe that the City could unilaterally “shut down” or limit use of
10 this portion of the I-90 Trail if it desired to do so. If it did, it would not need to seek
11 permission from any other authority since it is owned and controlled by the City.

12 16. It is my understanding that the City did close down the trail at various times during
13 the construction of the Park & Ride. No permission was sought from the State or Federal
14 Government in doing so.

15
16
17 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE
18 OF WASHINGTON AND THE UNITED STATES THAT THE FOREGOING IS TRUE
19 AND CORRECT.

20
21 DATED this 30TH day of April, 2009, at Mercer Island, Washington.

22
23 
24 MASATO (PATRICK) YAMASHITA

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

SUSAN CAMICIA,

Plaintiff,

vs.

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

Defendants.

No. 07-2-29545-3 SEA

Videotaped Deposition Upon Oral Examination
of
MASATO YAMASHITA

800 Fifth Avenue, Suite 4141
Seattle, Washington

Date: July 14, 2008

Reported By: Stacy L. Sauer, CCR
CCR NO: 29906

STARKOVICH REPORTING SERVICES

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Page 16

1 MR. COOLEY: I mean, I have no objection to
 2 proceeding that way, but whatever we establish as a rule for
 3 this deposition, is what I would tend to follow at other
 4 depositions, if that's acceptable --
 5 MR. BUDLONG: Yeah, I do have --
 6 MR. COOLEY: It sounds like it is.
 7 MR. BUDLONG: Yeah, I do have copies. Actually,
 8 let me let you -- and they'll just be numbered consecutively.
 9 MR. UMLAUF: And one thing we might want to do -- I
 10 don't know if we want to do just exhibits in numerical order
 11 for all the deps maybe from this point forward.
 12 MR. BUDLONG: I think that would be a great idea,
 13 if the others agree.
 14 MR. COOLEY: I have no objection to that.
 15 MR. BUDLONG: I had my staff out last week and so I
 16 was the exhibit preparer.
 17 Q. Do you see the -- in photo B in Exhibit 2 there, sir?
 18 A. Photo B?
 19 Q. Yes.
 20 A. Yes.
 21 Q. Does that show the bollards where the accident location
 22 is?
 23 A. Yes, it does.
 24 Q. Okay. And that location is on the -- within the City
 25 of Mercer Island right-of-way as of the date of the accident

Page 17

1 in June of 2006; correct?
 2 A. Yes, that's correct.
 3 Q. Okay. Now, I'd next like to hand you --
 4 (Exhibit No. 3, marked
 5 for identification.)
 6 Q. Mr. Yamashita, I'd next like to hand you what has been
 7 marked as Exhibit No. 3, which is a document that I believe
 8 is entitled a quitclaim deed from the Washington State to the
 9 City of Mercer Island back in May of 2000?
 10 A. Yes.
 11 Q. Okay. And have you seen that quitclaim deed before?
 12 A. Yes, I have.
 13 Q. What does that quitclaim -- or what did that quitclaim
 14 deed accomplish, to your understanding?
 15 A. I understand that this quitclaim deed essentially
 16 transferred property that was previously in the control of
 17 the State Department of Transportation, and it was
 18 transferred to the City. It was following the completion of
 19 the I-90 project. And I believe it was those areas that were
 20 more outside of the use of DOT and I-90.
 21 Q. Okay. Did the quitclaim deed include the
 22 sidewalk/bikeway where Susan Camicia was injured?
 23 MR. COOLEY: Object to form.
 24 A. I don't know specifically. I can take some time to
 25 look.

Page 18

1 Q. Okay.
 2 A. (Witness peruses document.)
 3 There's an -- there's a section that appears to be
 4 highlighted, but my eyes are not so good anymore, so I can't
 5 read the text under it, portions of it. I don't know for
 6 sure, but it appears that the legal description here for
 7 parcel 9 -- in parentheses, it says, Portions of North Mercer
 8 connection 78th Avenue Southeast, 81st Avenue Southeast, and
 9 Southeast 24th Street. That probably includes the sidewalk
 10 in question.
 11 Q. Okay.
 12 A. There's a reference to sheet 5 of 6. I'm not sure if
 13 that's part of this attachment, but that might shed light on
 14 it. I don't see the plan sheet here.
 15 Q. Okay. Is it your understanding that the City of Mercer
 16 Island acquired title to the right-of-way at the location
 17 where Ms. Camicia was injured, from the State in 2000?
 18 A. If that's what this document provided for, then yes.
 19 Q. Okay. Now, to your knowledge, did the State of
 20 Washington designate the sidewalk/bikeway where Susan Camicia
 21 was injured as a public transportation route?
 22 A. I haven't seen any specific description like that --
 23 Q. Okay.
 24 A. -- on drawings.
 25 Q. Have you seen any specific description where the State

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1 of Washington designated the sidewalk/bikeway where Susan
 2 Camicia was injured as a recreational land?
 3 A. A recreational land by the State Department of
 4 Transportation?
 5 Q. Yes.
 6 A. I believe there was one document. It wasn't
 7 construction drawings or a report, but it was more a
 8 descriptive narrative from more recent times. But other than
 9 that, no.
 10 Q. Okay. Does the City of Mercer Island have a process
 11 for designating certain sidewalks within the city as
 12 recreational lands?
 13 A. There's no formal process, to my knowledge, unless it
 14 is a physical change in the zoning of the underlying
 15 property.
 16 Q. Okay. Are you aware that there was any zoning
 17 determination before June 19, 2006, when Ms. Camicia was
 18 injured, where anyone from the City of Mercer Island
 19 designated a sidewalk where she was injured as a recreational
 20 land?
 21 MR. COOLEY: Objection to the form.
 22 A. I don't believe that a zoning was changed to describe
 23 it specifically as you described --
 24 Q. Okay.
 25 A. -- no.

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1 Q. So you weren't aware of any zoning decisions by the
 2 City of Mercer Island which designated the sidewalk as a
 3 recreational land at any time before Ms. Camicia was injured;
 4 correct?
 5 MR. COOLEY: Same objection.
 6 A. **Not to my knowledge, no.**
 7 Q. Okay. Now, are you aware of any other kind of official
 8 act by the City of Mercer Island that considered the question
 9 of whether the sidewalk location where Ms. Camicia was
 10 injured was a recreational land?
 11 MR. COOLEY: Object to the form. It's vague.
 12 A. **I believe there is a parks- and/or trail-related plan**
 13 **from the '90s that talked about that and did either designate**
 14 **or describe it as recreational facility or a linear park,**
 15 **something to that nature.**
 16 Q. To your knowledge, did the City of Mercer Island own
 17 the portion of the sidewalk where Ms. Camicia was injured
 18 when it made its 1991 plan that you have just described?
 19 A. **I don't know for sure.**
 20 Q. Okay. Are you aware of any evidence that the City of
 21 Mercer Island owned the location of the sidewalk where
 22 Ms. Camicia was injured before the quitclaim deed in 2000?
 23 MR. COOLEY: Object to form.
 24 A. **Nothing to my knowledge.**
 25 Q. Okay. Has the City of Mercer Island designated park

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1 areas within the city as recreational areas?
 2 A. **It's actually a little bit outside of my realm of**
 3 **expertise and responsibility. There is a separate parks and**
 4 **recreational department that operates and maintains parks.**
 5 Q. Do you have any knowledge, through your work as the
 6 city engineer, on whether the City of Mercer Island has
 7 procedures for designating certain lands as recreational
 8 lands?
 9 A. **I do not know.**
 10 Q. Okay. Does the City of Mercer Island have procedures
 11 for designating its transportation rights-of-way as
 12 recreational lands?
 13 MR. COOLEY: Object to the form.
 14 A. **I'm not aware of any formal procedure, no.**
 15 Q. Okay. Is the -- to your understanding, is the
 16 sidewalk/bikeway where Susan Camicia was injured in June of
 17 2006 a part of a regional transportation route between the
 18 east side and the city of Seattle?
 19 A. **It is part of a longer trail network, regional**
 20 **recreational trail. It's more commonly known of as the I-90**
 21 **trail.**
 22 Q. The I-90 trail. Okay. And is the I-90 trail the only
 23 non-motorized transportation route from the east side across
 24 Mercer Island into the city of Seattle?
 25 A. **Yes.**

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1 Q. Okay. Does the City of Mercer Island have any
 2 regulations, standards, or procedures for designating a
 3 sidewalk as a recreational land or non-recreational land,
 4 according to the width of the sidewalk?
 5 A. **Can you repeat the question?**
 6 Q. Sure. Does the City of Mercer Island have any
 7 standards or regulations or ordinances or codes or procedures
 8 for designating a sidewalk within the city as a recreational
 9 land, based upon the width of the sidewalk?
 10 MR. UMLAUF: Object to the form.
 11 MR. COOLEY: Join.
 12 A. **I don't believe so. Not related to the recreational**
 13 **land designation, no.**
 14 Q. Okay. All right. Does the City of Mercer Island have
 15 many sidewalks that people ride bicycles on?
 16 MR. UMLAUF: Object to the form.
 17 MR. COOLEY: Join.
 18 A. **Actually not that many. Not on Mercer Island.**
 19 Q. Okay. Does the Mercer Island City Code authorize
 20 bicycling on sidewalks except in the downtown business area?
 21 MR. COOLEY: Object to form.
 22 MR. UMLAUF: Join.
 23 A. **I don't know the answer to that.**
 24 Q. Okay.
 25 A. **I'm not familiar enough of the details of the -- that**

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1 **part of the code.**
 2 Q. Do pedestrians use -- do you know if people ride on
 3 sidewalks -- sorry.
 4 Do you know if people ride bicycles on sidewalks in
 5 the City of Mercer Island other than on the I-90 trail?
 6 A. **I have seen very few. Part of the reason for that is**
 7 **that Mercer Island doesn't have very many sidewalks outside**
 8 **of its town center.**
 9 Q. Outside of the town center. Okay.
 10 Does Mercer Island consider any sidewalks on the
 11 island to be recreational lands?
 12 MR. COOLEY: Object to form.
 13 A. **Any sidewalks? If you are asking me my opinion, I**
 14 **would say yes, that they would be used for a variety of**
 15 **purposes, including recreation.**
 16 Q. Okay. Does the City of Mercer Island consider all of
 17 its sidewalks to -- that bicycles could operate on to be
 18 recreational lands?
 19 MR. COOLEY: Object to the form.
 20 A. **Can you repeat the question?**
 21 Q. Yes. Does the City of Mercer Island consider all of
 22 its sidewalks that bicycles can be ridden on to be
 23 recreational lands?
 24 A. **We don't have any formal consideration either way.**
 25 Q. So there's never been any council -- city council

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1 adopted ordinance that says that any of the sidewalks on the
 2 city of Mercer Island are recreational lands, to your
 3 knowledge?
 4 A. Do you mean all or --
 5 Q. Any.
 6 A. -- any?
 7 Q. Correct.
 8 MR. COOLEY: Object to the form.
 9 A. I am not familiar with any such action.
 10 Q. Okay. Does the sidewalk where Susan Camicia was
 11 injured border on North Mercer Way?
 12 MR. COOLEY: Object to form.
 13 A. The sidewalk is adjacent to the North Mercer Way
 14 roadway, yes, on the north side.
 15 Q. Okay. Can bicycles lawfully be ridden on North Mercer
 16 Way adjacent to the sidewalk where Ms. Camicia was injured?
 17 A. Do you mean in the roadway?
 18 Q. Yes.
 19 A. To my knowledge of the motor vehicle laws and other
 20 related laws, yes, if you're traveling in the correct
 21 direction with traffic.
 22 Q. Does the City of Mercer Island consider the North
 23 Mercer Way street to be a recreational land?
 24 A. A street or roadway itself?
 25 Q. Yes.

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1 A. Not to my knowledge.
 2 Q. So if a bicyclist was riding on the street adjacent to
 3 the sidewalk where Ms. Camicia was injured and was injured
 4 because of a hazard, the City would not claim that that
 5 cyclist was injured in a recreational area, to your
 6 knowledge?
 7 MR. COOLEY: Object to the form.
 8 A. I don't quite understand. Can you repeat that?
 9 Q. Well, what I'm asking you is, let's say that a
 10 bicyclist was riding along North Mercer Way in June of 2006
 11 adjacent -- in the roadway -- but adjacent to where
 12 Ms. Camicia was injured, and the bicyclist struck a hazard in
 13 the roadway and was injured.
 14 In that situation, would you, as the city engineer,
 15 agree that the recreational land immunity would not apply?
 16 MR. COOLEY: Object to the form.
 17 A. I don't know the ins and outs of the recreational land
 18 immunity.
 19 Q. Does the City of Mercer Island have any ordinance or
 20 policy or procedure or code that you are aware of which
 21 designates recreational lands according to whether they are
 22 used for more than one purpose, such as bicycling or walking,
 23 just for example?
 24 A. I believe there is some mention in the City's
 25 pedestrian and bicycle facilities plan that talks about

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1 different uses.
 2 Q. Okay. But does the City, to your knowledge, have any
 3 ordinances or codes or regulations which designate
 4 recreational lands on the basis that they have multiple uses?
 5 MR. COOLEY: Object to the form. It's been asked
 6 and answered.
 7 A. Not to my knowledge.
 8 Q. Okay.
 9 (Exhibit No. 4, marked
 10 for identification.)
 11 Q. Mr. Yamashita, I have handed you what the court
 12 reporter has marked as Exhibit 4, which is a series of
 13 documents that come under the title "Letters Concerning
 14 Evaluation of I-90 Bicycle and Pedestrian Path as a Potential
 15 Section 4(f) Resource."
 16 And have you had a chance to take a look at the --
 17 to look through those documents?
 18 A. Just very generally.
 19 Q. Okay. Have you seen any of them before?
 20 A. Not to my recollection, no.
 21 Q. Okay. Were you aware --
 22 A. Excuse me. I may have seen this graphic that talks
 23 about "Alternative R-8A Floating Bridges" --
 24 Q. Okay.
 25 A. -- but I don't think anything else.

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1 Q. Were you aware that from 2002 through -- or up into
 2 2005, the State of Washington and the United States
 3 government were involved in determining whether the I-90
 4 trail, including the location where Ms. Camicia was injured,
 5 was a recreational land or was -- was or was not a
 6 recreational land?
 7 A. I don't recall that, no.
 8 Q. Okay. To your knowledge, sir, did the Washington State
 9 Department of Transportation retain jurisdiction over the
 10 I-90 trail as a transportation route after the sidewalk area
 11 was quitclaimed to the City of Mercer Island in 2000?
 12 MR. COOLEY: Object to the form.
 13 MR. UMLAUF: Object to the form.
 14 A. You asked me if the State DOT retained --
 15 Q. -- jurisdiction --
 16 A. -- jurisdiction over the trail --
 17 Q. -- as it went across --
 18 A. -- as the underlying property was deeded to the City?
 19 Q. Yes.
 20 A. I don't know specifically. I know that the State has
 21 some form of responsibility for the trail. I believe it's
 22 mostly related to a certain level of maintenance where either
 23 above or below whatever that standard is, then the City is
 24 responsible for the rest of the maintenance.
 25 Q. Okay. And could you please tell us fully what your

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1 understanding of the State's responsibilities for maintenance
 2 of the I-90 trail were and the City's responsibilities after
 3 the property was quitclaimed to the City in 2000?
 4 A. I believe it's described in one of the phases of the
 5 Turnback and Landscape Maintenance Agreement. I don't know
 6 the specific details because, again, it's something that is
 7 mostly maintained by the parks department -- Mercer Island
 8 Parks, rather than anyone under my responsibility.
 9 Q. Okay.
 10 A. So they would coordinate directly with the DOT.
 11 Q. All right. So your office -- the city engineer's
 12 office -- well, let me ask the question this way: Does the
 13 city engineering office have any responsibility for
 14 maintaining the I-90 trail sidewalk in the location where
 15 Susan Carnicia was injured?
 16 MR. COOLEY: Object to the form.
 17 A. Yes.
 18 Q. What are the responsibilities of your engineering
 19 department, sir, in maintaining the sidewalk where Susan
 20 Carnicia was injured?
 21 A. I believe this segment of the trail either falls under
 22 the responsibility of the parks department or the maintenance
 23 department. In most other cities, that's called the public
 24 works department, which is outside of my authority, but it
 25 falls under Glen Betker, if it's the maintenance department.

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1 Q. Okay. Do you know if the State Department of
 2 Transportation has any responsibility for maintaining the
 3 sidewalk or the bollards, for example, in the location where
 4 Susan Carnicia was injured?
 5 MR. COOLEY: Object to form.
 6 A. No, I don't believe so.
 7 Q. You don't believe they do?
 8 A. No.
 9 Q. Okay. Is it your understanding that the State
 10 Department of Transportation retains jurisdiction over the
 11 I-90 trail non-motorized transportation route?
 12 MR. UMLAUF: Object to the form.
 13 MR. COOLEY: Same object- -- or join.
 14 A. Can you rephrase the question?
 15 Q. Yes.
 16 A. I don't understand.
 17 Q. We discussed earlier that the -- there is an I-90 trail
 18 transportation route that connects the east side with
 19 Seattle, and that that route runs along -- or includes the
 20 sidewalk where Ms. Carnicia was injured. Correct?
 21 A. Correct.
 22 Q. Okay. And my question is: Is it your understanding
 23 that, since that is a regional transportation route that
 24 starts on the east side and runs across your city of Mercer
 25 Island and then on into Seattle, that the Wash- -- State of

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1 Washington Department of Transportation retains authority or
 2 jurisdiction over that trail?
 3 MR. COOLEY: Object to form.
 4 A. I'm not certain --
 5 Q. Okay.
 6 A. -- unless it's stated clearly in one of the turnback
 7 agreements.
 8 Q. Okay. Let me ask you this: Could the City of Mercer
 9 Island shut off the I-90 trail without the permission of the
 10 Washington State Department of Transportation?
 11 MR. UMLAUF: Object to the form.
 12 MR. COOLEY: Object to the form.
 13 A. In any location across Mercer Island?
 14 Q. Yes. To permanently -- well, let me just ask it this
 15 way: All the way across Mercer Island from the East Channel
 16 Bridge to the floating bridge, could Mercer Island shut off
 17 the I-90 trail permanently across the island without the
 18 permission of the Washington State Department of
 19 Transportation?
 20 MR. COOLEY: Object to the form.
 21 A. I don't know for sure. It may be mentioned in the
 22 turnback agreement, but I would assume that the answer would
 23 be no.
 24 Q. Why would you assume that the answer would be no?
 25 A. Because it does provide some level of regional

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1 connection from Seattle to Eastgate across Mercer Island.
 2 Q. Okay. The same question, but with regard to the
 3 Federal Highway Administration. To your knowledge, could the
 4 City of Mercer Island permanently cut off the I-90 trail
 5 where it runs through the city without obtaining the
 6 permission of the federal highway authority?
 7 MR. COOLEY: Object to the form.
 8 MR. UMLAUF: Object to the form.
 9 A. I don't know. I have never been involved in review of
 10 any kind of document that would say yes or no to that.
 11 Q. Okay. Do you think that the City of Mercer Island
 12 could shut down I-90 where it runs across the city without
 13 the permission of the Washington State Department of
 14 Transportation and the federal government?
 15 MR. UMLAUF: Object to the form.
 16 A. No. They would issue permits to authorize such action.
 17 Q. All right. And do you have any reason to believe, as
 18 you sit here today, that the I-90 non-motorized trail would
 19 be treated any differently than I-90 itself, for purposes of
 20 the question of whether the City of Mercer Island could shut
 21 it down and exclude public access without the permission of
 22 the state and federal authorities?
 23 MR. COOLEY: Object to the form.
 24 A. I will have to opine, but I-90, in terms of vehicular
 25 traffic, the freeway itself, that carries a lot of traffic,

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July 24, 2008

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Re: Camicia vs. Howard S. Wright Construction
and City of Mercer Island
Deposition of: Masato Yamashita
Date Taken: July 14, 2008
Cause No.: 07-2-29545-3 SEA

PLEASE TAKE NOTICE THAT:

The transcript of the above deposition is ready for your reading and signing. Please call to set up an appointment to do so at your earliest convenience. You must, by _____, read and sign the deposition or state in writing your reason for refusal to sign, or state in writing the fact that you waive your right to sign; failing to do so, signature will be deemed for all purposes waived, and your deposition will be forwarded to the appropriate party.

Thank you for your assistance in obtaining signature.

By: Stacy L. Sauer, CCR

cc: John Budlong

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CASE NO. 63787-8-I
(King County Superior Court No. 07-2-29545-3 SEA)

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

SUSAN CAMICIA,

Appellant,

v.

THE CITY OF MERCER ISLAND,

Respondent.

CERTIFICATE OF SERVICE

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ORIGINAL

I certify that I served, or caused to be served, a copy of
RESPONDENT'S BRIEF and APPENDICES via ABC Legal Messenger
on the 12th day of November, 2009, to the following counsel of record at
the following addresses:

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