

NO. 67713-6-I

**COURT OF APPEALS FOR DIVISION 1
STATE OF WASHINGTON**

ESTATE OF MAIA HAYKIN and RICHARD HAYKIN, individually
and as personal representative of the ESTATE of MAIA HAYKIN,

Appellants,

vs.

CITY OF BELLINGHAM, a municipal corporation,

Respondent.

BRIEF OF RESPONDENT CITY OF BELLINGHAM

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FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 DEC 15 AM 10:31

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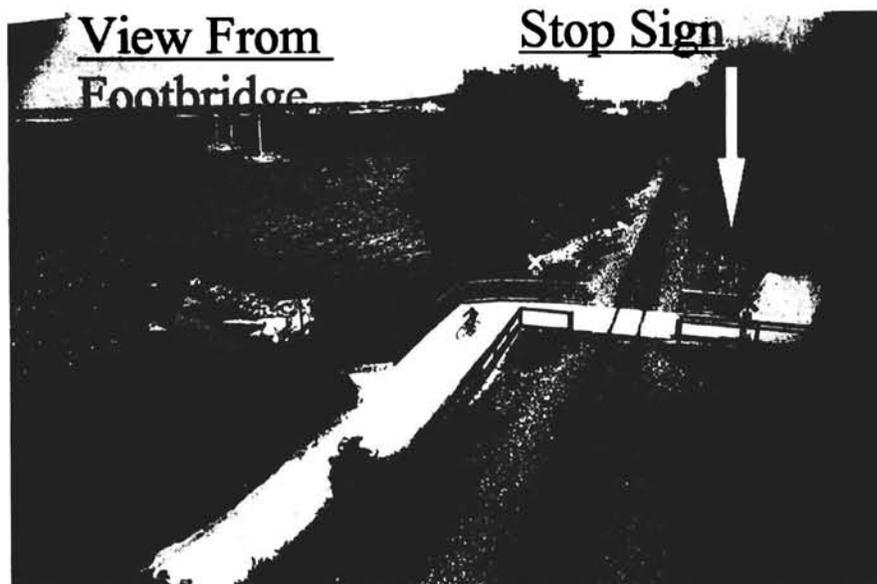
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I. INTRODUCTION

As Plaintiffs conceded, on May 20, 2008, Maia Haykin (“Mrs. Haykin”) was struck by a train while riding her bicycle on a recreational trail. Mrs. Haykin was struck by the train while crossing an at-grade railroad crossing that is part of the recreational trail. The trail is owned and maintained by the City of Bellingham (“the City”) and is known as the South Bay Trail. The South Bay Trail runs from downtown Bellingham to Boulevard Park, and continues on through Boulevard Park. The railroad crossing where Mrs. Haykin was struck is the northern access point to Boulevard Park and is part of the City of Bellingham Parks system. Applying straightforward precedent, the trial court granted the City of Bellingham’s Motion for Summary Judgment finding that the City of Bellingham was entitled to recreational use immunity under RCW 4.24.210. This Court should affirm.

II. STATEMENT OF THE CASE

Boulevard Park and the South Bay Trail are part of an extensive park and recreational trail system in the City of Bellingham. CP 220-223. The South Bay Trail is a recreational, mixed-use trail that starts in downtown Bellingham and leads to Boulevard Park. CP 220-221. The trail is the north access point to the Park and is part of the Park. CP 221. The trail runs through the Park and ends in south Bellingham (Fairhaven). CP 220-221. The north access point crosses railroad tracks. CP 221. There is no fee charged by the City to use the trail or Boulevard Park. CP 223.

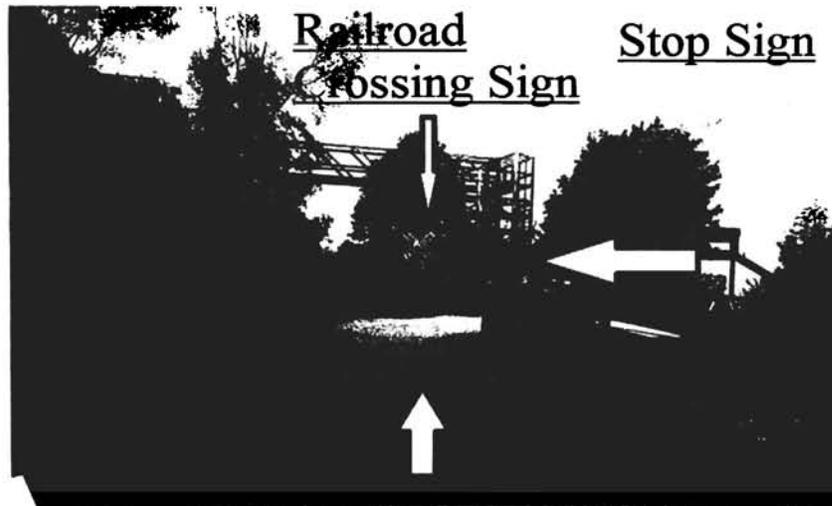


CP 270, 305.

The northern crossing was constructed with the agreement of BNSF Railway Company ("BNSF"). CP 103-110. Prior to the agreement, there was not a formal, at-grade crossing that led to Boulevard Park. CP 221. Despite the lack of a formal crossing, citizens crossed the tracks at this point and even climbed over concrete blocks placed by BNSF to get to the park. CP 221-222. The agreement with BNSF allowed for the construction of a formal, safe path across the tracks into Boulevard Park. CP 222.

The design of the crossing has several features intended to improve safety. CP 222. These include a sharp 90-degree angle on each side of the crossing to slow the user down and to allow for extensive sight distance to look for oncoming trains. CP 222. There are several warning signs at the

crossing, including a railroad warning sign, a stop sign, and a “crossbuck.” CP 222. These improvements formally opened the crossing for recreational use of the trail and Boulevard Park. CP 222.



CP 272, 306.

The crossing in question is part of BNSF’s right-of-way and mainline railroad. CP 103. As part of the 2001 agreement, BNSF granted the City a permanent crossing at this location. CP 103, 107-108. The agreement states: “It is understood that this northern crossing is a permanent crossing being granted by the Railway to the Agency.” CP 107-108. The agreement prohibits BNSF from using the crossing in a manner that will “materially interfere” with the City’s use. CP 108. The record therefore shows the City has a property right, and possession, and control of the north crossing.

On May 20, 2008, decedent Maia Haykin entered Boulevard Park riding her bicycle. CP 297-299. Mrs. Haykin was riding “leisurely” and not “extremely fast” as she rode toward the large red “STOP” sign posted next to the railroad crossing warning signs. CP 297-299. Eyewitness Brooke Stanton said that she and her companion had “stopped at the 1st or 2nd fence post from the end of the fence on the trail side because we heard the train.” CP 297. The train’s whistle was so loud that Stanton “cupped her hands over her son’s ears.” CP 299.

Witnesses watched Mrs. Haykin as she approached the train crossing. CP 297-299. They had stopped due to the approaching train, but Mrs. Haykin did not stop. CP 297-299. Indeed, “she didn’t appear to be trying to stop.” CP 295. They remained in a safe place and watched her continue riding and get struck by the train. CP 297. After watching the incident, a witness said “I couldn’t believe that she had really ridden in front of the train until we saw the train stopping.” CP 295.

Mr. Richard Haykin, as personal representative for the estate, and by himself individually, filed an Amended Complaint alleging the City was negligent. CP 323-327. The trial court granted the City’s Motion for Summary Judgment based on recreational use immunity pursuant to RCW 4.24.210. CP 3. The record supports the trial court’s ruling.

III. ARGUMENT

A. SUMMARY OF ARGUMENT

The record establishes that the City had a property interest and possessed and controlled the railroad crossing for purposes of the recreational use statute. Further, the City did not breach its duty to Mrs. Haykin, who was a recreational user at the time of the incident. The trial court did not err in granting the City's Motion for Summary Judgment and finding the City was entitled to recreational use immunity.

In the alternative, if the Court accepts the City did not have an ownership interest or possess and control some portion of the crossing that Plaintiffs claim was defective, the City is not the owner or possessor of the land under common law and cannot be held liable under any premises liability theory. Whether it is based on recreational use grounds, or any premises liability theory, this Court should affirm.

B. STANDARD OF REVIEW

When reviewing an order of summary judgment, the Court engages in the same inquiry as the trial court. *State v. Davis*, 102 Wash.App. 177, 184, 6 P.3d 1191, 1195 (2000). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Davis*, 102 Wash.App. at 184, 6 P.3d at 1191. The Court must consider all evidence and reasonable inferences therefrom in the light most favorable to the non-moving party. 102 Wash.App. at 184, 6 P.3d at 1191. If the plaintiff fails to establish the existence of an element essential to his or her case, there can be no

genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Id.*

C. SCOPE AND PURPOSE OF THE RECREATIONAL USE STATUTE

The express purpose of the recreational use statute is to encourage landowners and others in lawful possession and control of land to make them available to the public for recreational purposes by limiting their liability towards persons entering thereon. RCW 4.24.200; *Riksem v. City of Seattle*, 47 Wash.App. 506, 509, 736 P.3d 275, 277 (1987). In 2011 the legislature affirmed that there is an express legislative policy to increase the availability of recreational land. RCW 79A.80.005. A landowner or others in possession and control of the land who allow members of the public to use them for purposes of outdoor recreation without charging a fee shall not be liable for unintentional injuries to users unless the injury was sustained by reason of a known dangerous artificial latent condition for which conspicuous warning signs have not been posted. RCW 4.24.210.

The recreational use statute changed the common law by altering an entrant's status from that of a trespasser, licensee, or invitee to a new statutory classification of recreational user. *Davis*, 102 Wash.App. at 184, 6 P.3d at 1195. Lands used for bicycling, including recreational trails, are included in the statute. RCW 4.24.210. *See Riksem*, 47 Wash.App. 506, 736 P.2d 275. In the context of the statute, railroad tracks cannot be considered "latent" because they put a reasonable user on notice that a

train may appear. *Power v. Union Pacific Railroad Co.*, 655 F.2d 1380, 1388 (1981)¹.

D. THE CITY IS ENTITLED TO RECREATIONAL USE IMMUNITY BECAUSE IT HAD A PROPERTY INTEREST AND POSSESSION AND CONTROL OF THE CROSSING.

Plaintiffs' sole argument focuses exclusively on the precise location where the train and the cyclist collided.² Plaintiffs concede that the City designed, built and owns the path leading to the crossing. Plaintiffs concede that the City designed, built, and owns the path leading away from the crossing. Plaintiffs concede that the stop sign and crossbuck sign are both on City property. Nevertheless, according to Plaintiffs' argument, since the exact location of the collision is property owned by the railroad, the immunity does not apply.

Plaintiffs' argument may prove fatal otherwise (See Argument E, *Infra* at p. 13) but it ignores the substantial evidence of the City's property interest and possession and control of the crossing and its vicinity. The agreement between the City and BNSF combined with the fact that the crossing is part of the South Bay Trail and the City Park system shows the City is a "landowner" or possessor under the recreational use statute. The

¹ As discussed more fully in Section F of this brief, the trial court's determination as to latency was not raised on appeal and was properly determined in favor of the City.

² Below, Plaintiff argued strenuously that the City was negligent for not ordering the installation of lights and gates, or "dismount barriers." See CP 191-204. Plaintiffs' expert criticized the stop sign posted by the City. CP 44. All of these claims and arguments are abandoned for appeal.

trial court did not err in finding the City was entitled to recreational use immunity.

The agreement between BNSF and the City is titled “Permit for the Construction of a Pedestrian Crossing (MP 94.42) Bellingham, Washington.” CP 103. In the “recitals” to the agreement, BNSF states its intent to grant the City a permanent railroad crossing. CP 103. In paragraph 13 of the agreement, it states that it is “understood that this northern crossing is a *permanent crossing being granted* by the Railway to the Agency.” CP 107-108. [emphasis added]. Finally, in the last paragraph of the agreement, it states BNSF can use the “surface or subsurface of the crossing area in such a manner as will not materially interfere with the Agency’s uses.” CP 108.

The express language of the agreement makes it clear and obvious that BNSF granted the City a property interest in the crossing. Further, the agreement granted the City permanent possession and use of the crossing. The terms “permanent” and “grant” are not ambiguous or confusing terms. Indeed, the term “grant” connotes a transfer of a right. “Grant” is defined as “to give or confer (something) with or without compensation” or to “formally transfer (real property) by deed or other writing.” *Black’s Law Dictionary* 707 (7th ed. 1999). Consistent with the language of this agreement, the City used and continues to use the crossing as part of its Park system. CP 220-223. The City therefore has possession and control of the land.

The agreement in this case is analogous to the agreement in *Power*

v. Union Pacific Railroad, Co., 655 F.2d 1380 (1981). In *Power*, Union Pacific and Burlington Northern (the “actual” owner of the property) entered into a contract regarding the use of the railroad tracks. 655 F.2d at 1386-87. The contract granted Union Pacific equal joint possession and use of the right-of-way. *Id.* at 1387. The contract also stated the owner could not impair Pacific Union’s “usefulness,” that Pacific Union had the same rights and privileges as owner and other uses of the tracks, that employees were converted to “joint employees,” and that the agreement could not be terminated unless Union Pacific was in default for 6 months. *Id.* On appeal, the Ninth Circuit analyzed whether Union Pacific was a landowner or possessor under RCW 4.24.210. *Id.* Based on the contract language, the court held that Union Pacific was in lawful possession of the land for purposes of RCW 4.24.210. *Id.*

The agreement in the case at bar similarly establishes the City is a landowner or in possession and control of the land. While the agreement between the City and BNSF does not contain provisions concerning “joint employees” or a termination clause in case of default, it does contain similar express grants of use and possession. Like Union Pacific, the City was granted the crossing for its use. In fact, the grant to the City is permanent which makes its ownership interest more favorable to the grant Union Pacific received in *Powers*. Further, like Union Pacific, the City is entitled to use the land without material interference from the railroad. The terms of the agreement alone establish that the City had a property interest, possession, and control. The Ninth Circuit confirms that this type

of grant by itself is sufficient to find as a matter of law the City is entitled to immunity under RCW 4.24.210.

The crossing is part of the City of Bellingham Parks and Recreation Department trail and park system. CP 220-223. The record contains the City of Bellingham Guide Map and Bellingham Trail Guide, which describe the many recreational areas and trails in the City and includes the South Bay Trail crossing and Boulevard Park. CP 220-262. The City has thus incorporated the crossing as part of its trail system and it is used accordingly. Based on its use and incorporation into the City trail system, there is sufficient evidence in the record to show that the City does possess and control the land for purposes of RCW 4.24.210.

Granting the City recreational use immunity in this case furthers the intent of the statute. The purpose of the statute is to encourage landowners to open up their land for use. The City's action of obtaining permanent crossing rights and making improvements to the crossing is the reason the trail and park access was opened for recreational use. But for the actions of the City, the South Bay Trail, including the crossing, would not exist. It would be closed. The City's actions provide further evidence of its control over the crossing: it can open the trail or close the trail. The City's actions of opening this crossing and making it part of the South Bay Trail is exactly what RCW 4.24.200 and 4.24.210 contemplated. Public policy supports granting the City immunity in this case.

Plaintiffs suggest that the City did not argue at the summary

judgment hearing about ownership or possession and therefore there is nothing in the record to support dismissal on recreational land use immunity grounds. (Br. of Appellant 7.) To the contrary, the record contains substantial evidence of the City's property interest and possession and control in the form of the agreement between the City and BNSF. CP at 103-110. Furthermore, the record contains substantial information documenting the possession of the crossing in the form of Trail Guides and the Declaration of Interim Parks Director Leslie Bryson. CP 220-262. In general, the record shows a long discussion between BNSF and the City that clearly contemplated the desire of the City to add the trail to its trail system and BNSF's eventual acknowledgment and grant of possession to the City for that purpose. Far from there being no evidence to support the City's ownership, possession and control, there is substantial uncontroverted documentation establishing this fact.

Plaintiffs also attempt to differentiate the City and BNSF's agreement from the agreement in *Powers* by pointing out some of the rights BNSF has under the agreement. (Br. of Appellant 12.). However, the fact that BNSF has property rights in the land and is also considered an owner, does not by itself exclude the City's rights and possessory interest. The law does not preclude multiple, different forms of property rights. In fact, as *Powers* demonstrates, more than one entity can have property rights in the same land. *See also McCarver v. Manson Park and Recreation District*, 92 Wash.2d 370, 597 P.2d 1362(1979) (indication from evidence that Federal Government owned the land but the Park

District was landowner and possessor of the recreational areas).

Additionally, Plaintiffs attempt to argue that the City should be judicially estopped from arguing that it owns or possesses and controls the crossing because it admitted BNSF “owns and operates the railroad crossing” in its Answer to the Amended Complaint. (Br. of Appellant 7). Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by a clearly inconsistent position. *CHD, Inc. v. Taggart*, 153 Wash.App. 94, 101, 220 P.3d 229, 233 (2009). One of the elements courts focus on in determining whether to apply estoppel is “whether the party’s later position is clearly inconsistent with its earlier position.” *Taggart*, 153 Wash.App. at 101, 220 P.3d at 233.

The City is not taking an inconsistent position. Contrary to Plaintiffs’ brief, the Amended Complaint alleged at paragraph 7 that “BNSF owns and operates the *railway tracks* which intersect the South Bay Trail in the vicinity of North Boulevard Park in Bellingham, Washington.” [emphasis added] CP at 324. The City’s Answer stated: “This answer is directed at another defendant and therefore no response to such allegation is required in this Answer. To the extent a response is required the City Admits such paragraph.” CP at 316.

At most, the City admitted that BNSF owned the “railway tracks” in its Answer. By admitting BNSF owned the physical tracks in no way amounts to an admission that BNSF exclusively owned the crossing land or that the City did not have a possessory interest in said land. In fact, the

City expressly asserted recreational use immunity as an affirmative defense in its Answer. CP 321. The City therefore asserted it had ownership or possession and control in its Answer. The City is not taking an inconsistent opinion, let alone a “clearly” inconsistent opinion. Any argument about judicial estoppel is therefore not supported by the facts or the law. On the other hand, Plaintiffs’ allegation that the City had a duty to exercise reasonable care to safely design and maintain the pedestrian railroad crossing stands as an admission of the City’s possession and control over the trail crossing.

E. IF THERE IS NO RECREATIONAL LAND USE IMMUNITY, THERE IS NO PREMISES LIABILITY.

If this Court accepts Plaintiffs’ claim that the City has no right to recreational immunity because it did not own the land where the collision occurred, there is yet another problem for Plaintiffs’ case and another basis to affirm the trial court. If an entity “is not an owner or possessor or in control of property for purposes of the recreational immunity use statute, then it is not an owner or possessor under the common law and cannot be liable under a premises liability theory.” *Ravenscroft v. Washington Water Power Co.*, 136 Wash.2d 911, 927, 969 P.2d 75, 84 (1998). One who does not possess land owes no duty of care to prevent an unreasonable risk of harm arising from a condition. *Coulson v. Huntsman Packaging Products, Inc.*, 121 Wash.App. 941, 942, 92 P.2d 278, 279 (2004). To establish a common law negligence claim, a duty must be proven. *Coulson*, 121 Wash.App. at 943, 92 P.3d at 279

In *Coulson*, the plaintiff alleged the defendant corporation was liable for failing to maintain a tree in a planting strip that obstructed a stop sign. 121 Wash.App. at 942-43, 92 P.3d at 942. The tree was on property owned by the City of Kent. *Id.* The City's property, including the right-of-away, abutted the corporations property. *Id.* This Court held that although the corporation performed "neighborly maintenance" of the tree, it did not possess the land and therefore owed no duty to the plaintiff. *Id.* at 948.

Plaintiffs' Complaint for Negligence and Wrongful Death was based on premises liability. CP 323-327. The Complaint alleges the City had a duty to "exercise reasonable care to safely design and maintain a pedestrian railroad crossing." CP 324. Plaintiffs are now arguing and therefore conceding to this Court that the City does not possess or control the land in question.

If, arguendo, the City does not have an ownership interest or possession and control of the actual crossing, the City cannot be liable as a matter of law. Under the common law, only an owner or possessor of land can be liable under a premises liability theory. That is because only a possessor of land owes a duty to those who enter the land. *See Coulson*. If the City is not the owner or possessor of the land, there can be no duty and therefore no premises liability.

Indeed, the Washington Supreme Court spoke unequivocally to

this very point in *Ravenscroft*. The plaintiff in *Ravenscroft* argued that Spokane County was liable under a premises liability theory. 136 Wash.2d at 927, 969 P.2d at 83-84. The trial court had previously denied the County's summary judgment motion based on recreational immunity because the County could not show possession and control. *Id.* The trial court subsequently dismissed all claims based on premises liability against the County. *Id.* The Supreme Court upheld the dismissal reasoning that if the County did not have possession or control under the recreational immunity statute, then it cannot have possession or control under the common law either. *Id.*

Plaintiffs' concession that the City does not own, possess or control the crossing is dispositive. By arguing there is no possession or control for recreational immunity purposes, he is conceding there are no grounds to support a premises liability cause of action. Thus, consistent with the Supreme Court's holding in *Ravenscroft* and, as a matter of law, the City is entitled to summary judgment.

F. THE CITY IS ENTITLED TO IMMUNITY BASED ON THE RECREATIONAL NATURE OF THE LAND AND THE WARNING SIGNS POSTED.

While Plaintiffs only argued the narrow issue of ownership, possession and control under the recreational use statute, it is important to note that the record otherwise supports granting the City recreational use

immunity. It is not disputed and the record supports the contention that the City owned, possessed and controlled the South Bay Trail excluding the actual portion of land that makes up the crossing (although the record and law show the City did own, possess and control the crossing as well, see argument *supra*). CP 220-264. It is also undisputed and supported by the record that the South Bay Trail was opened by the City for recreational use for which no fee was charged. CP 220-223, 103-110. It is likewise undisputed and supported by the record that Mrs. Haykin was bicycling on the South Bay Trail when she was fatally injured. CP 323-327, 294-299.

Mrs. Haykin was a recreational user at the time of the accident. See *Davis*, 102 Wash.App. at 184, 6 P.3d at 1195. Under the recreational use statute, the City's duty was to conspicuously warn of known dangerous artificial latent conditions on its land. See *Id.* The terms "known," "dangerous," "artificial," and "latent," modify "condition," not one another. *Van Dinter v. City of Kennewick*, 212 Wash.2d 38, 46, 846 P.2d 522, 526 (1993). The term "latent" in the statute means not "readily apparent to the recreational user." *Van Dinter*, 212 Wash.2d at 45, 846 P.2d at 526. The condition itself must be latent; landowners are not liable for a patent condition that posed a latent or unobvious danger. *Id.* at 212. Railroad tracks are not latent because a reasonable person is put on notice that a train may be near. *Power* at 1388.

The City's only duty to Mrs. Haykin, a recreational user of the trail, was to warn of a known dangerous artificial latent condition. There

is nothing in the record showing there was a known artificial dangerous latent condition on the non-crossing portion South Bay Trail. There is likewise nothing in the record showing there was a known artificial dangerous latent condition in the crossing portion of the trail. Thus, any allegation that the City was negligent as to its duty in regards to the non-crossing or crossing part of the trail fails.

Furthermore, even though the railroad tracks were not latent, the City did post conspicuous warning signs in the form of a railroad sign, stop sign, and “crossbuck” on the trail approaching the crossing. Whether the Court looks at conditions of the actual crossing in isolation, or conditions on the other parts of the trail more broadly, the City is entitled to recreational use immunity under state law. The trial court appropriately granted summary judgment based on the recreational use statute.

IV. CONCLUSION

The recreational use statute gives immunity to landowners or others in possession or control of the land who open up the land for recreational use. The City’s possession and control is established by the agreement with BNSF which granted the City a “permanent crossing” and the fact that the crossing is part of the South Bay Trail, which is part of the City Parks system. The City did not breach a duty owed to Mrs. Haykin: the injury causing condition was not a known dangerous artificial latent condition. Further, if the condition was latent, conspicuous warning signs were posted. Based on the record and the law, the City is entitled to recreational use immunity.

Alternatively, if the Court finds the record does not support recreational immunity because the City does not own or possess and control the land, the City is still entitled to summary judgment. Pursuant to *Ravenscroft* and the common law for premises liability, if the City is not the possessor of the land, it cannot be liable. There is no genuine issue as to the material facts in this case. The trial court's summary judgment order should be affirmed.

Respectfully submitted this 14th day of December, 2011.

CITY OF BELLINGHAM



Shane P. Brady, WSBA #34003
Assistant City Attorney

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

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 DEC 15 AM 10:31

**ESTATE OF MAIA HAYKIN and
RICHARD HAYKIN, individually and
as personal representative of the
ESTATE of MAIA HAYKIN,**

No. 67713-6-I

Appellants,

CERTIFICATE OF SERVICE

vs.

**CITY OF BELLINGHAM, a municipal
corporation,**

Respondent.

I declare under the penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. I am an employee of the City of Bellingham. My employment address is 210 Lottie Street, Bellingham, Washington 98225.

On December 14, 2011, I served a true and correct copy of the following documents by e-mail transmission and regular U.S. mail on the parties listed below:

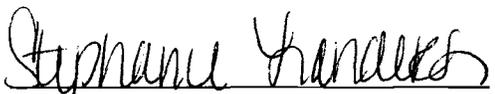
- 1. **Brief of Respondent City of Bellingham; and**

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2. **Certificate of Service.**

DATED this 14th day of December, 2011.

CITY OF BELLINGHAM


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