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No. 70647-1

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

MARK ACARREGUI, NONOY
FIGUEROA, MARK TRUMBAUER,
JAMES MOUNT, and all others similarly situated,

Plaintiffs - Appellants,

v.

CITY OF SEATTLE,

Defendant - Respondent.

**OPENING BRIEF OF APPELLANTS
MARK ACARREGUI, NONOY
FIGUEROA, MARK TRUMBAUER,
JAMES MOUNT, and all others similarly situated**

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I. INTRODUCTION (OR “2 IS *NOT MORE THAN* 1 + 1”)

This case involves a putative class action by four individuals on behalf of over 16,000 fellow vehicle owners who received improper notices of \$124 fines for infractions of purported traffic violations captured by “red light cameras” (RLCs). The notices at issue here were generated at a specific intersection in northeast City of Seattle (“City”), known as “Five Corners”, where RLCs are expressly prohibited by a state statute from being installed because the “[u]se of automated traffic safety cameras is **restricted to two-arterial intersections**, railroad crossings, and school speed zones **only**.” (emphasis added.) RCW 46.63.170(1)(b).

By the City’s own admissions, there are **more than** 2 arterials at Five Corners and its own legislative efforts to change the enabling law to “legalize” future use of RLCs at Five Corners were expressly rebuffed.

The trial court dismissed this action under CR 12(c), *without* deciding if the RLCs were legal and *without* certifying the class, on the purely procedural grounds that the plaintiffs were required to first seek to have their infractions vacated by the Seattle Municipal Court, *individually*, thus effectively precluding practical relief from the City’s violation of the governing law since municipal courts are venues of limited jurisdiction and have no authority over class actions.

As this matter is procedurally to be decided on a *de novo* basis by

the Court of Appeals, plaintiffs seek a determination that: 1) the RLCs at the Five Corners intersection, now “voluntarily” disconnected by the City after more than four years of operation, were illegal, 2) that the class of vehicle owners who received and paid the illegally issued notices of traffic infractions should be certified, and 3) the class is entitled to return of their \$124 payments to the City, plus pre-judgment interest thereon

II. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Plaintiffs’ Motion for Summary Judgment, without prejudice, pursuant to CR 56, and also erred in granting City’s Defendant’s Motion to dismiss pursuant to CR 12(c). CP 73.

2. The trial court erred in denying Plaintiffs’ motion for class certification pursuant to CR 23. CP 29.

3. The trial court erred in denying Plaintiffs’ motion for an order allowing the taking of depositions of Defendant City of Seattle representatives under CR 30(b)(6). CP 29.

4. The trial court erred in denying Plaintiffs’ Motion to Strike consideration of Judges Heller and Middaugh’s decisions in appeals by *pro se* vehicle owners of their traffic infraction notices at Five Corners. CP 73.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether this Court should find that the trial court erred in requiring that the plaintiffs (and all other members of the putative and uncertified class of vehicle owners), who allege that they received illegal notices of infraction first be required to have the “judgments” against them vacated in Seattle Municipal Court, when there is no authority possessed by such a limited jurisdiction to hear and decide class actions.

2. Whether this Court, acting *de novo*, should reverse both the trial court's Order Denying Plaintiffs' Motion for Summary Judgment pursuant to CR 56 and the trial court's Order Granting Defendant's Motion to Dismiss pursuant to CR 12(c), and instead enter an Order Granting Summary Judgment.

3. Whether the trial court's order denying Plaintiffs' Motion for Class Certification was in error since requiring 16,000 vehicle owners to file motions to vacate individual “judgments” against them effectively precludes justice from being awarded to them.

4. Whether the trial court erred when it denied Plaintiffs the right to take the depositions of the City's representatives under CR 30(b)(6) to obtain information concerning the claims in the lawsuit.

5. Whether the trial court erred in denying Plaintiffs' Motion

to Strike consideration of decisions by Judges Heller and Middaugh in appeals by *pro se* vehicle owners of their traffic infraction notices at Five Corners.

6. Whether this Court should remand the case to the trial court to direct the City to refund payments made by all vehicle owners from the date of commencement of the illegal placement of RLCs at the Five Corners intersection in 2008 until their disconnection in 2012.

7. Whether the Court should direct the trial court to enter an order that the Plaintiffs and the class they represent are entitled to prejudgment interest.

IV. STATEMENT OF THE CASE

A. Overview

The Plaintiffs are Mark Acarregui, James Mount, Nonoy Figueroa, and Mark Trumbauer (collectively "Plaintiffs"), who are also putative class representatives for vehicle owners who received over 16,000 notices of infractions from the defendant City at one specific intersection where automated red light cameras ("RLCs") were in use from 2008 until May, 2012. CP 1. The Plaintiffs, unaware that the RLC at the junction of five arterials in Northeast Seattle was illegal, paid the traffic infraction fines, and subsequently sought in this lawsuit to have the trial court order the

monies be refunded to them and approximately 16,000 other owners of vehicles similarly issued notices of infractions be as a class action suit. CP 25.

B. Passage of enabling legislation authorizing and restricting use of RLCs.

Prior to 2005, a Washington motorist could only be issued a notice of infraction for a traffic violation if the violation was committed **in the presence** of the officer issuing the notice¹. RCW 46.64.015; see also RCW 10.31.100(7)².

In 2005, Washington State passed legislation that authorized and enabled local government jurisdictions, such as the City, to use RLCs for the purpose of issuing notices of infractions. RCW 46.63.170. The legislation, however, contained numerous prerequisites for and restrictions on the use of RLCs by all jurisdictions, including the City. CP 1. These limitations notably provided that the “[u]se of automated traffic safety

¹ *State v. Magee*, 167 Wn.2d 639, 220 P.3d 1224 (2009) (State Supreme Court holding that highway patrol officer did not have authority to issue a notice of infraction to motorist for negligent driving in the second degree, based on motorist's position facing the wrong way on highway on-ramp, since officer did not see motorist committing alleged offense); see also, *State v. Bravo Ortega*, 177 Wn.2d 116, 297 P.3d 57 (2012) (State Supreme Court dismissing conviction of defendant where arresting officer relied upon another officer having seen the illegal action).

² “An officer may act upon the request of a law enforcement officer in whose presence a traffic infraction was committed, to stop, detain, arrest, or issue a notice of traffic infraction to the driver who is believed to have committed the infraction. The request by the witnessing officer shall give an officer the authority to take appropriate action under the laws of the state of Washington.”

cameras is **restricted to two-arterial intersections**, railroad crossings, and school speed zones **only.**” (emphasis added.) RCW 46.63.170(1)(b). CP 1. Although the enabling statute was modified in 2012, **after** the RLCs were discontinued at Five Corners, the language quoted above was the law during all applicable time periods to which this lawsuit applies. Moreover, the 2012 statutory modifications **did not expand** upon the above quoted restrictions in any event, but in fact added **additional restrictions**, such as requiring certain studies be completed before installing new RLCs.

Judges in the Municipal Court of Seattle began dismissing notices of infractions generated by RLCs that were issued to individual vehicle owners for traffic violations at Five Corners, citing the “two arterial language”. As these dismissals were publicized by local media, legislation was promoted by the City to “**expand**” the definition of allowable locations for RLCs to the intersection of two “**or more**” arterials.³ The

³ The City has defined in its municipal code what constitutes an “arterial” and has adopted an official map depicting every such arterial. Seattle Municipal Code Section 11.14.035 simply states “‘Arterial street’ means every street, or portion thereof, designated as such in Chapter 11.18.” CP 1. Chapter 11.18 of the Seattle Municipal Code, in turn, provides as follows: SMC 11.18.010 Arterial street map. CP 1. The streets which are identified as arterial streets in Exhibit A1 11.18.010 are designated as arterial streets for application of this subtitle. Exhibit 11.18.010 A (1) Arterial street map north portion. Exhibit 11.18.010 A. CP 1. The above referenced ordinances and maps are attached to SMC 11.18.010. CP 1.

City's efforts, clearly reflecting its concerns about the legality of the RLCs at Five Corners, were notably unsuccessful.

C. City's use of RLCs at "Five Corners" in Northeast Seattle.

"Five Corners" is an intersection of the following City officially designated arterials: 1) eastbound NE 45th Street, 2) westbound NE 45th Street, 3) 35th Avenue NE, 4) Union Bay Place NE, and 5) Mary Gates Memorial Drive NE. Both the surrounding neighborhood and the City refer to this intersection as "Five Corners". CP 1.

The City began using RLCs at Five Corners in 2008. CP 1. According to the City's own records, 16,950 of the total City-wide infractions occurred at Five Corners through May 31, 2012. CP 1.

The City fine for a "captured" violation at RLCs' locations was initially set at \$101, but was increased by the City on January 1, 2008 to the current \$124. CP 1. Since the RLCs at Five Corners came into being after the fine increase, all issued notices from alleged violations at that intersection were assessed a \$124 penalty.

Based on the City's records, the gross revenue generated by the City's use of the RLCs at Five Corners alone through May 31, 2012 is \$1,790,792.39; when pre-judgment interest at the statutory rate of 12% simple interest per annum of \$534,273.84 is added, the total amount

allegedly owed to Plaintiffs by the City as of April, 2013, was \$2,325,066.23. CP 23.

The City advised Plaintiffs' counsel that it discontinued use of the RLCs at Five Corners in May, 2012 (this occurred after the City received the notice of intent to file a claim against it in April, 2012, and after it was unsuccessful in February, 2013, in getting the State Legislature to amend the enabling statute to allow RLCs to be used at intersections of more than 2 arterials). CP 27.

D. Attempts by the City to legalize RLCs at Five Corners.

After the negative publicity in the news media about the City's use of RLCs at Five Corners, it City sought to obtain approval for the insertion of the words "**or more**" with respect to allowable intersections with arterials where RLCs could be authorized.⁴ CP 46. The State Legislature, however, **refused** to expand the enabling legislative of RCW 46.63.170(1)(b) to allow intersections with "**more than**" two arterials to be authorized for use of RLCs.⁵

⁴ See Second Substitute Senate Bill 5188 (62nd Legislature 2012 Regular Session), attached to CP 46, which would have added the words "**or more**" after the word "two" and before the word "arterials" (emphasis added).

⁵ In fact, in 2013 the legislature amended the enabling statute to require that use of RLCs be **further limited** to where the duration of yellow lights meet certain minimum interval durations and certain studies be first undertaken by municipalities before installing new RLCs.

On February 19, 2013, the City sent three of its representatives to testify in Olympia at a public hearing held by the State Senate Transportation Committee on Senate Bill 5678. CP 40. The testimony presented to the State Legislature by the City on that date *dispels any and all pretense by the City that it genuinely believes that it was authorized to have RLCs at Five Corners, and further documents that the State Legislature also did not intend that the existing law authorized such placement and use of RLCs at that location:*

CHAIR [SENATOR CURTIS] KING: We will now move to Senate Bill 5678.

[COMMITTEE STAFF] MR. [KELLY] SIMPSON: Senator King, Senator Eide, Committee Members, again. I'm Kelly Simpson with Committee Staff. Senate Bill 5678 authorized automated traffic safety cameras at intersections with two or more arterials.

Under current law, local governments are allowed to install automated traffic safety cameras to detect three different violations. Those would be: Stoplight, railroad crossing and school speed zone violations.

With respect to stoplight violations, the current law does limit cameras at intersections of two arterials. Under this legislation, the law would be expanded to include stoplight cameras at intersections with two or more arterials.

SENATOR [MARK] MULLETT: Thank you, Mr. Chair. So I've been – which is in Senator Frocket's district so I'm guessing that's why this bill is here. So I've been through an intersection by the U District that has multiple roads coming in, and it's got lights. How did that exist if, like – is this a law that expired and then we're re-authorizing it or –

MR. SIMPSON: **This current law never did allow red-light cameras at intersections of two or more arterials.** So I can't speak to that particular location you're describing but, as I say, the law was originally drafted to two arterial intersections. **And that's the current law, and this would**

expand that to two or more arterials.

SENATOR DAVID FROCKET:

...
I think that pretty much summarizes the bill. My – I'd say the basic thing is, you know, this is a local option. It's not required in any jurisdictions. **This would simply give local jurisdictions the option if they have an intersection like this one that has actually five roads coming into it** – there's not many of them, I'm guessing, around the state, but there are some - - it would give an option. And it would be up to the local jurisdiction and the officials and voters there to decide what they wanted to do.

.....
SENATOR [TRACEY] EIDE: Yes, we have three from the Seattle Finest. We have got Greg Doss, Eric Sano and Jim Morgan – sorry, gentlemen – the Seattle Police Department.

LIEUTENANT [ERIC] SANO: Well, thank you, Senators King and Eide and Members of the Committee for hearing us, and good afternoon. My name is Eric Sano. I'm a lieutenant with the Seattle Police Department assigned to our traffic section enforcement. **And I oversee the automatic traffic safety camera program for the Seattle Police Department.**

With me today is Officer Jim Morgan, who is the actual person who runs the program and looks at every video and every picture and authorizes the issuance of any tickets of violators. And also from our Office of Strategic Policy and Planning is Greg Doss.

So we're here today to speak in support of this bill, and I actually have some statistics because we actually had a red-light camera at that four – Five Corners intersection. **And over the years until we realized that it was in violation of the existing ordinance, we did have it there for three [sic] years.**.....

.....
SENATOR [MIKE] CARRELL: **How much money did you collect during those – that time period when you weren't authorized to actually do this?**

MR. [GREG] DOSS: **Our Department of Revenue would have to get you that number. We don't have it with us.**

SENATOR CARRELL: I'll bet that it's probably tens if not hundreds of thousands.

MR. DOSS: [Quickly changing the subject!] Senator Eide and Senator King, I want to talk a little bit more about the program.

.....

SENATOR [DON] BENTON: A couple of question. Greg, nice to see you again. I'm hoping that you will get Senator Carrell's question answered and get me that information. I'd like to know the revenue amount as well. When did you pull them out [at Five Corners]?

MR. DOSS: We pulled them out on May 1st of last year. **Prior to the last legislative session [in 2012], our law department had interpreted the code to say, the RCW to say that there had to be *at least two there*. Then with your specific actions last session it became clear that that wasn't the [legislative] intent, and so we went to disconnect the cameras and we have actually physically removed them from the Five Corners Intersection.**

SENATOR BENTON: Yeah, They have been gone for about ten months.

.....
(Emphasis added.)^{6 7}

E. Investigation into City's use of illegal RLCs at Five Corners.

The current lawsuit followed a series of three "investigation news

⁶ The transcript of the hearing on February 19, 2013 was prepared by a certified court transcriber, using the TVW videotape of the hearing, and then certified as authentic as a true and accurate transcription by the Honorable Hunter G. Goodman, Secretary of the Washington State Senate, on May 23, 2013. CP 46. This certification complies with ER 901 and 902; RCW 5.44.040. See also *State v. Shaw*, 120 Wn.App. 847, 86 P.3d 823 (Div. 1, 2004)(holding that information found on the internet can be admissible as evidence). A compact disk with the TVW video was submitted to the trial court and opposing counsel, but was inadvertently omitted from the official record with the Court Clerk and the initial designation of Clerk's Papers; the record is being supplemented.

⁷ As noted by *the* leading treatise on the law regarding statutory construction, Statutes and Statutory Construction (7th Ed., 2010), Professors Singler and Singler write: [W]hen lobbying consists of the presentation of briefs and arguments, it may have a very real effect on the interpretation of a statute. **If the object of the court is to determine the intent of the legislature, evidence presented in legislative committees may be a reliable indication of legislative intent.** (Citations omitted.) At p. 642 – 643. See also *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W.Va. 484, 647 S.E. 2d 920 (2007)(holding that post-enactment statements by an individual legislator are suggestive of the legislature's intent and certainly might be considered *when the statements are consistent with the statutory language and legislative history.*) (emphasis added.)

reports”⁸ by a local Seattle television station concerning the dismissal by Seattle municipal judges of individually brought challenges by vehicle owners to Notice of Infractions at Five Corners, on the basis **that the intersection was not one of the only 3 types of restricted locations for RLCs under state law.** CP 23. The television broadcast reported:

Investigators: Red-light cameras may issue illegal tickets.

Seattle: It’s just one little traffic case. **But it’s calling into question thousands of tickets generated by some of those red-light cameras in Seattle.**

Traffic judges have declared the camera set-up illegal at a busy intersection near the University of Washington and they’ve tossed tickets out, but the city is still ticketing unsuspecting motorists.

NE 45th Street at Union Bay Place NE is not your typical intersection.

...

Seattle traffic [Judge] Francis deVilla dismissed the infraction [against a vehicle owner based on RLCs at Five Corners because he] ruled that the camera system is illegal at the intersection. The judge apparently based that decision on state law which says cameras are restricted to intersections where two arterial roads meet – your typical four-way stop.

But then, **NE 45th Street at Union Bay is a five-way intersection.** The judge may have determined that one extra street means cameras cannot legally be placed here.

.....

And the City Attorney’s Office acknowledges that Seattle traffic judge Adam Eisenberg dismissed at least one ticket at the same intersection.

⁸ See <http://www.king5.com/news/investigators/Red-Light-Cameras-May-Issue-Thousands-of-Illegal-Tickets-83501377.html>;
<http://www.king5.com/news/investigators/Documents-Reveal-Judges-Dismissals-of-Red-Light-Camera-Tickets-87673842.html>; and
<http://www.king5.com/news/local/Investigators-Follow-up-Court-hearing-fails-to-clear-up-red-light-camera-controversy-104316879.html>

(Emphasis added.)

Investigators: Documents reveal judges' dismissals of red light camera tickets.

Seattle: There's new criticism of some of those red light cameras placed in Seattle. It's not coming from citizens, but from the City's traffic judges.

New documents obtained by the KING 5 Investigators show the city knows judges have been throwing cases out of court but has continued to issue tickets.

.....

'Let me start off by saying this particular setup at this location is illegal,' Judge Francis DeVilla said on an audio transcript, 'because it [has] more than two arterials feeding into it.'

The judge dismissed the ticket, citing the state's red light camera law, which says cameras are 'restricted to two-arterial intersections.'

The typical two-arterial intersection has two main streets that cross. But at 45th and Union Bay there's another street intersections, 45th Place, making it a three arterial intersection.

Thousands of red light infractions have been issued from the busy and confusing intersection even though a KING 5 records request shows judges starting tossing tickets last summer and put the city on notice.

Records show municipal Judge Adam Eisenberg may have been the first to do it.

In a June hearing, attorney Steve Rosen fought his ticket from 45th and Union Bay.

Judge Eisenberg's ruling: "I'm very familiar with the intersection. I think there's three major streets intersecting at that point. I'm going to grant the motion to dismiss.'

....

But the transcript filed by the city for that appeal did not include entire courtroom conversation, which we uncovered in the court reporter's documents.

Judge Eisenberg says at the end of the hearing. 'I think judge DeVilla feels the same way . . . " indicating judges previously discussed the intersection. **To which the prosecutor responds, 'I have to go tell the city to take that camera down.'**

But the cameras were still up months later then Diane Hievert got a \$124 ticket.

(Emphasis added.)

Court hearing fails to clear up red light camera controversy.

Seattle –

....

Earlier this year, the KING 5 Investigators reported that Seattle's traffic judges have been tossing tickets issued to red light runners at NE 45th Street and Union Bay Place.

The judges have ruled that language in the state law does not allow traffic cameras to be used at five-way intersections, like the intersection in question near University Village.

....

The cameras have issued nearly 12,000 tickets in the two years since they were installed at the intersection. **The city says it won't take them down unless a superior court judge rules against them.**

...

(Emphasis added.)

F. This litigation.

Although no new notices of infractions have been issued by the City at Five Corners since May, 2012 when the City discontinued (but did not remove the RLCs), the City did not offer to refund the Plaintiffs their monies. CP 1.

After the Plaintiffs filed an initial notice of claim against the City, and they received no response, this lawsuit was filed for the named four individual plaintiffs and on behalf of a proposed class of similarly situated vehicle owners under CR 23. CP 1.

The Plaintiffs noted the CR 30(b)(6) depositions of the City's representatives most knowledgeable about the RLC program in general,

and at Five Corners in particular. They also sought class certification under CR 23. CP 24. The City successfully moved for a protective order blocking both efforts of the Plaintiffs. CP 29. These two procedural rulings of the trial court are part of this appeal.

On June 7, 2013, the trial court heard cross dispositive motions: the Plaintiffs' motion for summary judgment under CR 56, and the City's motion to dismiss under CR 12(e). CP 30 and 34, respectively. Prior to ruling on the cross motions, the trial court denied Plaintiffs' motion to strike certain materials submitted by the City from its consideration, i.e. decisions by two other Superior Court judges in *pro se* appeals, and that order is also part of this appeal. CP 73.

V. ARGUMENT

A. Standards of Review

This Court reviews errors of law – such as the trial court's granting a Defendant's Motion to Dismiss under CR 12(c) against the Plaintiffs and the denying of a Plaintiffs' Motion for Summary Judgment under CR 56 – *de novo*. See *Meadow Valley Owners Ass'n v. Meadow Valley, LLC*, 137 Wn. App. 810, 816, 156 P.3d 240 (2007) (“Where the relevant facts are undisputed and the parties dispute only the legal effect of those facts, the standard of review is also *de novo*.”); see also *Coulter v. Asten Grp., Inc.*,

155 Wn. App. 1, 7 n.2, 230 P.3d 169 (2010) (statutory interpretation reviewed *de novo*).

This Court reviews the trial court's denial of a motion to certify a class action for abuse of discretion. *Weston v. Emerald City Pizza LLC*, 137 Wn. App. 164, 167-68, 151 P.3d 1090, 1092 (2007) ([w]e review the trial court's class certification decision for an abuse of discretion). (internal citations omitted). A trial court abuses its discretion when its decision is manifestly unreasonable or its discretion is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "A court acts on untenable grounds when its factual findings are not supported by the record; it acts for untenable reasons if it uses an incorrect standard of law or the facts do not meet the requirements of the standard of law." *Sherron Assocs. Loan Fund V (Mars Hotel) LLC v. Saucier*, 157 Wn. App. 357, 361, 237 P.3d 338 (2010).

B. The Municipal Court's imposition of RLC fines was improper as it lacked subject matter jurisdiction and "judgments" levied should be vacated.

1. The judgments entered were void.

The Seattle Municipal Courts that processed Five-Corner RLC infractions lacked jurisdiction over these matters since the placement of

RLCs was illegal. As such, the fines paid and/or “judgments” entered were void. *Summers v. Dept. of Rev. for State of Wash.*, 104 Wn. App. 87, 90, 14 P.3d 902, 903 (2001) (quoting from *Bresolin v. Morris*, 86 Wn.2d 241, 245, 543 P.2d 325 (1975)).

Here, the clear language of this statute provides that the “[u]se of automated traffic safety cameras is **restricted to two-arterial intersections**, railroad crossings, and school speed zones **only**.” (emphasis added.) RCW 46.63.170(1)(b). The carefully crafted language of the RCW, by the legislature, does not permit any court to find a party committed the infraction of running a red light when the evidence provided derives from an illegally placed RLC.

Since the placement of RLCs at Five-Corners was not legislatively permitted, the citations do not derive their power from RCW 46.63.170(1)(b) and thus the court lacked subject matter jurisdiction over these wrongfully levied fines. Furthermore, a court “lacks subject matter jurisdiction when it attempts to decide a type of controversy **over which it has no authority to adjudicate**.” *State v. Barnes*, 146 Wn.2d 74, 43 P.3d 490, 495 (2002). The Plaintiffs payment of a fine does not mean that subject matter jurisdiction has been waived. But, “[a] judgment entered without subject matter jurisdiction is void; such a **judgment must be**

vacated even if the party actively participated in the lawsuit, because lack of subject matter jurisdiction is not subject to waiver.” (emphasis added.) *Shoop v. Kittitas County*, 108 Wn. App. 388, 30 P.3d 529 (2001).

2. The Superior Court has original jurisdiction over this matter.

Additionally, the Washington Constitution grants to the Superior Court, not the Municipal Court, *original* jurisdiction over the Plaintiffs’ claims. Art. IV, S6, states (emphasis supplied):

“The *superior court* shall have *original* jurisdiction in all cases at law which involve...the *legality of any* tax, impost, assessment, toll or *municipal fine*...”

While Plaintiffs’ claims clearly “involve” the “legality of [a] municipal fine,” the City appears to have argued that the Legislature stripped the Superior Court of its original jurisdiction in cases involving the legality of a municipal fine, by enacting RCW 3.50.020⁹. The City’s argument was rejected by the Washington Supreme Court in *Orwick v. City of Seattle*, 103 Wn.2d 249, 692 P.2d 793 (1984). There, the Supreme Court analyzed the statutes governing Municipal Court jurisdiction to hear infraction cases and held that the Superior Court, not the Municipal Court, had original

⁹ See Seattle Municipal Code §3.33 “This chapter sets forth the structure and authority of Seattle Municipal Court... Consistent with RCW Chapter 35.20 and other applicable law, the purpose of the Court is to try violations of City ordinances and perform such other duties as may be authorized by law.” (emphasis added.)

jurisdiction to decide whether a city's enforcement of its ordinance violated statutory requirements or limitations imposed by state law. 103 Wn.2d at 25:

We *hold* that the superior courts have original jurisdiction over claims for equitable relief from alleged system-wide violations of mandatory statutory requirements by a municipal court and from alleged repetitious violations of constitutional rights by a municipality in the enforcement of municipal ordinances.
(Emphasis added.)

Thus since the Plaintiffs' case is about a violation of the statutory requirements in RCW 46.63.170(1)(b) and the Constitutional prohibition on excessive fines, under *Orwick* and the Washington Constitution, the Superior Court has jurisdiction of those claims and not the Municipal Court^{10 11}.

The Washington Supreme Court has not vacated *Orwick* or rejected its reasoning, nor has it changed its approach to municipal court

¹⁰ The Municipal Court does not have equitable powers under the Washington Constitution. Art. IV Section 6 (only district courts and the superior courts have equitable powers - a municipal court is not a district court).

¹¹ An interesting comparison is with the criminal rules for an appeal (RALJ). A party defendant can raise issues of a court's jurisdiction **at any time**. Even after a guilty plea. See RAP 2.5(a). See *State v. Card*, 48 Wn. App. 781, 784, 741 P.2d 65 (Div. 3 1987) (holding that lack of subject matter jurisdiction can be raised at any time when "fundamental justice so requires") (internal citations omitted).

jurisdiction in any subsequent case for over twenty-five years.¹²

Accordingly, this Court should find that the Seattle Municipal Court lacked proper subject matter jurisdiction over RLC infractions at Five Corners and therefore the judgments levied against the Plaintiffs (and all like them) are void.

C. The trial court erred in denying Plaintiffs' Motion for Summary Judgment, and also erred in granting City's Motion to Dismiss.

The trial court erroneously granted City's Motion to Dismiss and denied Plaintiffs' motion for summary judgment. Due to the similarity of the arguments pertaining to these Motions, a discussion of the law applicable to both is combined below.

Summary judgment is appropriate in an action where the pleadings and other admissible evidence prove that **no genuine issues of material fact exist** and that the moving party is therefore entitled to a judgment as a matter of law. Civil Rule 56; *Del Guzzi Construction v. Global*

¹² The City's reliance upon reference in footnote 10 of its Motion to Dismiss to the *McCarthy* case is in error, as it was reversed in *McCarthy v. City of Cleveland*, 626 F.3d 280, 2010 U.S. LEXIS 23203 (2010), where the majority of the U.S. Sixth Circuit ruled that failure to challenge a RLC ticket when issued did not preclude a later judicial challenge. CP 34. Noteworthy, in the *Kovach* case cited by the City in the same footnote, the trial court dismissed over 3,000 of the 20,000 tickets issued by the RLC at issue in that case due to no notice.

Northwest, 105 Wn.2d 878, 719 P.2d 120 (1986)¹³.

Additionally, the City's burden to successfully pursue a CR 12(c) motion to dismiss Plaintiffs' putative class action suit is a *very difficult one since it must prove "beyond a reasonable doubt that no facts justifying recovery exist"* (emphasis added); see also *P.E. Systems, LLC v. CPI Corp.*, 164 Wn. App. 358, 264 P.23d 279 (Div. 3, 2011)¹⁴.

1. The plain meaning of RCW 46.63.170(1)(b) permits RLCs at the intersections of only two arterials, and not "two or more" arterials.

The plain meaning of the relevant RLC statute does not permit the

¹³ The non-moving party may not rest on mere denials or allegations found in its pleadings. Instead, the non-moving party must present specific facts in order to demonstrate that issue(s) of genuine material fact exists. *Mackey v. Graham*, 99 Wn.2d 572, 663 P.2d 490 (1983); *Tokaz v. Frontier Federal Savings & Loan Association*, 33 Wn. App. 456, 656 P.2d 1089 (1982). A motion for summary judgment adequately supported by the evidence will not be denied merely upon the non-moving party's claim of unresolved factual issues or the bare assertion of the presence of an affirmative defense. Otherwise, "[t]he whole purpose of summary judgment procedure would be defeated if a case could be forced to trial by a mere assertion that an issue exists without any showing of evidence." *Jacobsen v. State*, 89 Wn.2d 104, 112, 569 P.2d 1152 (1977) (quoting from *Reed v. Streib*, 65 Wn.2d 700, 707, 399 P.2d 338 (1965)).

¹⁴ See *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 888 P.2d 147 (1995)(State Supreme Court reversed trial court's dismissal of employees suit against employer, stating "CR 12(b)(6) motions to dismiss for failure to state a claim should be granted only '*sparingly and with care*.'", quoting *Haberman v. WPPS*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987)); see *Berst v. Snohomish County*, 114 Wn. App. 245, 57 P.3d 27 (Div. 1, 2002)(reversing trial court's dismissal, stating "Courts should dismiss for failure to state a claim upon which relief can be granted only when it appears *beyond a reasonable doubt* that no facts justifying recovery exist")(emphasis added), at 251; *Mueller v. Miller*, 82 Wn. App. 236, 917 P.2d 604 (Div. 2, 1966)(Court of Appeals reversed trial court's dismissal under CR 12(b)(6) of quiet title action and remanded to allow the plaintiff to add a claim, stating "A court should grant dismissal only where 'it appears, beyond doubt, that the plaintiff can prove *no set of facts in support of his claim* that would entitle him to relief'" quoting *Danzig v. Danzig*, 79 Wn. App. 612, 616, 904 P.2d 312 (1995).

use of RLCs at intersections of more than two (2) arterials. The clear language of this statute provides that the “[u]se of automated traffic safety cameras is **restricted to two-arterial intersections**, railroad crossings, and school speed zones **only**.” (emphasis added.) RCW 46.63.170(1)(b). When a statute is unambiguous, as it is here, the meaning is “derived from the plain language of the statute alone.” *Fraternal Or. of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Or. of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655, 663 (2002). (See also 82 C.J.S. Statutes §310, “The legislature is presumed to have understood the meaning of words, phrases, and provisions used in a statute and to have intended to use them in their ordinary and common sense.”) The drafters of the Washington Practice Series best pronounce the rule regarding statutory construction:

As a general principle of statutory construction, words in a statute are given their **plain and ordinary meaning** unless a contrary intent is evidenced in the statute. The interpretation of a statute is a question of law for the court, and will be considered de novo by an appellate court. Where the statutory language is clear and unambiguous, the statute's meaning is determined from its language alone; courts will not look beyond the language nor consider the legislative history... **A court should not interpret a statute in a way that renders any portion of it meaningless.** (emphasis added.) 16 Wash. Prac., Tort Law And Practice § 0.11 (3d ed.)

Additionally, if the legislature has not provided a definition for statutory terms, "courts may give a term its plain and ordinary meaning by reference

to a standard dictionary." *Tenino Aerie v. Grand Aerie*, 148 Wn.2d 224, at 239, 59 P.3d 655 (2002).

Here, the relevant RCW states "two-arterials" **and not "two or more" arterials**. RCW 46.63.170(1)(b). As defined in *Webster's Dictionary*, "two" means "the sum of one and one; the number next greater than one, **and next less than three**; two units or objects." (emphasis added.) The placement of RLCs at Five Corners, which is comprised of five-arterials, thus violates the clear and unambiguous language and restrictions provided in this statute. Moreover, "it is a basic rule of construction that 'if there is any doubt as to the meaning of a taxing statute, it must be construed most strongly against the taxing power in favor of the citizen.'" *Foremost Dairies, Inc. v. Tax Commission*, 75 Wn.2d 758, 763, 453 P.2d 870, 873 (1969) (quoting *In re Ehlers' Estate*, 53 Wn.2d 679, 681, 335 P.2d 823, 825 (1959)).

a. A literal dictionary definition applies.

Similarly, two other key words used in the statute in question are "**restricted**" and "**only**", referring to the three permissible locations where RLCs are authorized. According to the Dictionary.com, the word "only" means "without anything further; solely, exclusive; **no more than**". (emphasis added.) The word "restricted" means "**confined; limited**"

according to Merriam Webster, *ibid.*; according to the Oxford Dictionary, “only” means “**limited in extent, number, scope or action**”. (emphasis added.)

In sum, courts are directed to interpret the words and phrases used in statutes in accordance with statutory definitions, but in the absence of statutory definitions, then standard dictionary definitions control¹⁵.

b. Statutory interpretation should not be deferred to the agency charged with enforcement if no ambiguity exists.

The argument that applying a literal interpretation would restrict the spirit or purpose of this RCW is invalid. Further, the argument that the desired interpretation by the Plaintiffs would create unreasonable restrictions on the City, and thus the duty of statutory interpretation should be deferred to the agency charged with this RCW enforcement (here, specifically the Seattle Police Department) is also invalid. *Citizens for a Better Env. California v. Union Oil. Co. of California*, 861 F. Supp. 889, 907 (N.D. Cal. 1994) *aff'd*, 83 F. 3d 1111 (9th Cir. 1996). Agency interpretation, however, can only be used if such interpretation is "not otherwise inconsistent with the plain language of the statute or with [its

¹⁵ See *Estate of Bunch ex. Rel. Bunch v. McGraw Residential Center*, 174 Wn.2d 425, 275 P.3d 1119 (2011); *State v. Zigan*, 166 Wn. App. 597, 270 P.3d 625 (Div. 3, 2012).

other] provisions." *Id.* The City's interpretation would "upset the legislature's careful balancing of interests," evidenced in RCW 46.63.170(1)(b). *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 558, 199 P.3d 393, 409 (2009). Moreover, "judges should act at all times in a manner that promotes public confidence in the impartiality of the judiciary." 2010 WL 6531455 (WA Eth. Adv. Comm.), 1. Applying any definition or applying statutory interpretation which skews "two-arterials" to mean "two or more" arterials runs afoul to not only the plain language of RCW 46.63.170(1)(b) but also to the judicial duty of impartiality. Also, our courts have held that if the language of a statute is plain, then it must effectuate it, even if the legislature's actions evidence policy choices that the court considers ill-advised. *State v. Gossage*, 165 Wn.2d 1, 195 P.3d 525 (2008). The courts decline to read into a statute language that the legislature omitted – such as, here – the words “**or more**” after the word “two” and before the word “arterials” -- whether intentionally or inadvertently, unless it is required to make the statute rationale or to effect the clear intent of the legislature. See *Anthis v. Copeland*, 173 Wn.2 752, 270 P.3d 574 (2012); *Densley v. Department of Retirement System*, 162 Wn.2d 210, 173 P.3d 883 (2007)(courts should assume the legislature means exactly what it says in

a statute and apply it as written).

c. The canon of lenity or strict construction applies regarding statutes with punitive impact.

Furthermore, statutes that punish are to be strictly construed under the *canon of lenity*. If the courts are interpreting a statute that has a punitive impact or that punishes, either **through fines**¹⁶ (such as \$124 for RLC violations here) or imprisonment, then the Court must strictly construe the statute (and any ambiguity that it finds in it) in favor of the one that is being subjected to such punishment. See *State v. Hampton*, 143 Wn.2d 789, 24 P.3d 1035 (2001).¹⁷ In sum, the one being punished gets the “close call”.

d. The City's contention that applying a literal translation would lead to "absurd results" is erroneous.

¹⁶ “The word penal connotes some form of punishment imposed on an individual by the authority of the state. Where the primary purpose of a statute is **expressly enforceable by fine**, imprisonment, or similar punishment, the statute is always considered penal.” (Emphasis added.) *Statutes*, *ibid.*, §59.1

¹⁷ “It is an ancient rule of statutory construction that penal statutes should be strictly construed against the government or parties seeking to enforce statutory penalties and in favor of the person on whom penalties are sought to be imposed. (citing, *inter alia*, *State v. Hirschfelder*, 148 Wn. App. 328, 199 P.3d 1017 (Div. 2, 2009); review granted, 166 Wn.2d 1011, 210 P.2d 1018 (2009). . . . This simply means that words are given their ordinary meaning and that any reasonable doubt about the meaning is decided in favor of anyone subjected to a criminal statute. . . . The rule that penal statutes should be strictly construed has several justifications based on a concern for the rights and freedoms of accused individuals. Strict construction can assure fairness when courts understand it to mean that penal statutes must give a clear and unequivocal warning, in language people generally understand, about actions that would result in liability and the nature of potential penalties.” *Statutes*, *ibid.* §59.3, at 173.

Additionally, while an argument may be made that a particular legislative enactment might appear to lead to “absurd results” if applied literally, the “[c]ourts do consider that the specific language contended to create ‘absurd’ results is the result of a ‘**political bargain**’”; William D. Popkin, A Dictionary of Statutory Construction (2007), at p. 6 – 7, citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, at 459 – 60 (2002), where the U.S. Supreme Court stated that a court rarely invokes the absurd results test to override unambiguous legislation. At 459.

Here, the 2005 legislative wording of the limiting types of location where RLCs could be used could have well been the “political bargain” necessary to get the controversial legislation passed by both houses of the legislature and signed by the Governor. Additionally, the State Supreme Court has recently pronounced, use of the canon of statutory construction of “unlikely, absurd or strained consequences” is to be **applied sparingly**. *Five Corners Family Farmers v. State*, 173 Wn.2d 296 268 P.3d 892 (2011).¹⁸

¹⁸ “It is true that we will avoid [a] literal reading of a statute which would result in unlikely, absurd, or strained consequences.” *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002). However, this canon of construction must be applied sparingly. See *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997) (“Although the court should not construe statutory language so as to result in absurd or strained consequences, neither should the
(continued . . .)

e. Judicial deference to the legislative language rule of construction.

The City would have this Court read into the subject statute words that are simply not there, i.e. “or more” or “at least”, referring to the intersection of two arterials. But this is not what the elected representatives passed in 2005, and subsequent sessions of the legislature have made it clear that it is not willing to change the law. But courts should not correct perceived “mistakes” in legislation to fix them; see *State ex. rel. Hagen v. Chinook Hotel, Inc.*, 65 Wn.2d 573, 399 P.2d 8 (1965) (even where it is apparent that the legislature made a mistake in enacting or amending a statute, courts of this state do not have the power to correct such mistakes, since the function of courts is limited to interpreting vague or ambiguous language); see also *Shelton Hotel Co. v. Bates*, 4 Wn.2d 498, 104 P.2d 478 (1940) (courts must be governed in construing statutes to give effect to each and every part of it; courts are not

(. . . continued)

court question the wisdom of a statute even though its results seem unduly harsh.”) (citation omitted). Application of the absurd results canon, by its terms, refuses to give effect to the words the legislature has written; it necessarily results in a court disregarding an otherwise plain meaning and inserting or removing statutory language, a task that is decidedly the province of the legislature. See *Rest. Dev., Inc.*, 150 Wn.2d 674, 682 80 P.3d 598, 601-02 (2003) (“[A] court must not add words where the legislature has chosen not to include them.”); *Point Roberts Fishing Co. v. George & Barker Co.*, 28 Wash. 200, 204, 68 P. 438 (1902); see also *State v. Ervin*, 169 Wn.2d 815, 824, 239 P.3d 354 (2010), (if a result “is conceivable, the result is not absurd.”)

permitted to read into a statute anything which it may conceive the legislature may have unintentionally left out.)¹⁹

f. The canon of *Expressio Unimus Est Exclusio Alterius* (rule of negative implication) applies here.

Another canon of statutory construction useful here is the **rule of negative implication** – *expressio unius est exclusio alterius* – literally the inclusion of one thing means the exclusion of the other. *Expressio unius* is implicated when a statute has a “gap”. The existence of the gap permits two very different inferences: either the legislature intended to omit the circumstance or the legislature never considered the circumstance. *Expressio unius* preserves the former: that when the legislature includes some circumstances explicitly, then the legislature intentionally omitted other similar circumstances that would logically have been included. In other words, the canon presumes that the legislature considered and rejected every related possibility. It further presumes that if the legislature had intended to cover every circumstance, then the legislature would have included a general catch-all. Jellum, Mastering Statutory Construction (2008), at 104. By the legislature’s *excluding* the

¹⁹ See *State v. Chandler*, 157 OhioApp. 3d 672, 813 N.E. 2d 65 (2004) (To determine legislative intent, courts have a duty to give effect to the words used in the statute, not to delete words used or to insert words not used.)

words “or more” or “at least” that the City wishes to have the Court read into the statute, the rule of construction *expressio unius* dictates that the court should not read those words into it.

g. The rule against redundancy applies here given use of “only” and “restricted” in the statute.

According to the rule against redundancy, the proper interpretation of a statute is one in which every word has meaning; nothing is redundant or meaningless. There are two separate aspects to this canon: 1) every word must have independent meaning; and (2) two different words cannot have the same meaning. If different words had the same meaning, then the second word would be surplus. Jellum, *ibid.*, at 104, citing *Feld v. Robert and Charles Beauty Salon*, 459 N.W.2d 279 (Mich. 1990).

Here, the statute states that RLCs are “**restricted**” to “**only**” arterials of two intersections. Thus under the rule against redundancy, this Court should give each word different meanings, *increasing the limitations even further than if just one of the words had been used.*

h. Interpretation of statutes that punish.

Lastly, if the courts are interpreting a statute that has a punitive impact or that punishes, then the Court must strictly construe the statute (and any ambiguity that it finds in it) in favor of the one that is being subjected to such punishment. See *State v. Hampton*, 143 Wn.2d 789, 24

P.3d 1035 (2001).

Therefore, the plain meaning of RCW 46.63.170(1)(b) should apply and thus bar the use of RLCs in locations of more than two arterials.

2. *Res judicata* does not apply.

a. The Plaintiffs' suit cannot be barred *res judicata* due to a lack of jurisdiction.

The City's position that the previous actions in the City's Municipal Court system of these named Plaintiffs constitute *res judicata* is without merit. The Washington Supreme Court has stated that the superior courts have original jurisdiction over claims alleging system-wide violations in the enforcement of municipal ordinances. *Orwick*, 103 Wn.2d 249, 692 P.2d 793 (1984).

b. Nominal fines effectively preclude litigation.

Further, the lack of incentive to litigate nominal fines bars *res judicata* application to this matter. For *res judicata* to apply, the "first proceeding" must be one where there was a full hearing on the merits or at least the incentive to engage in one. Clearly, the paying of a "nominal fine" to a court is not an act that gives rise to a collateral estoppel effect to preclude a subsequent challenge of a party's actions (especially here where it is not even considered a "traffic" fine *but treated as a "parking" ticket that does not go on your driving record*). See *Hadley v. Maxwell*,

144 Wn.2d 306, 27 P.3d 600 (2001) (holding that paying a fine for a lane change violation does not create collateral estoppel in a subsequent civil action.)²⁰

The courts have frequently ruled against application of *res judicata* where there are countervailing considerations supported by public policy. Claim preclusion can be defeated “on broad grounds of public interest alone.” Wright, *ibid.*, at § 4415, at p. 374 (citing to *Mercoird Corp. v. Mid-Continent Ins. Co.*, 64 S.Ct. 268 (1944). “The rules of preclusion inevitably have been affected by the resulting desire to achieve a proper balance between foreclosure and a fair opportunity to litigate.”²¹ Wright. *Ibid.*, Pocket Part Supplement (April 2013), at p. 92 (citing concurring opinion of J. Ripple in *ITOFCA, Inc. v. Megatrans Logistics, Inc.*, 322

²⁰ *Hadley* noted that one of the four requirements for *res judicata* is that the “application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied”, and that “[t]o determine whether an injustice will be done, respected authorities urge us to consider whether ‘the party against whom the estoppel is asserted [had] interests at stake that would call for a full litigational effort’. . . . In 1981, Washington joined other states in decriminalizing minor traffic offenses. . . . Critics contend the system creates too great an incentive to simply pay the fine rather than incur the time and expense to resist, whether or not the infraction was actually committed. . . . Collateral estoppel is, in the end, an equitable doctrine that will not be applied mechanically to work an injustice. To that end, we hold it is not generally appropriate when there is nothing more at stake than a nominal fine. There must be sufficient motivation for a full and vigorous litigation of the issue.” (Citations omitted.) (Emphasis added.) At 311 – 313.

²¹ See *ITOFCA*, at p. 933-934: 1) the party asserting *res judicata* has the burden of proof, 2) doubts about the “first” proceeding are to be resolved against claim preclusion, and 3) *res judicata* is not meant to be a “trap for the unwary” and “it must ensure fair notice to the litigants.”

F.3d 928 (7th Cir. 2003)).

Accordingly, this present suit brought by **these** Plaintiffs is not barred by the doctrine of *res judicata*.

3. The deactivation of RLCs evidences the illegality of the City's placing RLCs at Five Corners.

Action of removal or deactivation of RLCs at more than two-arterial intersections evidences the City's illegality in placement of those cameras. Removal or deactivation should be taken into consideration since it has a direct effect on the interpretation of RCW 46.63.170(1)(b) and the case at hand.

Such evidence is not barred by Washington Rule of Evidence 407 because such evidence does not qualify as "subsequent remedial measures." Wash. R. Evid. 407. Subsequent measures are barred as evidence that "would have made the event less likely to occur" when it is offered to prove "**strict liability**" as well as "**negligence**." (emphasis added.) 5A Wash. Prac., Evidence Law and Practice § 407.2 (5th ed.). This current suit brought by the Plaintiffs is not based on strict liability or negligence.

Thus, evidence of removal and/or deactivation of RLCs by the City at Five Corners should have been considered by the trial court as evidence of the City's awareness that its actions are illegal under applicable

enabling state legislation.

D. The trial court erred in denying Plaintiffs' Motion for Class Certification.

In *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 250 (2003), the court stated (internal quotations omitted):

Washington Courts favor a liberal interpretation of CR 23 as the rule avoids multiplicity of litigation, saves members of the class the cost and the trouble of filing individual suits and frees the defendant from harassment of identical future litigation. We resolve close cases in favor of allowing or maintaining the class.

See also *Smith v. Behr Process Corp.*, 113 Wn. App. 306 (2002) ("in a doubtful case ... any error, if there is to be one, should be committed in favor of allowing the class action").

A primary function of a class action lawsuit is to provide a procedure for vindicating claims, which if taken individually would be too small to justify individual legal action but which are of significant size and importance if taken as a group. See *Olson v. The Bon, Inc.*, 144 Wn. App. 627 (2008), in which the court stated at 637-38:

In cases such as this where the damages suffered is minimal, the ability to proceed as a class transforms a merely theoretically possible remedy into a real one. *Id.* "[Class actions are] often the only meaningful type of redress available for small but widespread injuries. Without it, many consumers may not even realize that they have a claim. The class action provides a mechanism to alert them to this fact."

When deciding a motion for class certification, the court accepts

plaintiffs' substantive allegations as true.²² Furthermore, the determination of whether plaintiffs' claims should be certified as a class action does not depend on the merits of plaintiffs' claims.²³

A class action may be maintained where the requirements of Civil Rule 23(a) and at least one section of Rule 23(b) are met. Civil Rule 23 (a) requires that (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Rule 23(b) requires that (1) the prosecution of separate actions would create a risk of inconsistent adjudications or prejudice absent class members, (2) injunctive or declaratory relief is appropriate for the class as a whole, or (3) common questions of law or fact predominate and class action is a superior method of adjudication.

1. The Requirements of CR 23(a) Are Met.

Plaintiffs have proposed the following definition for this class:

All vehicle owners who operated their vehicles in a manner that caused them to be cited for allegedly committing a traffic infraction, thereby receiving a Notice

²² See *Arthur Young & Co. v. U.S. District Court*, 549 F.2d 686, 688 n. 3 (9th Cir. 1976); *Blackie v. Barrack*, 524 F.2d 891, 901 n. 17 (9th Cir. 1975); *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913 (9th Cir. 1964).

²³ *Blackie*, 524 F.2d at 901; *In re Badger Mountain Irr. Dist. Sec. Litig.*, 143 F.R.D. 693, 696 (W.D. Wash. 1992)

of Infraction, and who paid money to the City, or such payment is currently pending, as a result of the use of red light cameras (RLCs) at the Five Corners intersection in Northeast Seattle between 2008 and 2012.

a. (a)(1) – Numerosity

Numerosity is established where the number of potential class members makes it impractical, not impossible, to litigate each case separately. *Harris*, 329 F.2d at 913-14. Numerosity exists where the class consists of as few as 40 class members. *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2nd Cir. 1995).

Here, numerosity is easily met because the City admits that it has issued 16,950 RLC tickets at Five Corners as of June 22, 2012. Furthermore, it would be economically nonsensical for each individual to bring suit against the City to recover the fine levied against them of less than \$125. Thus, the requirement of numerosity has been met.

b. (a)(2) – Commonality

The commonality requirement of CR 23(a)(2) is met where the plaintiffs and the class allege a single common material issue of law or fact, or the defendant has engaged in a common course of conduct in relation to the potential class members. *Blackie*, 524 F.2d at 902; *Harris*, 329 F.2d at 914. This standard is simply met in the case at bar due to the single common legal and factual issue which has injured thousands of potential plaintiffs: whether the placement of RLCs at Five Corners violated RCW 46.63.170(1)(b).

Here, the Plaintiffs and the class make identical legal allegations concerning each receiving a Notice of Infraction from the City for allegedly violating a traffic ordinance at Five Corners. Additionally, the substantive factual allegations are identical and not in dispute: Plaintiffs and all members of the class (1) are or were vehicle owners, (2) who operated their motor vehicle through Five Corners, (3) in a manner that allegedly violated a City traffic ordinance, (4) resulting in them receiving Notices of Infractions and levied fines, and (5) they either paid the fines or such fines are currently pending. Accordingly, the commonality requirement is met.

c. (a)(3) – Typicality

Typicality is present where the representative's claims arise from the same event, practice, or course of conduct as the class claims and rely on the same legal theories. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992); *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992).

All of the claims of the representative named Plaintiffs here are identical to the claims of the class, because they arose from the same practice of ticketing individuals who allegedly committed a traffic infraction at Five Corners detected by a RLC. Accordingly, the representative's claims are typical of the class.

d. (a)(4) – Adequate representation

Representation is adequate where plaintiffs' counsel is qualified

and competent to represent the class, and the class representatives do not possess interests that are antagonistic to the remainder of the class. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). Due to the Plaintiffs' claims in this case being identical, there is no conflict between the claims of the individual class representatives and the class. Moreover, class counsel in this case has been deemed competent and adequate in other actions that have been certified as large class actions.²⁴ Therefore, the requirements of Rule 23(4) have been met.

2. At Least One of the Requirements of CR 23(b) are Met.

a. (b)(1) – Risk of prosecution of separate actions

The court may certify a class action where the prosecution of separate actions would create a risk of the inconsistent or varying adjudications with respect to individual members of the class or where adjudications with respect to individual members of the class would as a practical matter be dispositive or substantially impair the interests of other members not parties to the adjudications. CR 23(b)(1).

Here, the potential for inconsistent adjudications is apparent. If one court holds that the City may maintain the RLCs at Five Corners and

²⁴ *e.g. Alcantara et. al. v. Columbia Tower Club*, King County Superior Court Cause No. 98-2-14577-3 SEA (involving over 1400 current and former employees of a private club in Seattle); *Scott et. al. v. Cingular Wireless et. al.*, King County Superior Court Cause No. 04-2-04205-4 KNT; reversed and remanded in favor of plaintiffs by 6-3 vote of Washington State Supreme Court in *Scott v. Cingular*, 160 Wn.2d 843 (2007)(involving claims of an estimated 150,000 Washington residents who subscribed to cell phone service with a national cell phone carrier). CP 24.

continue to collect the fines levied against motorists who travel through said intersection and are captured on camera, and another court holds in a different action initiated by a different plaintiff that the same charge is illegal, the discrepant rulings would establish incompatible standards.²⁵

b. (b)(2) – Declaratory relief

Class action certification is called for because the Plaintiffs allege that the City has improperly issued citations at Five Corners and refused to refund such fines, thereby making appropriate declaratory relief.²⁶

Here, the lawsuit alleges that the City violated the relevant RCW by placing RLCs at Five Corners. By the City's own admission in its Answer, it has issued 16,950 infractions at Five Corners, as of June 22, 2012, at \$124 each. Although the monetary damages for individual class members here are less than \$125, the amount of recovery potentially due to the class from citations issued at Five Corners through May 1, 2012 is more than \$2,325,066 including interest. CP 23.

Therefore, the personal monetary damages are individually minimal and class certification is appropriate under CR 23(b)(2).

c. (b)(3) – Predominance and superiority

A class action may be maintained where the court finds that

²⁵ See *Orwick v. Seattle*, 103 Wn.2d 249 (1984) (allowing the Superior Court to hear and decide challenges to enforcement of municipal traffic codes, and a municipal court does not have exclusive jurisdiction to decide challenges to traffic ordinances).

²⁶ CR 23(b)(2) ("the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate... corresponding declaratory relief with respect to the class as a whole").

common questions of law or fact predominate and a class action is a superior method to other forms of adjudication. CR 23(b)(3). Predominance is met where the class is sufficiently cohesive.²⁷

The proposed class here is cohesive because the material facts are virtually identical for the Plaintiffs and the class: all class members are vehicle owners who each received a Notice of Infraction from the City for allegedly committing a traffic infraction as a result of the RLCs at Five Corners. Accordingly, class action is the superior method for adjudicating the claims made here.

3. The proposed class should have been certified before the City's Dispositive Motions.

Class certification is generally required *before* any determination upon the merits.²⁸ This rule is justified by both the well-reasoned legislative history but also judicial precedent, which finds class certification should be addressed *before* consideration of dispositive motions to promote *judicial efficiency*.²⁹

²⁷ *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 227 F.R.D. 553, 562 (W.D. Wash., 2004).

²⁸ See *Bowling v. Pfizer, Inc.*, 142 F.R.D. 302 (S.D. Ohio 1991) (held that "class certification would be considered *before* motions for summary judgment and to dismiss" on grounds of judicial efficiency and to allow both parties to choose their litigation strategies accordingly) (emphasis added); see also *Peritz v. Liberty Loan Corp.*, 523 F.2d 349, 20 Fed. R. Serv. 2d 965 (7th Cir. 1975) (the language of Rule 23(c)(1) "requires class certification *prior* to a determination on the merits") (emphasis added); see generally 3 *Newberg on Class Actions* § 7:15 (4th ed.).

²⁹ *Pfizer*, 142 F.R.D. at 303 (emphasis added); see *Otto v. Variable Annuity Life Ins. Co.*, 98 F.R.D. 747 (N.D. Ill. 1983) (holding a ruling on summary judgment before a pending class certification would go "*well beyond* the fact of the pleadings and into the merits of the plaintiff's claim") (emphasis added); see also *Wilson v. American Cablevision of* (continued . . .)

This rule promoting judicial efficiency is not only beneficial to the Plaintiffs, but also grants certain advantages to the City. Civil Rule 23(c) provides that any judgment in an action maintained as a class, whether or not favorable to the class, will be **binding** on the entire class. CR 23 (emphasis added). As held in *Bieneman v. City of Chicago*:

[A] class representative who has lost on the merits may have a duty to the class to oppose certification, to avoid the preclusive effect of the judgment, while the defendants suddenly want the certification that they might have opposed at the outset. ***It is therefore difficult to imagine cases in which it is appropriate to defer class certification until after decision on the merits.*** 838 F.2d 962, 964, 10 Fed. R. Serv. 3d 914 (7th Cir. 1988) (emphasis added).

Additionally, Washington Civil Rule 23(c) demands an urgent and immediate pace to certify a class. CR 23(c)(1) states:

As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subsection may be conditional, and may be altered or amended **before the decision on the merits.** (emphasis added).

The Merriam-Webster Dictionary defines “as soon as” as “***immediately*** at

(. . . continued)

Kansas City, Inc., 130 F.R.D. 404, 405-06, 18 Fed. R. Serv. 3d 252 (1990) (“Adherence to the general rule applicable to Rule 23(c)(1) will avoid the inevitable complications and waste of judicial time produced when a district court attempts simultaneously to certify a class and to rule on the merits of the class action claims presented by motions for summary judgment”); see generally 3 Newberg on Class Actions § 7:15 (4th ed.).

or shortly after the time that,” and provides the synonyms “immediately” and “*instantly*.”³⁰ (emphasis added).

Therefore, to promote judicial efficiency and minimize costs to all parties, and also to stay true to the carefully crafted Washington Civil Rule, it was in the best interest of the City and the Court to have the proposed class certified before deciding dispositive motions.

E. The City's admissions re illegality of placement of cameras is admissible evidence.

The statements quoted above by designated representatives of the City to the State Senate on February 19, 2013, are clearly admissible hearsay evidence, being both an *inconsistent statement* (conflicting with the City’s current position in its Motion to Dismiss)³¹ and an *admission against interest by a party opponent* (admitting that RLCs at Five Corners was not consistent with the legislature’s intent in RCW 46.63.170(1)(b) to restrict the their use at that intersection).³² See Evidence Rule 801(d)(1) and 801(d)(2), respectively.³³ See also Evidence Law and Practice (5th Ed.

³⁰ <http://www.merriam-webster.com/dictionary/as+soon+as?show=0&t=1366215342>

³¹ See *McClure v. Delguzzi*, 53 Wn.App. 404, 767 P.2d 146 (Div. 2, 1989)(an admission under ER 801 is simply a statement by a party that is in some way inconsistent with the party’s position at trial).

³² Seattle Police Department Lieutenant Sano testified that the RLCs at Five Corners were in place “until we realized that it was in violation of existing ordinance [sic, meant statute]”. (emphasis added.)

³³ ER 801(d). A statement is not hearsay if – (1) Admission by Party Opponent. The statement is offered against a party and is (i) the party’s own statement, in either an
(continued . . .)

2007), at §801.19, .20, .34. Further, admissions can be implied by silence in the face of an accusation under Rule 801. Ibid. Here, when Senator Carrell asked the City’s designated representatives “**How much money did you collect during those – that time period when you weren’t authorized to actually do this?**”, the City was more than silent in response to the accusation of improperly picking the pockets of vehicle owners, downright conceding the truth of the accusation by responding to that question as follows: “Our Department of Revenue would have to get that number. We don’t have it with us.”³⁴ Sadly for vehicle owners caught in the City’s “red light camera trap”, Senator Carrell was woefully underestimating in his guesstimate as to how much revenue the City had illegally collected from the Five Corners RLC from 2008 through 2012 when he suggested “**I’ll bet that it’s probably tens if not hundreds of thousands.**” CP 46. In fact, as admitted by the City and confirmed by

(. . . continued)

individual or a representative capacity, or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party’s agent or servant acting with the scope of the authority to make the statement for the party, or (v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

³⁴ “Admissions by silence in civil cases – The reference in Rule 801(d)(2)(ii) to adopted statements include an admission implied by a party’s silence under circumstances normally eliciting a denial or explanation.” (Emphasis added.) Tegland, *ibid.*, at §801.43, at p. 401, citing *Beck v. Dye*, 200 Wn.1, 92 P2d 1113 (1939).

Plaintiffs' expert using the City's public records search, **the total revenue wrongfully garnered was over \$1,700,000!** CP 30.

F. The trial court erred in denying Plaintiffs' Motion for an order allowing the taking of depositions of Defendant's employees.

Although good cause is needed to grant a CR 26(c) protective order, no such cause is evident here. First, the City did not explain as to why the fact that the trial court ruling on dispositive motions constitutes "good cause" to prevent the necessary continuation of discovery. Rather, the City appeared to allege that because there were future hearings, then *ipso facto* there is good cause without any case law supporting this line of reasoning. Second, discovery of the topics designated in Plaintiffs' CR 30(b)(6) motion would have provided considerable insight and have shed much light to both the legal and monetary issues in this matter. The subject matters were expected to show the City's knowledge of its wrongful actions and the other facts underlying the Plaintiffs' claims. Thus since a protective order was granted, the Plaintiffs were severely limited in their ability to gather this pertinent information. Third, the City's complaint of burden was a bare assertion. CP 18. There were only nine subject matters in Plaintiffs' 30(b)(6) motion, all specifically related to Plaintiffs' claims. CP 19.

Accordingly, this Court should at minimum reverse the trial court's

ruling granting the City's motion for a protective order staying discovery.

G. The trial court erred in denying Plaintiffs' Motion to Strike dicta and other inadmissible materials.

1. Opinion expressed as dicta by King County Superior Court Judge Laura Middaugh.

In its Motion to Dismiss, the City submitted to the Court a reference to the entering of an order by Judge Middaugh, relating to an order entered by a Municipal Judge Magistrate that found that the RLCs at Five Corners were unauthorized.³⁵ CP 34. The City also submitted a computer disk that purportedly contained a recording of the full hearing before Judge Middaugh (although Plaintiffs' counsel could not access it when installed), and a purported transcript of the hearing prepared by a paralegal in the City's office) attached to the declaration of City's counsel's declaration. The City admitted that Judge Middaugh's decision voiding the ruling of the Seattle Municipal Court Magistrate was "**based on jurisdictional grounds**; because the ruling had been made at a mitigation hearing (where by law, liability has already been admitted), the Magistrate lacked jurisdiction to dismiss the infraction as a matter of law." (Emphasis added.) CP 34. Apparently, not germane to Judge Middaugh's decision to void the municipal court decision at issue, she took the opportunity to gratuitously state in open court her view that the lower court's opinion decision was in error given her opinion that the legislature

³⁵ King County Superior Court Cause No. 10-2-06706-0 SEA.

intended to allow RLCs at the intersection of more than 2 arterials, such as Five Corner's intersection. Significantly, the defendant vehicle owner/respondent in above referenced appeal appeared before Judge Middaugh without legal counsel and was acting *pro se*.

2. Decision by King County Superior Court Judge Bruce Heller.

The City in its Motion also referenced to from a decision by King County Superior Court Judge Bruce Heller involving RLCs at the Five Corners intersection. CP 34. Like the case before Judge Middaugh referenced above, this case was also one where the Seattle Municipal Court had dismissed a notice of infraction by a vehicle owner accused of violating the RLC at Five Corners, and the City appealed. This time, however, not only was the defendant/respondent *pro se* but he **failed to appear** at the hearing!

3. The decisions of "sister" courts and judges have no precedential value.

Superior court in each county has the same jurisdiction within that county as superior court of every other county has within its county, and where there are two or more judges of superior court in any county, their authority is identical under this provision. *State ex. rel. Campbell v. Superior Court for King County*, 34 Wn.2d 771, 21 P.2d 123 (1949); see, also, Wash. Const. Art. 4, Section 5.

4. Opinions, such as that of Judge Middaugh, that are dicta are to be disregarded by the Court.

The City candidly acknowledged and admits in its Motion that the ruling rendered by Judge Middaugh on appeal that voided the decision from Seattle Municipal Court was not based on anything to do with the legality of RLCs at Five Corners, but rather was based solely on a procedural flaw in the magistrate’s ruling. Such makes Judge Middaugh’s expression of her views as to the legislative intent behind the restrictions expressed so clearly in RCW 46.63.170(1)(b) that limit the use of RLCs to only “two-arterial intersections” manifestly non-authoritative dicta. Statements that do not relate to an issue before a court and are unnecessary to decide the case constitute dicta³⁶.

5. GR 14.1 prohibits use of unpublished decisions and opinions.

The City’s submittal of the purported decisions and opinions of Judges Middaugh and Heller violated the mandates of GR 14.1, which prohibits their use.

GR 14.1. CITATION TO UNPUBLISHED OPINIONS (2013)

(a) Washington Court of Appeals. A party may not cite as an authority an unpublished opinion of the Court of Appeals. Unpublished opinions of the Court of Appeals are

³⁶ *Pierson v. Hernandez*, 149 Wn.App. 297, 305, 202 P.3d 1014 (2009) (quoting *DCR, Inc. v. Pierce County*, 92 Wn. App. 660, 683 n. 16, 964 P.2d 380 (1998)); see also, *State v. Raleigh*, 157 Wn. App. 728, 735 (Div. 2 2010) (statements that are dicta are non-binding on the court).

those opinions not published in the Washington Appellate Reports.

(b) Other Jurisdictions. A party may cite as an authority an opinion designated “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like that has been issued by any court from a jurisdiction other than Washington state, only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court. The party citing the opinion shall file and serve a copy of the opinion with the brief or other paper in which the opinion is cited.

While the above quoted restrictions of unpublished opinions expressly relate to unpublished opinions of the “courts of record”, i.e. the Washington Court of Appeals and those outside of the State of Washington, *a fortiore*, they apply to the unpublished opinions of a “court of non-record” such as the Superior Court. Having a party’s counsel’s paralegal of the City Attorney’s (Heller case) or a court reporter (Middaugh case) prepare a transcript does not make an unpublished decision become miraculously a “published” opinion³⁷.

H. The trial court erred in denying Plaintiffs' Motion to Strike the Declaration of Gregory Narver, which contained the aforementioned dicta.

Portions of City’s 12(c) Motion found in the attached Declaration of Gregory Narver (“Narver Decl.”) that refer to the decisions and dicta of

³⁷ Although the published opinions are public record, they are not binding on this Court. See *Skamania County v. Woodall*, 104 Wn.App. 525, 536 n.11, 16 P.3d 701, (2001) (citing RAP 10.4(h)) (“[u]npublished opinions have no precedential value and should not be cited or relied upon in any manner.”); *Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wn.App. 542, 548-49, 13 P.3d 240 (2000)(Div. 1, 2001); *State ex rel. Lonctot v. Sparkman & McLean Co.*, 16 Wn. App. 402, 406, 556 P.2d 946 (1976).

Judges Heller and Middaugh, found on p. 2, l. 1 – 3, l. 14 – 10 of the Narver Decl., should have been stricken from the record. In addition, Exhibit A (Order Reversing Municipal Court Ruling by Judge Heller and transcript relating thereto), Exhibit G (Order voiding Municipal Court Ruling by Judge Middaugh), Exhibit H (transcript prepared by City of Attorney’s paralegal of portion of Judge Middaugh comments from the bench), and an unmarked “Compact Disk” provided by the City (purporting to contain a recording of the hearing before Judge Middaugh on October 4, 2010) all should have been stricken along with portions of the Narver Declaration that referred to them.

I. Calculation as to amount of “principal” damages regarding wrongfully issued notices.

As a direct and proximate result of the wrongful conduct of the City, Plaintiffs (and the members of the putative Class) have sustained damages in the form of economic loss for payment of wrongfully issued notices of infraction. The total revenue generated by the City’s use of the RLCs at Five Corners from 2008 through May 31, 2012 is \$1,790,792.39.

J. Plaintiffs are entitled to prejudgment interest on the amount of principal damages.

To the amount of “principal” damages, the Plaintiffs are also entitled to an award of accrued prejudgment interest. The drafters of the Washington Practice Series best pronounce the rule regarding such

interest:

Prejudgment interest is **avored** in the law **because it promotes justice**. It is designed to compensate the plaintiff for the loss of the use of money to which the plaintiff was entitled. Authority to award prejudgment interest need not be drawn from a contractual agreement to pay it, or from a special feature of particular causes of action, but **may be awarded in any case** in which the claim upon which recovery is based was for a fixed sum or where the evidence provided a basis upon which the recovery could be computed with exactness, without relying on opinion or discretion. (emphasis added.) 16 Wash. Prac., Tort Law And Practice § 6.13 (3d ed.)

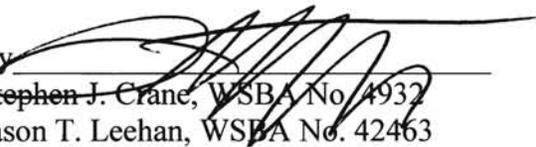
Further, “[w]here prejudgment interest is properly awarded, the interest period begins with the **date the claim arose and continues to the date of judgment**.” (emphasis added.) *Id.* Therefore, prejudgment interest is appropriate in the case at bar and such interest should accrue from the date the aforementioned citations were issued.

VII. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court and: 1) grant the Plaintiffs’ Motion to Certify the Class, 2) grant Plaintiffs’ motion for Summary Judgment, and 3) allow prejudgment interest on the collected fines from class members. It should also reverse the trial court’s granting of the City’s motion for dismissal under CR 12(c).

Respectfully submitted this 25th day of November, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of November, 2013, an original and one copy of the foregoing Plaintiffs-Appellants Brief on Appeal was hand delivered for filing to the Court of Appeals, Division I, and one copy of same to opposing counsel (together with a verbatim transcript of proceedings), and Notice of Association of Counsel to both, as follows:

Clerk of the Court
Court of Appeals, Division 1
600 University Street
Seattle, WA 98101

Gregory Narver
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Signed this 25th day of November, 2013, in Seattle, Washington.



Albert Ta