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No. 69263-1-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON, SEATTLE

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THE-ANH NGUYEN,

Plaintiff/Appellant,

vs.

CITY OF SEATTLE,

Defendant/Respondent,

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**BRIEF OF RESPONDENT CITY OF SEATTLE**

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PETER S. HOLMES  
Seattle City Attorney

JEFFREY COWAN, WSBA #19205  
Assistant City Attorney  
Attorneys for Respondent,  
City of Seattle

Seattle City Attorney's Office  
600 – 4<sup>th</sup> Avenue, 4<sup>th</sup> Floor  
P.O. Box 94769  
Seattle, Washington 98124-4769  
(206) 684-8200

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## I. INTRODUCTION

On August 24, 2008, a rented U-Haul truck driven by appellant The-Anh Nguyen collided with a tree planted by the City of Seattle next to Olson Pl. SW, a busy thoroughfare. The collision split the tree in two, injured the driver, and damaged the truck. Mr. Nguyen sued the City, alleging that the tree's branches "were hanging too low," causing the truck "to strike the tree branch." After a four day bench trial, the court entered judgment for the City, and dismissed Mr. Nguyen's claims with prejudice.

Appellant's case on appeal rests, as it did at trial, on the premise that a branch of the tree extended over the street at a height lower than the 14-foot minimum required by ordinance, and thus represented a breach of the City's duty of reasonable care to street users. However, as in his case in chief at trial, appellant points to no evidence—*absolutely no evidence*—as to how high the branch actually was. Since the tree was knocked down in the collision, the height of the branch could not be measured after the accident. There is no record of how high over the street it was before the accident. Indeed, the evidence shows that the truck did not actually strike the branch, but struck the *trunk* of the tree. The trial court found that the tree did not represent a dangerous condition, and concluded that the City's maintenance of the tree did not constitute a breach of duty towards Mr. Nguyen.

On this appeal, appellant fails to show that the trial court's findings of fact are unsupported by substantial evidence, that its conclusions of law are erroneous, or that its procedural rulings represent an abuse of discretion. Accordingly, the judgment should be affirmed.

**II. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR<sup>1</sup>**

Fairly read, appellant's assignments of error raise the following issues:

Did the City breach its duty to maintain Olson Pl. SW in reasonably safe condition for ordinary travel? (Assignments of error 6 and 12.)

Did the City have actual or constructive notice of any dangerous condition of the tree appellant drove into ? (Assignment of error 10.)

Did the trial court err in ruling that the requirement of actual or constructive notice is not an affirmative defense, but an element of a plaintiff's case in chief against a municipality? (Assignment of error 9.)

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<sup>1</sup> Appellant's brief contains no discussion of the issues pertaining to his assignments of error 1,2, 3, 4, 7, and 8. See RAP 10.3(a)(6). Issues not briefed are deemed waived. *Kadoranian v. Bellingham Police Dep't*, 119 Wn.2d 178, 191, 829 P.2d 1061 (1992).

### III. STATEMENT OF THE CASE

On the day of his accident, Mr. Nguyen was driving a rented U-Haul truck, accompanied by two friends. RP 147-149. While driving downhill in the curb lane on Olson Pl. SW, the truck suddenly turned to the right, Mr. Nguyen heard a loud noise, and the truck went up onto the curb. RP 248-249. Mr. Nguyen did not know what happened, or what caused the truck to go onto the curb. RP 249. The truck continued on the curb a certain distance as one of the passengers helped Mr. Nguyen steer it back into the street. RP 249. Before he was able to do so, Mr. Nguyen heard a second loud noise, apparently coming from the rear of the truck. RP 249. In his rearview mirror, he saw “a whole bunch of leaves and branches,” but still couldn’t tell what had happened. RP 249-250. After reentering Olson Pl, he drove back to the debris on the ground, where a tree had fallen. RP 250. Mr. Nguyen believed he had hit a tree branch because he could see nothing in front of him when he was driving and the loud noise came from above. RP 251-252.

Appellant’s expert, Steven Stockinger, a collision consultant, testified that he could not determine exactly what part of the tree was impacted by the truck. RP 346; 388-389. He said no one could tell where that point was, and he disavowed a statement in a declaration he prepared during discovery to the effect that the truck hit a branch which extended

over the street. RP 390. He surmised that the truck impacted the tree “where that trunk bifurcates, somewhere, the limb, the trunk...” RP 390. He testified that the cargo box of the U-Haul truck was 11 feet tall.

A photograph taken in 2007 as part of the Seattle Department of Transportation’s assessment of pavement conditions depicts the tree at issue in this case. Exhibit 50; RP 485-486. The tree was planted in 1976. RP 476. Nolan Rundquist, the Seattle City Arborist, testified that the photo provides no evidence of the clearance of the large branch visibly overhanging the street. RP 486. Mr. Stockinger offered no opinion as to how high the branch was. RP 392, 397, 430.

Following a bench trial, the court found that Mr. Nguyen suffered injuries in the accident, but that prior to the accident, the City had received no complaints concerning the tree; that there was no evidence of a condition of the tree that would have conferred constructive notice of a danger to passing vehicles; and that no act or omission of the City was a cause in fact of the accident. CP 508. The Court concluded that the City did not breach its duty to maintain Olson Pl. SW in reasonably safe condition for ordinary travel, and that no act or omission of the City was a proximate cause of Mr. Nguyen’s accident. CP 508.

After a trial to the court, judgment for the City was entered on August 3, 2012. CP 510-511. Appellant's motion for reconsideration was denied on August 27, 2012. CP 537-538.

#### IV. ARGUMENT

**A. In the absence of evidence that the tree knocked down by appellant's truck posed a danger to drivers, the trial court correctly concluded that the City did not breach its duty of care to appellant.**

A trial court's findings of fact following a bench trial will not be overturned if supported by substantial evidence. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Conclusions of law are subject to de novo review. *Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001). Appellant's brief does not set forth grounds for reversal under either of these standards.

Seattle, like all cities, is under a duty to maintain its public ways in reasonably safe condition for ordinary travel. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). In arguing that the City breached this duty, appellant cites the Seattle Municipal Code for two propositions: that trees which extend above a roadway must be trimmed to a height of 14 feet, SMC 15.42.020; and that no one shall allow any tree trunk, limb or branch to pose a hazard to the public, SMC 15.42.010. The

City agrees that these ordinances define the scope of its duty with respect to trees planted in its street infrastructure. However, appellant points to no evidence that the tree in question had branches lower than 14 feet overhanging Olson Pl. SW, or that it posed a hazard to the public. Conspicuously absent from appellant's brief is any mention of either the height of any branch, or the manner in which the tree is supposed to have endangered the public.

In fact, no evidence as to the height of any overhanging branch was entered at trial. Looking at Exhibit 50, Nolan Rundquist, the Seattle City Arborist, testified that there is no way to determine from the photo what the clearance of the large branch overhanging the roadway was. RP 486. Appellant's expert, Steven Stockinger, agreed. RP 397. ("Nobody knows that because the tree is gone.") He offered no opinion as to how high the branch was. RP 392. ("I don't know.") Applying the 14-foot minimum clearance required by SMC 15.42.020, there is no evidence supporting appellant's contention, at page 19 of his brief, that the branch depicted in Exhibit 50 was "improperly low."

Nor is there evidence that the tree in question posed any kind of hazard to the public. Mr. Rundquist said that there was no way to determine from Exhibit 50 if the tree trunk protruded over the street, but that trees that did so would show signs of contact with vehicles in the form

of missing bark; no such signs are visible in Exhibit 50. RP 486-487. He testified that SDOT maintains a contact number for complaints about its trees and for compiling a database. RP 487. He stated that calls come from many sources, including citizens, the police, transportation companies, other City agencies, and King County Metro. RP 487-488. A search of the caller database disclosed no complaint about the tree in question before the day of the accident in this case. RP 488.

Appellant's expert stated that the tree's trunk extended into the roadway, but that he considered the *curb* to be part of the roadway. RP 393-394. However, curbs are not part of the travelled road surface as a matter of law. RCW 35.69.010. When pressed to say if Exhibit 50 showed the tree to encroach through the vertical plane of the edge of the *pavement*, he testified that he couldn't tell, and "nobody else can either." RP 395-396. He acknowledged that if the tree had encroached into the roadway, vehicles larger than the U-Haul truck using the same part of the street, such as Metro buses, would have hit it. RP 406, 434.

On this record, appellant cannot demonstrate that no substantial evidence supports the trial court's finding that "[p]rior to August 24, 2008, SDOT had received no complaints regarding the tree struck by Mr. Nguyen's rental truck. A photograph of the tree taken one year before the accident in this case shows the tree trunk leaning towards the

roadway, but neither low-hanging branches nor damage to the tree that might have been caused by passing vehicles. (Ex. 50).” CP 508, Finding of Fact 6.

**B. The City is under no duty to inspect its street infrastructure, including trees.**

Appellant argues that because the City “did not have a program to inspect its trees...[it] breached its implied common law duty to inspect the trees it planted next to its roadways for dangerous conditions.” Brief, p. 23. However, no such duty exists. Appellant cites no common law, statutory, or regulatory requirement that a municipality inspect its street infrastructure as an element of its duty to provide streets that are reasonably safe for ordinary travel. Moreover, there is no support in the law for appellant’s assertion that “[f]or the limited purpose of the trees the City has planted, [it] assumes the role of the possessor of land adjacent to a public highway.” Brief, p. 23.

The City’s duty to street users does not derive from its ownership of land because the City does not in fact own Olson Pl. SW, or any other street. Rather, it retains an easement for a public right of way over the adjacent property:

We have never departed from the rule of law first stated by the Territorial Court 98 years ago in *Burmeister v. Howard*, 1 Wash.Terr. 207, 211 (1867):

(W)hen an easement is taken as a public highway, the soil and freehold remain in the owner of the land encumbered only with the right of passage in the public; and upon a discontinuance of the highway, the soil and freehold revert to the owner, and in the case of streets and alleys, the proprietors of adjacent lots own the soil to the middle of the street, subject only to this right of passage in the public...

*Puget Sound Alumni of Kappa Sigma, Inc. v. City of Seattle*, 70 Wn.2d 222, 226, 422 P.2d 799 (1967); *accord, Kiely v. Graves*, 173 Wn.2d 926, 931, 271 P.3d 226 (2012). The City's duty to the travelling public derives from its status as a municipality, not a property owner:

The rule is well-nigh universal in this country that although a municipality is not an insurer against accident nor a guarantor of the safety of travelers it is nevertheless obligated to exercise ordinary care to keep its public ways in a reasonably safe condition for persons using such ways...

*Berglund v. Spokane County*, 4 Wn.2d 309, 313, 103 P.2d 355 (1940), reversed on other grounds, *Keller v. City of Spokane, supra*.

Because the City is not the "owner" of Olson Pl., Mr. Nguyen was not an "invitee" on the street. There are in fact no "invitees," "licensees," or "trespassers" on public ways. The City's duty to maintain its streets does not therefore encompass duties landowners owe to invitees, such as inspecting its premises under circumstances defined by the common law. The fact that the City does not routinely inspect its trees, including the tree at issue in this case, is thus not evidence of breach of duty. The trial court

did not err in concluding that “[t]he City of Seattle did not breach its duty to maintain Olson Pl. SW in reasonably safe condition for ordinary travel.” CP 508, Conclusion of Law 1.

**C. The City could not have had constructive notice of a hazard that cannot be shown to have existed.**

A city can be found liable for an unsafe condition which it did not create only if it had actual or constructive notice of the condition, *Nibarger v. City of Seattle*, 53 Wn.2d 228, 229-30, 332 P.2d 463 (1958). With respect to the tree at issue in this case, there is no evidence of any unsafe condition of which the City *could* have had notice. As discussed above, the evidence is that the City received no complaints about the tree from anyone – citizens, the police, trucking companies, Metro – that the tree posed a hazard of any kind. Exhibit 50, taken a year before appellant’s accident, shows nothing wrong with the tree. Appellant’s expert was unable to say that the branch was lower than 14 feet, or that the trunk encroached over the road surface.

Appellant argues, “The City had actual notice of other trees along Olson Pl. SW, of the same variety as the tree at issue and planted by the City at the same time as the tree at issue, having low hanging branches, encroaching on into the roadway and colliding with the top of and damaging a Metro bus, and vehicles colliding with trees along Olson Pl.

SW for unknown reasons.” Brief, p. 28. But since it is unknown how high the overhanging branch was in *this* case, it should go without saying that the fact that a Metro bus hit the overhanging branch of *another* tree is not evidence that the branch of our tree violated the 14-foot minimum clearance required by ordinance.<sup>2</sup>

Appellant cannot demonstrate that the City had constructive notice of a dangerous condition of which there is no evidence in the record. Substantial evidence supports the trial court’s finding that “[t]here is no evidence on the condition of the tree in question that would have conferred constructive notice of a danger to vehicles using Olson Pl. SW.” CP 508, Finding of Fact No. 8.

**D. Proof of actual or constructive notice of a dangerous condition is an element of a plaintiff’s negligence case against a government entity, not an affirmative defense which must be pled by the government.**

Appellant’s argument that the City waived the defense of lack of notice because that defense was not affirmatively pled was first raised in appellant’s “Motion in Limine to Strike Affirmative Defense of Notice of Unsafe Condition,” and was denied by the court. CP 198-201; RP 554. A trial court’s denial of a motion *in limine* is reviewed for abuse of

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<sup>2</sup> Indeed, it is not even evidence that the branch of the *other* tree was impermissibly low: it could have met the 14-foot clearance requirement, but been struck by a truck higher

discretion. *Clark v. Gunter*, 112 Wn. App. 805, 808, 51 P.3d 135 (2002). Appellant cites no authority that supports his contention that lack of notice is an affirmative defense of which, like all affirmative defenses, the defendant has the burden of proof.

On the contrary, it is the plaintiff's burden to prove lack of notice, a burden plainly enunciated in premises liability cases where notice of the allegedly dangerous condition is central to the plaintiff's case. *See, e.g., Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652, 869 P.2d 1014, 1015 (1994) ("The plaintiff must establish that the defendant had, or should have had, knowledge of the dangerous condition in time to remedy the situation before the injury or to warn the plaintiff of the danger."); *Iwai v. State*, 129 Wn.2d 84, 96, 915 P.2d 1089 (1996) ("To prove constructive notice, Plaintiffs carry the burden of showing the specific unsafe condition had 'existed for such time as would have afforded [the defendant] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger.") The same is true in municipal liability cases such as this. Indeed, in *Nibarger v. City of Seattle*, *supra*, summary judgment was affirmed precisely because the plaintiff failed to demonstrate actual notice:

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than 14 feet, causing it to droop and be struck by the bus.

The respondent's [plaintiff below] only attempt to show actual notice was the testimony of a policeman who lived across the street and saw that the sidewalk in question was not cleared... There is no evidence in the record that it was his duty, as a policeman, to notify the street department of the condition of sidewalks in general or of the place of the injury in particular. The city did not have actual notice of the dangerous condition in question.

53 Wn.2d 228, at 229-230. Simply put, “[a]ctual or constructive notice of a ‘patent danger’ is an essential component of the duty of reasonable care.” *Lewis v. Krussel*, 101 Wn. App. 178, 186-187, 2 P.3d 486 (2000).

For this reason, appellant’s argument that the City “failed to bring the defense of lack of notice” until “one week before trial” is a non-sequitur. Brief, p. 36. As a matter of law, appellant always had the burden of proving notice; proof of that essential element of his case never depended on the City’s assertion of lack of notice as an affirmative defense. The trial court did not abuse its discretion in denying appellant’s motion *in limine*.

**E. Where appellant’s moving truck collided with the City’s stationary tree, *res ipsa loquitur* does not create an inference that the tree collapsed because the City was negligent.**

Appellant argues that the City’s negligence should be inferred under the doctrine of *res ipsa loquitur*. Brief, pp. 23-25. Appellant’s “Motion for Reconsideration on Liability,” which presented this argument after trial, was denied by the trial court. CP 460-494; CP 537-538.

Rulings on motions for reconsideration are reviewed for abuse of discretion. *Kenco Enterprises Northwest, LLC v. Wiese*, 172 Wn. App. 607, 614, 291 P.3d 261 (2013).

The elements of *res ipsa loquitur* are: (1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence; (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant; and (3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff. *Pacheco v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324 (2003). However, appellant assumes, without explanation, that the instrumentality of the accident was the tree, not the truck he was driving. Yet he does not dispute that substantial evidence supports Finding of Fact No. 3, in which the trial court found that the truck's cargo box struck the tree (CP 507), or the court's description in its oral ruling of how and where the truck impacted the tree. CP 640, 645.<sup>3</sup> The simple fact is that the truck collided with the tree, not the other way around.

That fact distinguishes the case from *Curtis v. Lein*, 169 Wn.2d 884, 239 P.3d 1078 1080 (2010), on which appellant relies. There, the

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<sup>3</sup> The court incorporated its oral rulings, into its Findings of Fact and Conclusions of Law. CP 509.

plaintiff was injured when a dock gave way under her feet. 169 Wn.2d at 888. But the tree in this case did not spontaneously collapse because it was rotted by disease or otherwise defective. It was shattered by the impact of Mr. Nguyen's truck driving into it, something over which the City plainly had no control. On this record, he is not entitled to the inference, supplied by the doctrine of *res ipsa loquitur*, that the City's negligence caused the tree to fall down. Appellant cannot show that the trial court abused its discretion in denying his motion for reconsideration.

## V. CONCLUSION

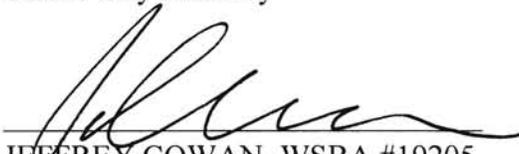
Appellant offers no explanation of how the trial court's findings of fact are unsupported by substantial evidence. He fails to show that the court's conclusions of law were erroneously applied to those facts. He makes no argument that the court abused its discretion in denying his pre- and post-trial motions. His theories that the City has a duty to inspect its street infrastructure, that the lack of notice of a dangerous condition must be affirmatively pled by a municipal defendant, and that *res ipsa loquitur* permits the inference of the City's negligence, have no support in the cases.

Accordingly, the judgment of the trial court should be affirmed.

Respectfully submitted this 22<sup>nd</sup> day of April, 2012.

PETER S. HOLMES  
Seattle City Attorney

By:

  
\_\_\_\_\_  
JEFFREY COWAN, WSBA #19205  
Assistant City Attorney

Attorneys for Respondent City of Seattle

## APPENDIX

### **15.42.010 General provisions—Trees.**

No one shall plant in any public place any maple, Lombardy poplar, cottonwood or gum, or any other tree which breeds disease dangerous to other trees or to the public health. No one shall allow to remain in any public place any tree trunk, limb, branch, fruit or foliage which is in such condition as to be hazardous to the public, and any such trees now existing in any such planting (parking) strip or abutting street area may be removed in the manner provided in this subtitle for the revocation of permits and removal of obstructions.

### **15.42.020 Overhanging trees and shrubs.**

No flowers, shrubs or trees shall be allowed to overhang or prevent the free use of the sidewalk or roadway, or street maintenance activity, except that trees may extend over the sidewalk when kept trimmed to a height of eight feet (8') above the same, and fourteen feet (14') above a roadway.

**RCW 35.69.010**

**Definitions.**

The term "street" as used herein includes boulevard, avenue, street, alley, way, lane, square or place.

The term "city" includes any city of the first or second class or any other city of equal population working under a special charter.

The term "sidewalk" includes any and all pedestrian structures or forms of improvement for pedestrians included in the space between the street margin, as defined by a curb or the edge of the traveled road surface, and the line where the public right-of-way meets the abutting property.

**PROOF OF SERVICE**

CATHERINE LESCHI WILCOX certifies under penalty of perjury under the laws of the State of Washington that the following is true and correct.

I am employed as a Legal Assistant with the Seattle City Attorney's office.

On April 22, 2013, I requested ABC Legal Messengers to serve, by 5:00 p.m. on April 22, 2013, a copy of this document upon the following counsel:

Attorneys for Plaintiff:

Edward Hemingway  
Buckley & Associates PS, Inc.  
675 South Lane Street, Suite 300  
Seattle, WA 98104

I further state that I requested ABC Messengers to deliver by April 22, 2013, for filing, the original and one copy of this document to the Court of Appeals, Division I.

DATED this 22<sup>nd</sup> day of April, 2013.

  
CATHERINE LESCHI WILCOX

No. 69263-1-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON, SEATTLE

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THE-ANH NGUYEN,

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vs.

CITY OF SEATTLE,

Defendant/Respondent,

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***ERRATUM TO BRIEF OF RESPONDENT CITY OF SEATTLE***

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PETER S. HOLMES  
Seattle City Attorney

JEFFREY COWAN, WSBA #19205  
Assistant City Attorney  
Attorneys for Respondent,  
City of Seattle

Seattle City Attorney's Office  
600 – 4<sup>th</sup> Avenue, 4<sup>th</sup> Floor  
P.O. Box 94769  
Seattle, Washington 98124-4769  
(206) 684-8200

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The following *erratum* to the Brief of Respondent City of Seattle,  
filed April 22, 2013, is submitted:

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“On the contrary, it is plaintiff’s burden to prove lack of notice...”

Should read:

“On the contrary, it is plaintiff’s burden to prove notice....”

Dated this 23<sup>rd</sup> day of April, 2013.

PETER S. HOLMES  
Seattle City Attorney

By:

  
\_\_\_\_\_  
JEFFREY COWAN, WSBA #19205  
Assistant City Attorney

Attorneys for Respondent City of Seattle

**PROOF OF SERVICE**

CATHERINE LESCHI WILCOX certifies under penalty of perjury under the laws of the State of Washington that the following is true and correct.

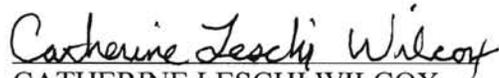
I am employed as a Legal Assistant with the Seattle City Attorney's office.

On April 23, 2013, I requested ABC Legal Messengers to serve, by 5:00 p.m. on April 23, 2013, a copy of this document upon the following counsel:

Attorneys for Plaintiff:  
Edward Hemingway  
Buckley & Associates PS, Inc.  
675 South Lane Street, Suite 300  
Seattle, WA 98104

I further state that I requested ABC Legal Messengers to deliver by 4:30 p.m. on April 23, 2013, for filing, the original and one copy of this document to the Court of Appeals, Division I.

DATED this 23<sup>rd</sup> day of April, 2013.

  
CATHERINE LESCHI WILCOX