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IN THE
SUPREME COURT OF THE STATE OF WASHINGTON

SUSAN CAMICIA,

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Plaintiff/Respondent,

v.

THE CITY OF MERCER ISLAND,

Defendant/Petitioner,

IN RE THE COURT OF APPEALS DIVISION I
Case No. 63787-8-1

CITY OF MERCER ISLAND'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Susan Camicia was injured when she rode her bicycle into a large wooden bollard on the I-90 bicycle path. She sued the City of Mercer Island (“the City”) for negligence.¹ But, as the bike path is—by definition—land used for “bicycling,” the recreational land use immunity statute explicitly applied:

...any public or private landowners or others in lawful possession and control of any lands whether designated resource, rural, or urban... who allow members of the public to use them for the purposes of outdoor recreation, which term includes... *bicycling*, skateboarding or other nonmotorized wheel-based activities... without charging a fee of any kind therefor, *shall not be liable for unintentional injuries to such users.*

RCW 4.24.210(1) (emphasis added). This straightforward reasoning was well-taken by the Honorable Laura Inveen, who entered summary judgment in favor of the City.

Division I reversed, however, on grounds completely antithetical to precedent. The Court of Appeals found “issues of fact,” related to whether the City had “authority to designate the I-90 trail as recreational land.” Op. at 12. This conclusion, worse than being substantively incorrect, was based upon an undeveloped issue, raised *sue sponte* on appeal. The City timely sought review, which this Court granted.

The courts’ treatment of recreational immunity—particularly, when confronted with sympathetic facts—has consequences. Rational

¹ Camicia also sued co-defendant, Howard S. Wright Construction, an entity doing construction at the time. The claims against Howard S. Wright are stayed pending this appeal, but otherwise set for trial.

landowners will have no trouble closing down parks and paths if resolution of claims comes down to ad hoc, non-statutory factors—as Division I applied—effectively frustrating the legislature’s objective. *See* RCW 4.24.200 (“... to *encourage* owners to make [land] available to the public...”).

This Court should apply the recreational immunity statute as written, and confirm the applicability of thirty years of unbroken precedent. Camicia may pursue recovery against the co-defendant to the extent that her claims ultimately have merit.

II. ARGUMENT

On the afternoon of June 19, 2006, Camicia, like many others, was riding along the I-90 bike path on Mercer Island.² CP 4; CP 566. Unfortunately, while bicycling, she failed to account for a large wooden bollard in the middle of the path and collided with it. CP 4. She does not claim that the bollard was difficult to see; indeed, she acknowledges that had she looked up, she would have seen it. CP 567. But she was looking elsewhere at the time of the collision. CP 568. She brought suit against the City and Howard S. Wright Construction. CP 3, 5.

The City moved for summary judgment, which the trial court granted by memorandum opinion. CP 872-79.³ Division I issued an

² Though Camicia has argued that she was a “vocational commuter,” her deposition transcript tells a different story. It is apparent that she road home from work, met a friend, and proceeded to bicycle around Mercer Island for recreational purposes. CP 566. But, as discussed below, her subjective intentions are not material to the analysis.

³ To be fair, Judge McBroom denied summary judgment originally for failure of proof. Based upon admissions in the pleadings, the City did not know that Camicia would challenge the City’s ownership of the path. When Camicia did so, Judge McBroom

unpublished opinion reversing. The City timely filed a petition for review, supported by the Washington State Association of Municipal Attorneys and the City of Seattle, as *amicus curiae*. It was granted on June 10, 2011.

A. The Plain Language Of The Statute, And Uniform Case Law Interpreting It, Require Application Of Recreational Land Use Immunity To Bicycle Paths

(1) Read the statute; (2) read the statute; (3) read the statute!

In re England, 375 F.3d 1169, 1182 (D.C. Cir. 2004) (Roberts, J.) (*quoting* Friendly, BENCHMARKS 202 (1967)). Justice Frankfurter's advice on statutory interpretation is no less true today.

Our case ultimately comes down to the plain language of the recreational immunity statute, which provides:

... any public or private landowners or others in lawful possession and control of any lands whether designated resource, rural, or urban, or water areas or channels and lands adjacent to such areas or channels, who allow members of the public to use them for the purposes of outdoor recreation, which term includes, but is not limited to... *bicycling*... without charging a fee of any kind therefor, *shall not be liable for unintentional injuries to such users.*

RCW 4.24.210 (emphasis added); *Riksem v. City of Seattle*, 47 Wn. App. 506, 510-11, 736 P.2d 275 (1987) (applying recreational immunity to a regional bike path).⁴

found issues of fact, but wrote into the order that it was "without prejudice"—all parties agreed that the question would ultimately have to be resolved before trial. CP 497 (Note 6); RP 53-54; CP 545-46. Judge McBroom then retired, and the case was transferred to Judge Inveen, who resolved the question on with completed record.

⁴ If a condition is known, dangerous, artificial, and latent, recreational immunity does not apply. *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 46, 846 P.2d 522 (1993). Carnicia has never claimed that the large, wooden bollard was a "latent" condition—nor could she. *Cf. Gaeta v. Seattle City Light*, 54 Wn. App. 603, 609, 774 P.2d 1255 (1989) (railroad track was not latent).

The statute, by its own terms, applies to land held open for recreational bicycling. As the language is unequivocal in this regard, it need not be “interpreted.” *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). So long as a landowner “allow[s] members of the public” to use property for “bicycling,” immunity presumptively applies. RCW 4.24.210.

1. The Record Conclusively Established That The I-90 Bicycle Trail Is, And Has Always Been, Considered A Recreational Resource

The ultimate question is whether the I-90 trail is a recreational area within the meaning of the statute. The answer, one-sidedly demonstrated in the record, is yes. The bike path was originally built by the Washington Department of Transportation in the mid to late 1980’s. CP 157. It was part of the “SR 90 North Mercer Connection,” which specifically provided for the design and construction of a “bike path.” *Id.*⁵ It was operated as a bike path since construction.

In 2000, the City acquired it from the State by quitclaim deed. CP 610-41 (quitclaim deed and survey). As owner, the City always considered it recreational. The location of Camicia’s accident was located within the City’s linear park system. CP 159; CP 688.⁶ In this regard, it is one of several major park elements identified in the City’s Comprehensive Park, Recreation, Open Space, Arts & Trail Plan. CP 159. The I-90 trail

⁵ The original plan sheets also reflect construction of a “bike path.” CP 158; CP 161-66. At one point, the contractor specially ordered curb cuts for ramps onto the “bike path.” CP 158; CP 170-72. And a local environmental assessment refers to the area as a “bike trail,” as did State Department of Transportation plans. CP 158; CP 173-75; CP 167-69.

⁶ This designation is consistent with planning documents and records dating back to 1973. CP 688.

and Linear Park are referred to as "regional parks." *Id.* The Comprehensive Plan likewise reflects "8 miles of trails in the corridor." CP 159; CP 178. The Mercer Island Parks Guide, too, references this location. CP 160; CP 181-82.⁷ The path itself generally follows the north side of the I-90 freeway, but also diverges, and runs through grassy landscapes such as Luther Burbank and Lid Parks. CP 158.

Furthermore, the design of the bike path is inconsistent with anything *except* a bike path.⁸ This is the very reason bollards were installed. Bollards are large wooden posts, unique to bike paths. CP 143-45; CP 158. Because they are wider, bollards tend to keep motorists from entering the path by mistake. This is what Camicia collided with while she herself was recreating.

While sympathetic, there is no real dispute about the City's intent. The I-90 bike path was always held open, and treated as, a recreational bike path.

B. Injecting Third Party Beliefs Into The Immunity Inquiry Frustrates The Sole Objective Of The Statute

In reversing the trial court, Division I did what no other court had ever done: weigh third party interests. For decades, the analysis has turned on the beliefs and standpoint of the landowner, and nobody else.

⁷ By ordinance, the City treated the I-90 bike path differently than its transportation facilities. CP 688. Adult entertainment, for example, would be permissible next to a road or sidewalk, but it must be kept at least 600 feet from the bike trail. CP 688-89.

⁸ The path has a width of 8-10 feet and asphalt construction. CP 158. Had it served some other purpose, this would make no sense. CP 159. Its use by bicyclists, walkers, runners, and other "wheeled users" was specifically anticipated. *Id.* Narrower sidewalks are designed for exclusive use by pedestrians. *Id.*

WSDOT issued a report indicating that some areas of the I-90 path served a “transportation purpose,” to be sure. But if the applicability of immunity came down to the beliefs of others, no landowners could ever have certainty in opening land. That is why, consistent with the purpose of the statute, courts have historically deferred to the landowner.

1. The Standpoint of the Landowner Controls the Analysis

To determine whether the statute applies, courts view the circumstances from the standpoint of the landowner. *Cultee v. City of Tacoma*, 95 Wn. App. 505, 514, 977 P.2d 15 (1999); *Gaeta v. Seattle City Light*, 54 Wn. App. 603, 608, 774 P.2d 1255 (1989). If a landowner has brought himself within the terms of the statute, it applies irrespective of other subjective purposes that the land may serve. *Id.* The extraneous views of others are not material.

This body of law makes a lot of sense as a practical matter. If landowners are going to voluntarily—and gratuitously—permit the recreating public onto their land, they must be permitted to control their own destiny. The analysis must come down to *the landowner's* beliefs—and not those of unpredictable third parties. If the law were otherwise, and immunity turned on the opinions of others, RCW 4.24 would provide no security at all. This defeats the stated purpose of RCW 4.24.200.

Camicia has repeatedly offered third party determinations—rendered by WSDOT or the U.S. Department of Transportation—for the proposition that there are “issues of fact” regarding the recreational nature of the bike path. This is a false premise. As a matter of settled law, the

viewpoints, beliefs, and opinions of third parties have no bearing.

2. Division I's Reliance On Third Party Opinions—Besides Being Legally Unprecedented—Was Factually Unfounded

In its unpublished opinion, Division I relied upon a Section 4(f) determination made by WSDOT, in which portions of the I-90 path were deemed “non-recreational.” Op. at 12-13. Aside from the legal error in the analysis, *see supra*, this misreads the record.

Significantly, the “determinations” cited by Division I did not even apply to the accident site. The author of WSDOT’s evaluation, Paul Kruger, testified:

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

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

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

A: I don’t recall that we did.

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

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

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

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

CP 504 (Objections omitted). This is consistent with the determination itself. CP 756 (“The shared-use pathway *on the HMH floating bridge* is considered a transportation facility.”).

The letter from the U.S. Department of Transportation likewise applied to the floating bridge, not the City-owned portion. See CP 752 (“[development] will affect the shared-use path *on the Homer-Hadley floating bridge.*”); CP 753 (“the primary purpose of the share-use path *on the floating bridge* is transportation.”) (emphasis added). But the accident in this case was in the City, *not* on the floating bridge.

Though this critical distinction was overlooked by Division I, Judge Inveen was sensitive to it. In her memorandum order, she noted that both the WSDOT and federal determinations applied to the floating bridge, *not* the accident site near the Park and Ride. See CP 878-79.⁹ In this regard, Division I simply misread the factual record.

It also bears emphasis that, even if these determinations did apply, the City never agreed or concurred to any of them. Division I’s belief that the 2004 assessment was prepared “in coordination with the City of Mercer Island and City Engineer Yamashita,” Op. at 13, is again incorrect. A closer review of the record indicates that Mercer Island staff was merely “consulted”—on unrelated issues. City Engineer Yamashita, for example, was consulted on a “drainage analysis.” CP 775. There is certainly nothing establishing concurrence, agreement, or coordination on the issue of recreation.

3. Even If The Third Party Determinations Could Be Read To Apply To The Accident Site—Which They Cannot—Thirty

⁹ The distinction is a logical one. As Judge Inveen explained, it makes sense to distinguish between a path along a busy interstate freeway floating bridge and one that “winds its way through city and park land, adjacent to other streets where bikes can travel.” CP 879.

Years Of Precedent Would Still Require Application Of
Recreational Immunity

Lastly, even if the Court were to unlawfully credit third-party beliefs—and incorrectly assume that they apply to a section of the bike path that they do not—it would still not support the result Camicia seeks. Her “evidence,” even given a generous spin, only confirms that recreation is a very important use of the bike path:

DOCUMENT	SUBSTANCE	RECORD
2004 EIS Comments and Responses, I-90 2-Way Transit and HOV Operations	<i>“Recreation is an important function of the path ...”</i>	CP 362 (emphasis added)
WSDOT Report Evaluating I-90 Bicycle and Pedestrian Path as Potential Section 4(f) Resource	<i>“According to the WSDOT Design Manual, the I-90 bicycle and pedestrian path is considered a ‘shared-use’ path... It is designed and built primarily for use by bicycles...”</i>	CP 365 (emphasis added)
2002 USDOT/FHA letter discussing potential Section 4(f) Resource	<i>“While WSDOT has acknowledged that recreation is an important function of the path ...”</i>	CP 369 (emphasis added)
2004 Final EIS, I-90 2-Way Transit and HOV Operations	<i>“While I-90 shared-use path...is used by bicyclists commuting to and from work and was provided primarily for transportation purposes, it is also used for recreational purposes...”</i>	CP 377 (emphasis added)

Recreation is an undeniably critical function of the I-90 bike trail, whether in the City park system, or adjacent to the I-90 Floating Bridge owned by WSDOT. Fortunately, the applicability of recreational immunity to dual-use properties is not a new issue for the Washington

courts. Over 30 years ago, in *McCarver v. Manson Park & Rec. Dist.*, 92 Wn.2d 370, 377, 597 P.2d 1362 (1979), the plaintiff died in a diving accident at a local park. The estate argued that the statute should not apply because the land that was held open “exclusively” for recreational use. *Id.* This court rejected the argument, and clarified the scope of the statute. It held, in no uncertain terms, that recreational immunity does not turn on the “extent” of recreation that can be derived on a given piece of property:

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

Id. This Court declined to delve into a “primary” and “secondary” role analysis.¹⁰

This reasoning has been applied elsewhere, in much closer cases than this one. In *Widman v. Johnson*, 81 Wn. App. 110, 114, 912 P.2d 1095 (1996), for example, the plaintiff was driving along an old, recreational logging road intersecting highway SR 407. At the intersection—which was missing a stop sign—she collided with a pickup truck. The plaintiff argued that the site of her accident “was not recreational land within the meaning of the statute.” *Id.* at 114. Citing

¹⁰ Despite revisiting the recreational immunity statute several times, the legislature has refused to overrule this longstanding application—which strongly militates against revisiting the issue. See *Buchanan v. Int'l Bhd. of Teamsters*, 94 Wn.2d 508, 511, 617 P.2d 1004 (1980) (where the legislature refuses to clarify its intent following a judicial interpretation, acquiescence is presumed); *Rtehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (the courts should not “change their mind” as to what a statute means).

McCarver, Division II rejected the argument, reasoning that any “other purposes” of the road “lack[ed] legal significance.” *Id.*

Similarly, in *Chamberlain v. Dept. of Transp.*, 79 Wn. App. 212, 901 P.2d 344 (1995), the plaintiff was hit and killed by a vehicle while sightseeing on Deception Pass Bridge. *Id.* at 214-15. The area itself was open to vehicle traffic. *Id.* The plaintiff argued that recreational immunity should not apply to a bridge that is subject to vehicle traffic. The court disagreed, reasoning that “[t]he fact that ‘highway’ and ‘sidewalk’ are defined elsewhere does not require that they be excluded from the provisions of the recreational use immunity statute.” *Id.* at 218.

In *Riksem v. City of Seattle*, 47 Wn. App. 506, 736 P.2d 275 (1987), the plaintiff was riding on a bike path when injured. *Id.* at 508. He argued, as Camicia does, that it was unfair to distinguish between “commuters” and “recreational users.” The court disagreed:

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

Id. at 512 (emphasis added) (citing *McCarver v. Manson Park & Rec. Dist.*, 92 Wn.2d 370, 377, 597 P.2d 1362 (1979)); *see also Gaeta v. Seattle City Light*, 54 Wn. App. 603, 608-09, 774 P.2d 1255 (1989) (held insignificant that the park user had a “commercial purpose”).¹¹

¹¹ Camicia will likely point to a Louisiana case, *Smith v. Southern Pac. Transp. Co. Inc.*, 467 So.2d 70 (La. Ct. App. 1985) and *Nielsen v. Port of Bellingham*, 107 Wn. App. 662, 27 P.3d 1242 (2001). They are factually and legally inapposite. Neither involved a bike path or any other enumerated use in RCW 4.24.210(a). *Smith* involved an out-of-state

The case law is uniform. *No court* has denied immunity on account of an alternative “transportation use”—presumably, because nearly all recreation *necessarily* has alternative purposes. Snow mobile riding is, by definition, “transportation.” Hunting and fishing have commercial and practical purposes. Water channels are subject to commercial ferries. As this Court pragmatically—and correctly—held over 30 years ago, RCW 4.24.210 is not subject to a “limiting construction... based upon primary and secondary uses.” *McCarver*, 92 Wn.2d at 377. Perhaps the Legislature will one day create one—it certainly knows how to qualify its statutes¹²—but, to date, it has not.

If a “bicycle path” is not land used for “bicycling,” it is difficult to know what would be. The legislature expressed a specific intent to include bicycling paths within the ambit of the statute, and it should be enforced by this Court.

C. The Record One-Sidedly Establishes That The City Could Shut Down The Recreational Bike Path Where Camicia Collided With A Bollard

Recreational immunity requires that the defendant have “possession and control” of the property in question. RCW 4.24.210.

statute and a radically different analysis; *Nielsen* involved a commercial port that charged fees.

¹² The Legislature routinely couches its statutes in terms of primary purposes—when that is its intent. *See, e.g.*, RCW 59.20.030(10) (defining mobile home park in terms of “primary purpose” of income production); RCW 46.04.500 (defining “roadway” in terms of its ordinary use); RCW 19.270.010(1) (defining “advertising” in the Computer Spyware Act by virtue of the primary purpose of the conduct); RCW 31.12.436(8) (defining where credit unions can invest funds by the “primary purpose” of the target organization). It *chose not to do so* in the Recreational Use Immunity Act. *See Millay v. Cam*, 135 Wn.2d 193, 202, 955 P.2d 791 (1998) (when language is used in one instance, but different language is used in another, a difference in legislative intent is presumed).

This has been construed to mean a “continuing authority to determine whether the land should be open to the public.” *Tennyson v. Plum Creek Timber Co.*, 73 Wn.App. 550, 558, 872 P.2d 524 (1994).

In *Tennyson*, for example, several contractors—who were doing contractual excavation work on the property—attempted to raise recreational immunity as a defense. The court disallowed it, reasoning that the contractors “had no continuing authority to determine whether the land should be open to the public.” *Id.* at 558 (citing *Labree v. Millville Mfg., Inc.*, 195 N.J.Super. 575, 481 A.2d 286 (App. Div. 1984) (extending immunity to contractor did not further purposes of statute)).

As applied here, the question is whether the City had authority to close down the portion of the bike path that it undisputedly owned. It could, and there is no factual argument to the contrary. As City Engineer Yamashita unequivocally explained:

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

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

CP 609 (*Yamashita Decl.* ¶ 15-16). This testimony was confirmed by Steve Lancaster, the City’s Development Services Director, in his declarations. CP 299; 675-678. He testified that WSDOT neither owned, nor retained control, over the accident site. *Id.*¹³

¹³ In their supplemental declarations, Messrs. Lancaster and Yamashita spend significant time correcting Camicia’s various misrepresentations of their deposition testimony. To

Indeed, even WSDOT—the party that Division I believed had authority—denied control over the accident site. Its representative, Mr. Krueger, did not believe that WSDOT owned the accident site, and was unaware of any right to control or regulate it. CP 504.

In short, this case is not *Tennyson* or *Labree*. The City owned the I-90 bike path, had plenary control of it, and could freely shut it down. In fact, it did so from time to time. Immunity applies, not only because the legislature requires it, but because this *does* further the state's policy objectives: property owners, such as the City, do retain discretion to shut down recreational areas if divested of their statutory protections—unlike the contractors in *Tennyson*.

Because the City retained possession and control of the accident site, the statute applies.

D. Camicia Did Not—And Could Not—Deny The Inherent Unfairness Of Division I Ruling On An Unraised, Undeveloped Factual Issue

Almost as troubling as the outcome of this appeal, is the way it was reached. Civil litigation is based upon the premise that attorneys are in the best position to choose the arguments they will make, and will do so in a manner that permits their adversary to respond. The system breaks down when appellate judges raise, and rule upon, factual issues in late stages.

Almost the entirety of Division I's opinion is predicated upon ambiguous language in a quitclaim deed that was never litigated or raised

the extent that Camicia advances them here, the Court is encouraged to review the supplemental declarations, as well as Judge Inveen's memorandum order—which also corrects the record. CP 605-609, CP 675-678, CP 862-868.

as an issue prior. For Division I to do so on a closed record—without even permitting supplemental briefing—is, at best, unfair, and, at worst, of constitutional dimension.

In fact, this case illustrates the very problem of “litigating the unlitigated” on appeal. Had the City had an opportunity to respond, error could have been averted.

1. Division I Violated RAP 12.1, Doing A Diservice To The Parties, As Well As The Trial Court¹⁴

All parties to an appeal benefit from appellate restraint toward undeveloped issues. The main features of the civil justice system are: (1) neutral and passive decision makers, and (2) party presentation of evidence and arguments. Stephan Landsman, *Readings On Adversarial Justice: The American Approach To Adjudication*, 2-4 (1988). Party identification of the issues is at the very core of this system.¹⁵

This is no less true in Washington. This Court has repeatedly observed that, to the extent possible, parties should present the entirety of their case to the trial court “so it may accurately rule on all issues involved and correct errors in time to avoid unnecessary retrials.” *State v. Boast*, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976). When this involves a disagreement, it is incumbent upon the objecting party to give “a

¹⁴ George C. Christie, *Objectivity in the Law*, 78 YALE L.J. 1311, 1329 (1969) (“[T]he primary social purpose of the judicial process is deciding disputes in a manner that will, upon reflection, permit the loser as well as the winner to feel that he has been fairly treated.”)

¹⁵ See Neal Devins, *Asking the Right Questions: How the Courts Honored the Separation of Powers by Reconsidering Miranda*, 149 U. PA. L. REV. 251, 252 (2000) (“[A] central tenet of our adversarial system is that (save for jurisdictional issues) the parties to a case—not the judges deciding the case—raise the legal arguments.”).

reasonably definite statement” so that the adversary “may be afforded an opportunity to remedy the claimed defect.” *Id.* Rulings should be made on a completed record. *Cf. Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990).

This not only ensures the best outcome, but also protects the dignity of the trial judge. Quite simply, it is unfair to reverse a trial court judge based upon an argument or issue never before them. That judge, as this Court recognized, should be given the first opportunity to resolve it:

The trial court, in our view, should have had the benefit of vigorous and detailed objections... giving it an opportunity to correct the error, if any. It cannot be presumed that because the court once refused instructions suggesting appellant’s view of the basis for liability, further argument, bolstered by reference to specific points of law, with respect to instructions Nos. 8 and 9 would not have prevailed.

Haslund v. City of Seattle, 86 Wn.2d 607, 614, 547 P.2d 1221 (1976).

RAP 12.1 does allow for review of new issues, to be sure. But those issues must be raised in a specific, codified way:

Issues Raised by the Court. If the appellate court concludes that an issue which is not set forth in the briefs should be considered to properly decide a case, *the court may notify the parties and give them an opportunity to present written argument on the issue raised by the court.*

RAP 12.1(b) (emphasis added). These steps—notice and an opportunity to be heard—reflect due process.¹⁶ This never occurred at the Court of

¹⁶ See *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000) (the rules of procedure are designed to further the due process of law that the constitution guarantees); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) (“[t]he opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.”).

Appeals level.

It is also relevant that, in practice, the appellate court reaches only *legal issues* for the first time on appeal—not factual issues. *See, e.g., City of Seattle v. McCready*, 123 Wn.2d 260, 268, 868 P.2d 134 (1994) (constitutional authority of superior court considered for the first time on appeal); *Obert v. Envtl. Research & Dev. Corp.*, 112 Wn.2d 323, 333, 771 P.2d 340 (1989) (“determinative statute” analyzed on appeal); *Hall v. Am. Nat'l Plastics, Inc.*, 73 Wn.2d 203, 205, 437 P.2d 693 (1968) (similar). This makes sense, after all. New points of law, in most circumstances, can be argued on a closed record. It is a matter of research and briefing.¹⁷ Factual investigation, preparation of declarations, and the marshaling of evidence—by contrast—cannot be performed on appeal.

Thus, if a factual argument is to be made, there is nothing unfair about requiring *a party* to make it at the proper time. Not only is this what attorneys are paid to do, but it is the premise on which our system rests:

The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.

United States v. Burke, 504 U.S. 229, 246 (1992) (Scalia, J., concurring).

Conversely, as discussed below, there is very little benefit to *sua sponte* review of factual issues. Decisions made on an undeveloped record invite unnecessary remands—and further appeals—or worse, unreviewable error.

¹⁷ It still does a disservice to the trial court, however.

2. Had The City Been Permitted To Respond, It Could Have Averted Error

Division I considered—and believed it resolved—the meaning of a quitclaim deed without any input from the parties. In doing so, it illustrated the very problem with litigating undeveloped factual issues.

Division I was unaware that the language in the quitclaim deed reflected the 18th Amendment to the Washington State Constitution, which provides that gas tax monies be “placed in a special fund to be used exclusively for *highway purposes*.” Wash. Const. art. II, sec. 40 (emphasis added).

Division I simply took for granted that a recreational bike path could never be a “highway purpose,” when, in reality, the opposite is true. Indeed, it is codified:

For the purposes of this chapter, the establishment of paths and trails and the expenditure of funds as authorized by RCW 47.30.030, as now or hereafter amended, shall be deemed to be for highway, road, and street purposes...

RCW 47.30.060 (emphasis added).¹⁸ The constitutionality of this statute was recently upheld in *Northwest Motorcycle Ass'n v. State Interagency Committee for Outdoor Recreation*, 127 Wn. App. 408, 414-15, 110 P.3d 1196 (2005), where the court confirmed that gas tax revenues can be directed toward recreational trails.

By statute, bike paths have been a legitimate “highway purpose” since 1979. And more to the point, the legislature re-visited Recreational

¹⁸ A “‘trail’ or ‘path’ means a public way constructed primarily for and open to pedestrians, equestrians, or bicyclists, or any combination thereof...” RCW 47.30.005.

Immunity over a half-dozen times since then—only expanding it. If it wanted to exclude areas constructed with “highway funds,” or with a potential “road/street purpose,” it would have done so. See *Martin v. Trial*, 121 Wn.2d 135, 148, 847 P.2d 471 (1993) (legislature presumed to have full knowledge of existing laws affecting matters upon which it acts). But the legislature *has not* limited recreational immunity in this way, presumably because it would be bad public policy and defeat the very purpose of the statute.

The courts have only confirmed this reasoning. In *Widman*, the accident occurred on an actual road in a known recreational area—immunity applied. *Widman*, 81 Wn. App. at 114. In *Chamberlain*, the accident happened on a walkway in a scenic viewing spot, that also fit the statutory definition of a sidewalk—immunity applied. *Chamberlain* 79 Wn. App. at 218. So long as the area is recreational in nature, treated as such, and held out for public use without a fee, a simultaneous “road/street purpose” has no bearing on immunity. That is precisely the case here, and Camicia has *never* argued otherwise.

Finally, and as an aside, Division I ignored the apparent—and undisputed—intent of the parties to the deed. The City and WSDOT have always interpreted their deed’s language to allow for recreation—which has been continuous since the bike path’s construction. There is no evidence of WSDOT exercising rights under the deed, or even wanting to. If anything, the opposite is true. See CP 504 (denying ability to regulate un-owned portions of the bike path). The I-90 bike path has been used for

recreation since its construction, and any limits to the contrary have long-since been waived. *See Martin v. City of Seattle*, 111 Wn.2d 727, 732-34, 765 P.2d 257 (1988) (“If a forfeiture is not declared within a reasonable time, the power of termination expires.”).¹⁹

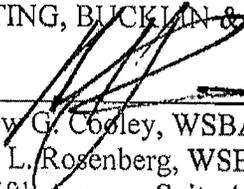
Upon review, it is not difficult to see why Camicia herself did not raise this issue—it is ultimately without merit.

III. CONCLUSION

Judge Inveen was correct in her ruling, and her decision should stand. The City respectfully requests that this Court affirm her order of dismissal, and reverse Division I’s opinion to the contrary.

Respectfully submitted this 8th day of July, 2011.

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¹⁹ There are a number of other problems with Division I’s treatment of the deed. For example, the plain language of the quitclaim deed does not support the opinion. By its own terms, WSDOT conveyed “all right, title, and interest under the jurisdiction of the Department of Transportation.” CP 611. This is consistent with the statutory definition of a quitclaim deed. *See* RCW 64.04.050 (covers “all the then existing legal and equitable rights of the grantor in the premises therein described”). Any contradictory language purporting to reserve rights would be, at best, ambiguous. An ambiguous reservation will be construed *against* the restrictions. *Schnitzer v. Panhandle Lumber Co.*, 14 Wn.2d 434, 439, 128 P.2d 501 (1942); *Shoemaker v. Shaug*, 5 Wn. App. 700, 704, 490 P.2d 439 (1971) (“It is elementary law in this jurisdiction that forfeitures are not favored and never enforced in equity unless the right thereto is so clear as to permit no denial.”). Furthermore, even if there were a restriction, it could not be enforced by Camicia—who is a “stranger to the deed.” *Donald v. City of Vancouver*, 43 Wn. App. 880, 884-85, 719 P.2d 966 (1986) (plaintiff lacked standing to stop city from transferring land, contrary limitations imposed by deed).

DECLARATION OF SERVICE

The undersigned, hereby declares under penalty of perjury under the laws of the State of Washington, that on the 11th day of July, 2011, she served a true and accurate copy of the *City of Mercer Island's Supplemental Brief to the Supreme Court of the State of Washington* via electronic mail and ABC Legal Services messenger upon the following:

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Subject: Camicia v. The City of Mercer Island - City's Supplemental Brief (85583-8)

Dear Sir / Madam:

Please find attached for filing, the City of Mercer Island's *Supplemental Brief* for filing, as well as a transmittal letter to Clerk Ronald Carpenter.

Please do not hesitate to contact me with any questions.

Sincerely,

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