No. ~~68668~~-1-I
69358-1

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

STEVEN JEWELS,

Plaintiff/Appellant,

v.

CITY OF BELLINGHAM

Defendants/Respondents.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION TO REPLY

The stated purpose of the Recreational Land Use Statute is to encourage land owners to open up their properties for public recreation. RCW 4.24.210. However, the legislature put limits on such broad immunity to discourage landowners, including municipalities, from acting recklessly and without any regard to safety of the users of those properties. The trial court impermissibly weight the evidence presented on the issues of latency and knowledge.

The position of the City of Bellingham is essentially that does not have to follow its own standards, the State of Washington's, or even the federal safety standards when dealing with the traveling public upon roadways within its own parks. It is the position of the City of Bellingham that it can put unmarked hazards in a roadway, contrary to its own standards, and then claim immunity. It was never contemplated by the Washington Legislature that a landowner would not have knowledge of what he himself had done. Cornwall Park is in a residential area and the entrance is open to the public as any street. Appendix C. Respondent claims it can act inconsistently when building or maintaining roadways in its parks and then claim that it lacked the knowledge that what it was doing was hazardous even though just a few yards away it followed its own required safety standards. Appendix C. The Manual of Uniform Traffic Control Devices (hereinafter "MUTCD") applies specifically to government agencies with road building authority such as municipalities and specifically to the roads that it builds to be traveled upon by the public. There are minimum standards to ensure the safety of traveling public so that it does not encounter inconsistent devices that individuals may not understand. Washington State defers to the federal MUTCD which requires that users be provided warning for all obstructions on a roadway. See WAC 468-95 et. seq.

Respondent's own contemporaneous documents call the portion that obstructed the roadway and caused Mr. Jewels' injuries:

"The 2nd speed bump in Cornwall South was only partly painted. A section next to the shoulder area was not painted and a cyclist did not see that it was part of the speed bump." Emphasis added CP 76.

Appellant in his briefs has followed that description by calling it a speed bump extension, an accurate description of the hazard that led to Mr. Jewel's injury.

Lastly, the trial court considers the appellant by Declaration of Jim Couch and the report by engineering expert Edward Stevens presented by appellant at the time of summary judgment hearings and the motion for reconsideration was harmless error.

II. RECREATIONAL LAND USE STATUTE

The recreational land use statute, RCW 4.24.210, provides immunity to landowners for unintentional injuries to recreational users of the land. The statute applies if a landowner who is in lawful possession and control allows the public to use the land for recreational purposes without charging a fee. RCW 4.24.210 provides in relevant part:

> (1) . . . 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, . . . without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users.
>
> (4) Nothing in this section shall prevent the liability of a landowner or others in lawful possession and control for injuries sustained to users by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted. . . .

Because the recreational land use statute is in derogation of common law, it is strictly construed. *Matthews v. Elk Pioneer Days*, 64 Wn.App. 433, 437, 824 P.2d 541 (1992). The "limited circumstances" under which landowners "may not escape liability" are when "(1) a fee for the use of the land is charged; (2) the injuries were intentionally inflicted; or (3) the injuries were sustained by reason of a known dangerous artificial latent condition for which no warning

signs were posted." *Davis*, 144 Wn.2d 612, 616 30 P.3d 460 (2001). For the exception of immunity to exist for a known dangerous artificial latent condition, "each of the four elements, 'known, ' 'dangerous, ' 'artificial, ' and 'latent' [must be] present in the injury causing condition" in order to establish a recreational use landowner's liability. *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 933, 969 P.2d 75 (1998). In this case all four elements are present. The City of Bellingham created the obstruction in the roadway itself, and did not warn users of the roadway of the hazard contrary to its own adopted standards.

While the stated purpose of the legislature for this law was to increase the availability of recreational land by providing landowners immunity, but that immunity has never been absolute. The legislature has continued to exception to immunity since its inception in 1967. This is a city park to which the Recreational Land Use Statute immunity was extended in 1979. It does not concern natural resources managed by the state under RCW 79A.80 et. seq.

A. Latency

Appellant has always held that it was the unpainted speed bump extension that was not visible and that is what caused his crash. CP 005, 92.When he encountered this unexpected obstruction, Mr. Jewels lost control of his bicycle which then was deflected into the curb-cut which caught and broke his tire increasing his injuries. CP 92. Even if the curb had been intact, it is just as likely that Mr. Jewels would have impacted it and been thrown from his bicycle. The issue is not the curb, nor the curb cut, but rather the unpainted speed bump extension. Respondent points out that the curb was visible and the curb cut were visible. However, while they contributed to Mr. Jewels injuries, they were not cause of his crash, for it was the unpainted speed bump extension that caused him to lose control of his bicycle. For example, if it had been a motorcyclist that had been deflected off the roadway and into the tree, the tree itself was not the dangerous condition, but rather the unmarked hidden hazard that caused the motorcyclist to suddenly veer off the road.

The issue of latency in this case cannot be determined at summary judgment. Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to prevail as a matter of law. C.R. 56(c); *Public Employees Mutual Ins. Co. v. Fitzgerald*, 65 Wn. App. 307, 828 P.2d 63 (1992). Here the non-moving party is the plaintiff, Steven Jewels who offered evidence via his own declaration and declaration of cycling expert Jim Couch, that the condition was **not discernible** to a cyclist traveling normally down the road. CP 90-91. "Latent" has been defined under the recreational use immunity statute as "not readily apparent to the recreational user." *Van Dinter v. Kennewick,* 121 Wn.2d 38, 45, 846 P.2d 522 (1993); *Gaeta v. Seattle City Light,* 54 Wn.App. 603, 609, 774 P.2d 1255 (1989). In this case it is a bicyclist traveling at speed along the road that is the perspective from which that the condition must be assessed.

Latency is an issue of fact, as all issues of fact in summary judgment; all inferences must be construed against the moving party, in this case the City of Bellingham. CR 56(c) *Public Employees Mutual Ins. Co. v. Fitzgerald*, 65 Wn. App. 307, 828 P.2d 63 (1992). The question under the Recreational Land Use Statute "is whether the injury causing condition – not the specific risk it poses – is readily apparent to the ordinary recreational user." *Ravenscroft v. Washington Water Power Co.,* 136 Wn.2d 911, 925, 969 P.2d 75 (1998) (emphasis omitted). "[L]atency should be viewed from the plaintiff's perspective; the same condition might be latent to one and patent to another depending on the viewer's vantage point." *Davis v. State,* 102 Wn.App. 177, 192-93, 6 P.3d 1191 (2000) *aff'd* 114 Wn.2d 612 (2001).

Here the appellant has provided sufficient evidence regarding latency by not only his own declaration but that of Jim Couch and also with the evidence presented by respondent's very own work order as well as evidence presented by respondent. CP 076.

Unlike the cases cited by respondent, the speed bump at issue was new as these road improvements had been built by the city in 2007, not even a year before Mr. Jewels encountered them and was injured. Sometime later, respondent admits to creating the unmarked obstruction

in the road. CP 016. *Declaration of Slick.* Importantly, the problem with the speed bumps and the non-standard, unpainted extension at Cornwall Park is that they were a dangerous hazard from the moment the speed bumps were installed. Later the extension was added and left unpainted. CP 016; CP 80-82 and CP106-108 *See* Rutherford Dec. Ex. C. Report by engineer Edward Stevens, pgs. 3-5 and *see* Dec. of Couch. Speed bumps like the ones installed in Cornwall Park, are dangerous for bicyclists and motorcycles and must be painted to alert them so that they can take appropriate action. *Id.* Additionally, gaps are commonly left and are used by cyclists so that they can travel through them safety. CP 107 *See* Couch Declaration. It is undisputed that the extension of the speed bump was unpainted when Mr. Jewels encountered it and fell. CP 91-92 *See* Declarations of Jewels, Rutherford Dec. Ex. B.

In fact, the work order from the City of Bellingham states:

> "The 2nd speedbump in Cornwall South was only partly painted. A section next to the shoulder area was not painted and a cyclist did not see that it was part of the speed bump. He hit it and took a nasty fall from his bike. **PLEASE PAINT ENTIRE SPEED BUMP AND MAKE IT VISIBLE.**
> (emphasis added)

CP 076. Even the park's employees understood that that unpainted portion was part of the speed bump and that it was not visible without the paint. This work order is an admission against interest by the defendant that the extension of the speed bump was in fact **not visible** to traveling cyclists. ER 801(d)(2). The respondent's park employees knew that the speed bump needed to be visible as required by federal and state standards as it was a hazard to the traveling public. *See* federal and state supplement of Manual of Uniform Traffic Control Devices provided.

As the speed bumps in Cornwall Park were not installed until 2007, they clearly were never compliant with any safety and traffic standards, and in fact were known to be dangerous to bicyclists and motorcycles. CP 073 and MUTCD.

"Latency should be viewed from the plaintiff's perspective; the same condition might be latent to one and patent to another, depending on the viewer's vantage point." *Davis v. State,* 102 Wn.App. 177, 192-193, 6 P.3d 1191 (2000) *aff'd* 114 Wn.2d 612 (2001). The extreme edge of the speed bump and its unpainted extension is obscured by the curve and the shade as appellant approached it. CP 21 *See* Declaration of Tom Slick, Exhibit A; where the view of the speed bump extension is entirely obscured by the curve. The City contended that it was readily apparent to someone standing there. Notably the witness for the respondent, City of Bellingham employee Tom Slick, gives no indication of how close he was to the speed bump, nor any sight distances which would be relevant to bicyclist traveling at speed. Moreover, it is important to note that this is a road for cars and bicycles to travel upon, not a pedestrian sidewalk. Mr. Slick knew that obstruction was there and knew where to look for it and that it had already been painted warning yellow. His testimony is tainted as well as irrelevant on this issue.

Additionally, that the speed bump extension had a different color of paving material over it does not signal to a bicyclist that there was an extension to the speed bump. Asphalt is a paving material and this may have simply been a patch over a hole, no create a raised area. It is common to see darker asphalt covering cracks in the pavement, but that does signal that there is an obstruction. A paving material, even one of the different hue, does not alert a driver or a bicyclist that there is an obstruction on the roadway. Had this extension been painted warning yellow, like the rest of the speed bump, then this it would have been an obvious hazard. Using the exhibits of the respondents, but for the yellow paint, there is no way for a person to know that the speed bump extension is not of the same level of rest of the road. CP 20 *See* Declaration of Tom Slick, Exhibit E. Unlike Mr. Slick, Mr. Jewels did not have the luxury of knowing that the extension was there, when he traveled at speed along the road of Cornwall Park. In fact, the actions and omissions of the respondent led Mr. Jewels to believe that the speed bump did not

reach the curb and that there WAS a gap available for cyclists to safety pass the speed bump. CP 92 and 107. *See* Jewels and Couch Declarations.

Clearly the trial court here when confronted with conflicting evidence regarding latency, did not construe the evidence presented by appellant, as the non-moving party, in the light most favorable as required. Summary judgment is proper if, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. CR 56(c); *Michak v. Transnation Title Ins. Co.*. 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003). A genuine issue of material fact exists if reasonable minds could differ regarding the facts controlling the outcome of the litigation. *Hulbert v. Port of Everett*. 159 Wn.App. 389, 398, 245 P.3d 779, *review denied*. 171 Wn.2d 1024, 257 P.3d 662 (2011).In reviewing summary judgment orders, a court considers supporting affidavits and other admissible evidence based upon the affiant's personal knowledge. *Infl Ultimate. Inc. v. St. Paul Fire & Marine Ins. Co.*. 122 Wn.App. 736, 744, 87 P.3d 774 (2004).

Also, unlike the cases cited by the respondent, the extension to the speed bump, was a small object, two inches high, appears to be similar in width to the speed bump, approximately ten inches in length CP 25 *Dec. of* Tom Slick. It was considerably smaller than the gravel pit cited in *Tennyson v. Plum Creek Timber Co.,* 73 Wn.App. 550, 872 P.2d 524 (1994); and the railroad tracks cited in *Gaeta v. Seattle City Light,* 54 Wn.App.603, 774 P.2d 1255 (1989) or an earth mover equipment such as in *Van Dinter v. Kennewick,* 121 Wn.2d 38, 846 P.2d 522 (1993), all are items which by their very nature and size announced their presence and dangers. There was also nothing to impede the view of those enormous hazards, such as happened here. Additionally, unlike *Tennyson*, appellant was on a paved roadway, with curbs and marked crosswalks. CP 16-21. While one should anticipates hazards in a working gravel pit, no such expectations could or should exist on a paved city road.

Respondents also cite the case of *Swinehart v. City of Spokane,* 145 Wn.App. 836, 187 P.3d 345 (Div. 3 2008); but that is also easily distinguishable from the case at hand. *Swinehart* involved a playground in which children and their guardians and stand to look for hazards. That case did not involved traveling cyclist going through a playground, but rather a supervised child whose guardians could stand and see that the woodchips surrounding the play structure had been disturbed. Mr. Jewels was on a bicycle, on a road that is no different from the streets around the park, except for the speed bumps and traveling at speed. CP 92.

Importantly, the issue of latency in this case cannot be determined at summary judgment. It is a contested issue of fact. Only when there is no genuine issue as to any material fact, is a moving party entitled to summary judgment as a matter of law. CR 56; *Christen v. Lee*, 113 Wn.2d 479, 488, 780 P.2d 1307 (1989). "In deciding a motion for summary judgment, the court must construe all the facts and reasonable inferences in favor of the nonmoving party; in this case Mr. Jewels. The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion." *Snohomish County v. Anderson*, 124 Wn.2d 834, 843, 881 P.2d 240 (1994). In light of a contemporary document by the respondent that states that it must be painted to make it visible, it is a strong indicator that this is an issue of fact to be determined at trial and not at summary judgment. CP 76.

B. Respondent's Spoliated the Evidence

In addition to the evidence provided by appellant that the speed bump extension was not discernible to the traveling cyclist, it is respondent who altered the evidence. Bellingham Park's Department knew of Mr. Jewels' injury as well as its cause immediately when it occurred. CP 92 and CP 76. *See* Jewels Declaration ¶ 12 and Rutherford Dec. Exhibit B. The City of Bellingham knew there had been an injury, knew the cause of the injury and then it altered the conditions, without taking the time to document the conditions that had caused an injury.

Washington courts have recognized that spoliation is the "intentional destruction of evidence." *Happy Bunch, LLC v. Grandview North, LLC,* 142 Wn. App. 81, 94 n.5, 173 P.3d

959 (2007); *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 381, 972 P.2d 475 (1999); *Henderson v. Tyrrell,* 80 Wn. App. 592, 605, 910 P.2d 522 (1996 (emphasis added). To remedy spoliation, a court may apply a rebuttable presumption that shifts the burden of proof to the party who destroys or alters important evidence. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 381, 972 P.2d 475 (1999); *Henderson,* 80 Wn. App. at 605, 910 P.2d 522.

In the leading Washington Supreme Court case on spoliation, *Pier 67, Inc. v. King County,* the Supreme Court described the basic remedy for spoliation:

> [W]here relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him.

Pier 67, Inc., 89 Wash.2d 379, 385-86, 573 P.2d 2 (1977); *see also Marshall,* 94 Wn.App. at 381, 972 P.2d 475. In determining whether to apply the rebuttable presumption, a court considers "(1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party." *Marshall,* 94 Wash.App. at 381, 972 P.2d 475 (quoting *Henderson,* 80 Wash.App. at 607, 910 P.2d 522). Notably, bad faith is not a prerequisite to a finding of spoliation, which only requires a finding of "improper" actions. *Magana v. Hyundai Motor AM.*, 167 Wn.2d 570, 220 P.3d 191 (2009). Here the respondent, knowing about the severity of Mr. Jewels' injuries did nothing to preserve any evidence of scene.

C. Respondent had Knowledge that Unmarked Obstructions in the Roadway were Hazardous but Created one anyway.

1. Legislative History is clear that a Landowner cannot create a Hazard and then claim Ignorance of its existence and danger

It is a plaintiff's burden to prove knowledge of the condition on the part of the landowner. *Tabak v. State,* 73 Wn.App. 691, 696, 870 P.2d 1014 (1994). However, if actual knowledge is denied, then the plaintiff's must come forward with evidentiary facts from which a trier of fact could reasonably infer actual knowledge, by a preponderance of the evidence. *Id.* Actual knowledge may established by circumstantial evidence. *Id. citing Morgan v. United*

States, 709 F.2d 580, 583-84 (9th Cir. 1983). Generally, a plaintiff can show actual knowledge by circumstantial evidence. WPI 1.03.

The respondent confuses this element of the exception under the Recreational Land Use Statute in its claims to not know that the hazard it created in the roadway was dangerous. It is important to look at the legislative history. When the Recreational Land Use Statute was first proposed in 1967, during debate in the Washington Senate, it was proposed that the word "known" should be added preceding "dangerous artificial latent condition." The senator offering the amendment gave the following example:

> Senator Donohue buys a section of range land. He has not explored it foot by foot. Someone says, "Can I hunt on this range land?" and the Senator says, "Yes, you can hunt." Unbeknownst to Senator Donohue, the prior owner somewhere dug a well and didn't properly cover it. Now this is an artificial, latent defect--artificial because man made, latent because it appears to be covered and isn't. Senator Donohue has not personally explored this whole section. This amendment says that the Senator does not have to post something he doesn't know about. If there is an open well that he knows about, he has to post it. But he shouldn't be liable for something on this land that he doesn't know about.

H.R. 258, Wash.S.Jour., 42nd Legis. 875 (1967) cited in *Morgan v. United States,* 709 F.2d 580, 584 (9th Cir. 1983).

It was never contemplated by the legislature that a landowner who creates an artificial condition would not have knowledge of his own actions. In the case at hand, The City of Bellingham itself created the hazard, therefore how can it now claim that it did not know about it? One knows what one does and this is markedly different situation that what the legislature contemplated. No third party came and created speed bump extension, neither were there changes due to the passage of time nor from use. The City of Bellingham cannot claim to not know what it itself has done and then done contrary to the safety standards itself adopted.

2. The City of Bellingham has adopted the State Standards which it has used elsewhere.

In the case at hand only a few months had transpired before Mr. Jewels had the misfortune of colliding with the unpainted speed bump extension. While respondent argues that the roadway where Mr. Jewels was injured is not a street, the construction standards remain the

same for the traveling public. The City of Bellingham is who ordered those speed bumps installed on the roadway and it is the City of Bellingham who failed to adhere to applicable standards of the Manual on Uniform Traffic Control Devices ("MUTCD") which has been adopted by the federal government at 23 CFR § 655.603 and the guidelines provided by the Washington State Department of Transportation's Manual on Uniform Traffic Control Devices ("WAMUTCD") RCW 47.36.030 and WAC 468-95-010. The Washington State Supreme Court has held that a municipality owes a duty to all persons, whether negligent or fault-free, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel. *Keller v. City of Spokane,* 146 Wn.2d 237, 249, 44 P.3d 834 (2002). Even though this is within a park, the traveling public is clearly considered as it is a roadway that is paved with traffic control devices.

The City of Bellingham has adopted the Revised Code of Washington concerning vehicles and traffic via Ordinance 1999-04-020. Also the City of Bellingham has adopted the Washington Administrative Codes which also contain the Washington State version of the Manual of Uniform Traffic Control Devices. WAC 468-95-010. There is no question that speed bumps are traffic control devices for their purpose to slow traffic. However, nowhere are speed bumps even used in the manual, neither the 2003 version which was in effect in 2007 when respondent created the speed bumps, nor more recent version to be enacted later this year. Appendix D. Engineer Stevens noted that spped bumps pose a danger to the bicycling public as well as to motorcyclists. CP 80-82.

Attached as Appendix C is a photograph by Google earth that clearly shows that respondent installed speed humps along Indiana Street just yards away from the road into Cornwall Park. Speed humps are very different from speed bumps and were then and continue to be, the safe design to calm vehicular and bicycle traffic. It is hypocritical for the City of Bellingham to install speed bumps were it can claim protection from liability as here, while properly installing speed humps where no claim for protection can be had for improper design. The City of Bellingham clearly knows what the standards for safe travel are within its jurisdiction.

The speed bumps were installed in Cornwall Park sometime in August of 2007. CP 16 and CP 073 *See* Rutherford Dec. Exhibit A. It is believed that sometime after the installation, the extension to the speed bump was added by the City of Bellingham. CP 16. A few months later on June 30, 2008, Mr. Jewels encountered the non-standard speed bump and fell. This was not a feature created by the city that fell prey to ravages of time, but rather was created with poor design and without adequate warnings as required by state and federal standards by respondent.

The 2003 MUTCD states on page 22:

> Section 1A.07 Responsibility for Traffic Control Devices Standard:
> The responsibility for the design, placement, operation, maintenance, and uniformity of traffic control devices shall rest with the public agency or the official having jurisdiction. 23 CFR 655.603 adopts the Manual on Uniform Traffic Control Devices as the national standard for all traffic control devices installed on any street, highway, or bicycle trail open to public travel.

There is no question that it is the City of Bellingham is who is responsible for the design, and painting as well as the failure to paint the entire hazard of the speed bump.

It is important to note the distinction between speed bumps and speed humps. Speed humps are broader, the rise relatively gradual and are included in the Manual of Uniform Traffic Control Devices (MUTCD).[1] The federal standards have been adopted by the State of Washington including the 2003 MUTCD and more recently the 2009 standards.[2] The Washington State's published manual of 2003, was in effect when the City of Bellingham contract to install the dangerous speed bumps in Cornwall Park in 2007. CP 073. This 2003 version supplements to the federal version, also uses speed humps and not speed bumps.[3] It is notable that Indiana Street, which is just south and runs parallel to the road into Cornwall Park has a series of speed humps. Speed bumps are abrupt and a hazards to vehicles, particularly two

[1] http://mutcd.fhwa.dot.gov/htm/2009/part3/fig3b_29_longdesc.htm.
[2] http://mutcd.fhwa.dot.gov/knowledge/natl_adopt_2009.htm and http://www.wsdot.wa.gov/Publications/Manuals/M24-01.
[3] http://www.wsdot.wa.gov/publications/manuals/fulltext/M22-01/M22-01.09Revision.pdf

wheeled motorcyclists and bicyclists. Notably, speed bumps are not included in the MUTCD or in any state traffic control and design manuals in 2003 and are now specifically disallowed. CP 79-82 *See* Report by Edward Stevens, Exhibit C of Rutherford Dec. In fact the most recent Washington State Manual states at page 1515-14:

> 4. Approach Treatments
> Design shared-use path and roadway intersections with level grades, and provide sight distances. **Provide advance warning signs and pavement markings that alert and direct path users that there is a crossing** (see the MUTCD). **Do not use speed bumps or other similar surface obstructions intended to cause bicyclists to slow down.** Consider some slowing features such as horizontal curves (see Exhibits 1515-2 and 1515-8). Avoid locating a crossing where there is a steep downgrade where bike speeds could be high. (Emphasis added). [4]

The speed bump had not yet suffered the effects of time, like the pothole in the road cited in *Ertl v. State Parks & Recreation Commission,* 76 Wn.,App. 110 (1994) or like the building in *Nautoth v. Spokane County,* 121 Wn.App. 398, 88 P.3d 996 (Div. III 2004) which was falling apart. In those two cases, there were no allegations that the *Ertl* trail was constructed incorrectly, as here, nor that the building in *Nautoth* had a construction defect. In both those cases, it was time and wear that had caused changes to the instrumentality to that led to injuries. That is not case here in which the City of Bellingham, created the obstruction in the road and failed to adequately warn the traveling public. That the City of Bellingham was lucky for a few months, does not change that it created the latent and dangerous condition made even worse as it was deceptive for a bicyclist would assume that the unpainted portion of the speed bump was a gap in which he or she would be safe to travel through. *See* Declaration of Couch.

3. City of Bellingham Ordinances Required that Mr. Jewels ride right into the hazard created by the City itself.

Notably the City of Bellingham has adopted by Ordinance No. 10612 that "bicycles may be operated only on paved and graveled ways and established trails within city park property. Bellingham, Wash., Mun. Code §8.04.060. The City of Bellingham also adopted the requirement that all bicyclists upon a roadway "**shall ride as near to the right side of the**

roadway as practicable" Bellingham, Wash., Mun. Code §11.08.070. Mr. Jewels could ride nowhere else but on that roadway and as far to the right as possible. That is exactly where the unpainted speed bump extension which was created by the City of Bellingham in the place where it required Mr. Jewels to ride which, made it inevitable that a bicyclist would lose control of his bicycle and crash.

D. The Unmarked Speed Bump Extension was Dangerous

A condition that poses an unreasonable risk of harm is "dangerous. *Gaeta v. Seattle City Light,* 54 Wn.App. 603, 608-609, 774 P.2d 1255 (1989). An unmarked obstruction in a roadway, in an area where bicyclists are required to travel by ordinance is a dangerous condition. In fact, due to the dangerousness of the speed bumps to bicyclists, bicyclists seek out the gaps in speed bumps to travel through them safely. CP 79-82, 91, 107-108, Jewels Dec. Couch Dec. Stevens Report. Mr. Jewels was deceived into believing there was a gap between the curb and the painted portion of the speed bump. There were gaps in the previous speed bump, the extension was unpainted and functionally invisible due to the lower height to the curb and painted portion of the speed bump, as well as the curve and shade, which hid it from view of traveling bicyclists.

The injury causing instrumentality need not be one thing but can be a combination. *Ravenscroft II* 969 P.2d 75, 136 Wn.2d 911 (Wash. 1998). Nonetheless the dangerous condition must be latent, which it is in this case as speed bumps which caused Mr. Jewels to look for a gap to travel through safety are dangerous, but was then met with the unmarked extension of the next speed bump which caused him to lose control of his bicycle. CP 91 and 107-108. Notably, there is another obstruction on the other side of the roadway from where Mr. Jewel encountered the unpainted speed bump extension. That other obstruction is away from the speed bump, is on a straight away coming from the other direction and it also has been painted warning yellow. Like the speed bump extension at issue, it also is an obstruction in the roadway, but has nothing

around it obscure from view. Nonetheless as an obstruction in the roadway, it has been painted warning yellow. CP 21.

E. MUTCD and WAMUTCD Apply to the Road into Cornwall Park

The 2003 Manual of Uniform Traffic Control Devices (hereinafter MUTCD) which are the minimum federal standards begins with:

> **Traffic control devices shall be defined as all signs, signals, markings, and other devices used to regulate, warn, or guide traffic, placed on, over or adjacent to a street, highway, pedestrian facility, or bikeway by authority of a public agency having jurisdiction.**

The City of Bellingham is an agency with authority to build roads. MUTCD applies to all such agencies with road building authority. Appendix A 2003 MUTCD 1-1. It is Respondents position that it installed the speed bumps to "calm vehicular and bicycle traffic." CP 16. Further, under section 1A.02 Principles of Traffic Control Devices is states

> This manual contains the basic principles that govern the design and use of traffic control devices **for all streets** and highways open to public **travel regardless of type** or class or the public agency having jurisdiction.

Further, the City of Bellingham has adopted the Washington version of the MUTCD as codified under WAC 468-95-010, Bellingham, Wash., Mun. Code §11.03.010 (1994). Additionally, the definitions under RCW 46.04 were incorporated into the Washington version of MUTCD. WAC 308-330-100. The Revised Code of Washington defines roadway as follows:

> "Roadway" means that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the sidewalk or shoulder even though such sidewalk or shoulder is used by persons riding bicycles. In the event a highway includes two or more separated roadways, the term "roadway" shall refer to any such roadway separately but shall not refer to all such roadways collectively. RCW 46.04.500.

The State of Washington has defined highway as:

> Highway means the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel. RCW 46.04.197

For bicyclists the MUTCD states that the term bikeway is a **generic term for any road, street, path or way** that is in some manner specifically designated for bicycle travel, regardless whether such facilities were designated for the exclusive use of bicycles or to be shared with other transportation modes. 2003 MUTCD Section 9A.03 page 9A-1. That would include a road into a park in a city that requires bicycles to travel along the paved roadway. Bellingham, Wash., Mun. Code §8.04.060

Clearly the road into the Cornwall Park is a roadway open to use of the public for purposes of vehicular travel to which the standard of MUTCD applies. Additionally, it is not distinguishable from the adjacent city streets, as it has curbs and crosswalks. However, unlike the adjacent streets which are MUTCD compliant, the roadway into Cornwall Park is not complaint.

Courts have found that MUTCD applies to park roads. *Albertson v. Fremont County, Idaho*, 834 F.Supp.2d 1117 (D. Idaho 2011); Hayes v. United States, 539 F.Supp. 2d 393 (DDC 2008). The only case in Washington that discusses MUTCD and private roads is a case involving a gated access road which had signs prominently displaying that only authorized vehicles were allowed. In that case it was clear that the public had to no right to enter and use that road at all. *Allemeier v. The University of Washington,* 42 Wn.App. 465 (Div. I 1985). That is not the case here which the public has unfettered access to Cornwall Park except between the hours of 6 a.m. to 10 p.m. for public safety reasons. Bellingham, Wash., Mun. Code § 8.04.040.

Even if this court were to find that the road into Cornwall park is not a "roadway" under the MUTCD, the adoption of the safety standards by the City of Bellingham certainly are evidence that it knew, or had knowledge, of how to construct a safe roadway and how to properly and safely calm vehicular and bicycle traffic, as well that the placement of an unpainted obstruction into the path of travel of bicyclists would be dangerous.

The 2003 MUTCD states in Section 1A.06 that "[U]niformity of devices simplifies the task of the road user because it aids in recognition and understanding thereby reducing perception/reaction time. . . . Uniformity means treating similar situations in a similar way. . . . A standard device used where it is not appropriate is as objectionable to a nonstandard device." MUTCD PAGE 1A-2. In this case a non-standard device was used, the speed bumps but also the City of Bellingham did not treat a similar situation in the similar way as the adjacent Indiana Street has the safe speed humps. Appendix C.

Respondent argues that the road into Cornwall Park is akin to a private road or driveway. However, to be as such then it must be possible to exclude traffic which in this case it is not done. RCW 46.04.420. While there is a city ordinance that excludes all users by ordinate between the hours of 10 p.m. and 6 a.m., there is nothing more. Bellingham, Wash., Mun. Code § 8.04. There are no gates or barriers. Nonetheless, if it was a private driveway into say a business, and someone was injured due to an unmarked artificial latent hazard such as here, liability would be imposed.

The speed bump at issue had not yet suffered the effects of time, like the pothole in the road cited in *Ertl v. State Parks & Recreation Commission,* 76 Wn.,App. 110 (1994) or like the building in *Nautoth v. Spokane County,* 121 Wn.App. 398, 88 P.3d 996 (Div. III 2004), which was falling apart. In those two cases, there were no allegations that the *Ertl* trail was constructed incorrectly, as here, nor that the building in *Nautoth* had a construction defect. In both those cases, it was time and wear that had caused changes to the instrumentality that led to injuries. That is not case here in which the City of Bellingham, who created the obstruction in the road, and then failed to adequately warn the traveling public. That the City of Bellingham was lucky for a few months, does not change that it created the latent and dangerous condition made even worse as it was deceptive for a bicyclist would assume that the unpainted portion of the speed

bump was a gap in which he or she would be safe to travel through. CP105-108 *See* Declaration of Couch.

F. The court property allowed the report of the experts.

Summary Judgment requires that documents be authenticated to be admissible but does not limit the type of evidence allowed to authenticate a document. It only requires that some evidence sufficient to support a finding that the evidence is question is what its proponent claims it to be. *International Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.* 122 Wash. App 736 (2004).

Additionally, CR 1 states that the Civil Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." This is a modest case in which the appellant has already expended considerable costs. To demand that a party have to expend further costs to present in a different form, what has already been presented to the trial court is duplicative, unnecessary and costly and unjust.

4. Appellant's Expert Edward Steven's Report

Respondent argue that all of appellant's evidence should be struck because plaintiff's counsel did not submit an authentication to that evidence. Nonetheless, it was up to the discretion of the trial court to decide whether to consider the evidence it had before it, including the report of plaintiff's engineering expert Stevens. CP 78-89.

Furthermore, in order for the court to strike appellant's evidence, the respondent would have to show that they are prejudiced by the admission of the evidence, after the minor procedural error; "for error without prejudice is not grounds for reversal." *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196 (Wash. 1983) *citing Thomas v. French,* 99 Wn.2d 95, 104, (1983). "Only errors affecting the outcome of the trial will be deemed prejudicial." A "harmless error is an error which is trivial or formal or merely academic and was not prejudicial to the substantial rights of the party assigning it". *State v. Johnson,* 1 Wn. App.

553, 555 (Wash. Ct. App. 1969). The error is only prejudicial if it affects the outcome of the trial. *State v. Hopson,* 113 Wn.2d 273, 284, 778 P.2d 1014(Wash. 1989) ("The standard used to determine whether error is harmless or prejudicial is to ascertain whether it presumptively affected the final result of the trial."); *Brown v. Spokane County Fire Protection Dist. No. 1,* 100 Wn.2d 188, 196, 668 P.2d 571 (1983) ("Error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial"); *James S. Black & Co. v. P & R Co.,* 12 Wn. App. 533, 537, 530 P.2d 722 (1975); *Northington v. Sivo,* 102 Wn. App. 545, 552, 8 P.3d 1067 (Div. I 2000). In fact, the respondent must show that it was not only prejudiced, but "substantially prejudiced" by the harmless error. *Alpha Kappa Lambda Fraternity v. Wash. State Univ.,* 152 Wn.App. 401, 414 216 P.3d 451 (2009) ((Administrative law)"In reviewing an agency action for procedural error, "[t]he court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.") *citing* Rev. Code Wash. (ARCW) § 34.05.570 (1)(d) (Administrative law); ***see also*** *Gesa Fed. Credit Union v. Mut. Life Ins. Co.,* 105 Wn.2d 248, 256 (1986) ("Where a party, in exercising its redemption right, commits a technical but harmless procedural error, a forfeiture requirement is not only unjust, but inconsistent with the very purpose of the statute.") *citing Matcha v. Wachs,* 132 Ariz. 378, 381 (Ariz. 1982); ***see also*** *Klickitat County Citizens Against Imported Waste v. Klickitat County,* 122 Wn.2d 619, 637-638, 860 P.2d 390 (1993) ((Native American law) "Procedural errors occurring during the EIS process are reviewed under the rule of reason. Where such errors are not consequential, they must be dismissed as harmless.) *citing Mentor v. Kitsap Cy.,* 22 Wn.App. 285, 290-91 588 P.2d 1226 (1978).

Additionally, this is a relatively small case which falls within the monetary limits of Mandatory Arbitration. Notably, appellant had motioned the court to put this matter into mandatory arbitration prior to respondent filing its motion for summary judgment. Appellant should not be forced to expend more and more costs. CR 1 states that the Civil Rules "shall be

construed and administered to secure the just, speedy, and inexpensive determination of every action." The court correctly decided to allow appellant's evidence of the report of his engineering expert. Respondent cannot meet its burden to show substantial prejudice that would have precluded the court from allowing this evidence.

5. Plaintiff's Expert Couch

Appellant produced a declaration by a cycling expert, who has testified in other legal matters regarding bicycling, including *Buday v. Pierce County,* Cause No. 09-02-09465-4. Jim Couch has been qualified in Washington courts as an expert under ER 702 for his knowledge, skill, experience and training . . . . in bicycle maintenance, repair and on how bicyclists navigate through the roadways and respond to hazards they may encounter, including speed bumps. Mr. Couch properly stated the basis of his expertise at the beginning of his declaration. CP 106. His testimony via signed declaration was related to his 30 years of experience is not only as a cyclist but also his involvement in cycling events. CP 106. Mr. Couch having particular expertise regarding bicycling and bicycles is qualified as an expert. Any supposed or alleged lack of qualifications on the park of Mr. Couch should go to weight of his opinions, not whether or not they were admissible. *Davis v. Niagara Machine Co.,* 90 Wn.2d 342, 581 P.2d 1344 (1978) and *Palmer v. Massey-Fergunson, Inc.*, 3 Wn.App. 508, 476 P.2d 713 (1970). The court did not err in allowing his declaration. RP 18

III. CONCLUSION

In ruling upon a summary judgment motion, it is the trial court's duty to consider all the evidence in the record, and where "from this evidence, reasonable men could reach only one conclusion, the motion should be granted." *Meissner v. Simpson Timber Co.,* 69 Wn.2d 949 (1966); *accord, Teagle v. Fischer & Porter Co.*, 89 Wn.2d 149 (1977).

Appellant presented sufficient evidence to overcome a motion for summary judgment by a showing of the presenting evidence that the artificial condition upon which he lost control of

his bicycle was 1) latent in that it could not be seen by a traveling cyclist, an intended user of the roadway; 2) that respondents had to know about the condition themselves had created; and the 3) that an unmarked obstruction in a roadway where bicyclists were required to travel was dangerous and contrary to local, state and federal standards. The unmarked obstruction in the roadway created by respondent fulfills the requirements of the exception under the Recreational Land Use Statute as the City of Bellingham created this artificial, latent, and dangerous condition. Neither can the City of Bellingham claim that it did not know what itself created contrary to all applicable safety and traffic standards. Appellant presented sufficient evidence to withstand a motion for summary judgment so that this matter be remanded.

Respectfully submitted this 28th of May, 2013.

Crystal Grace Rutherford, WSBA #27202
Attorney for Appellant Jewels

APPENDIX C

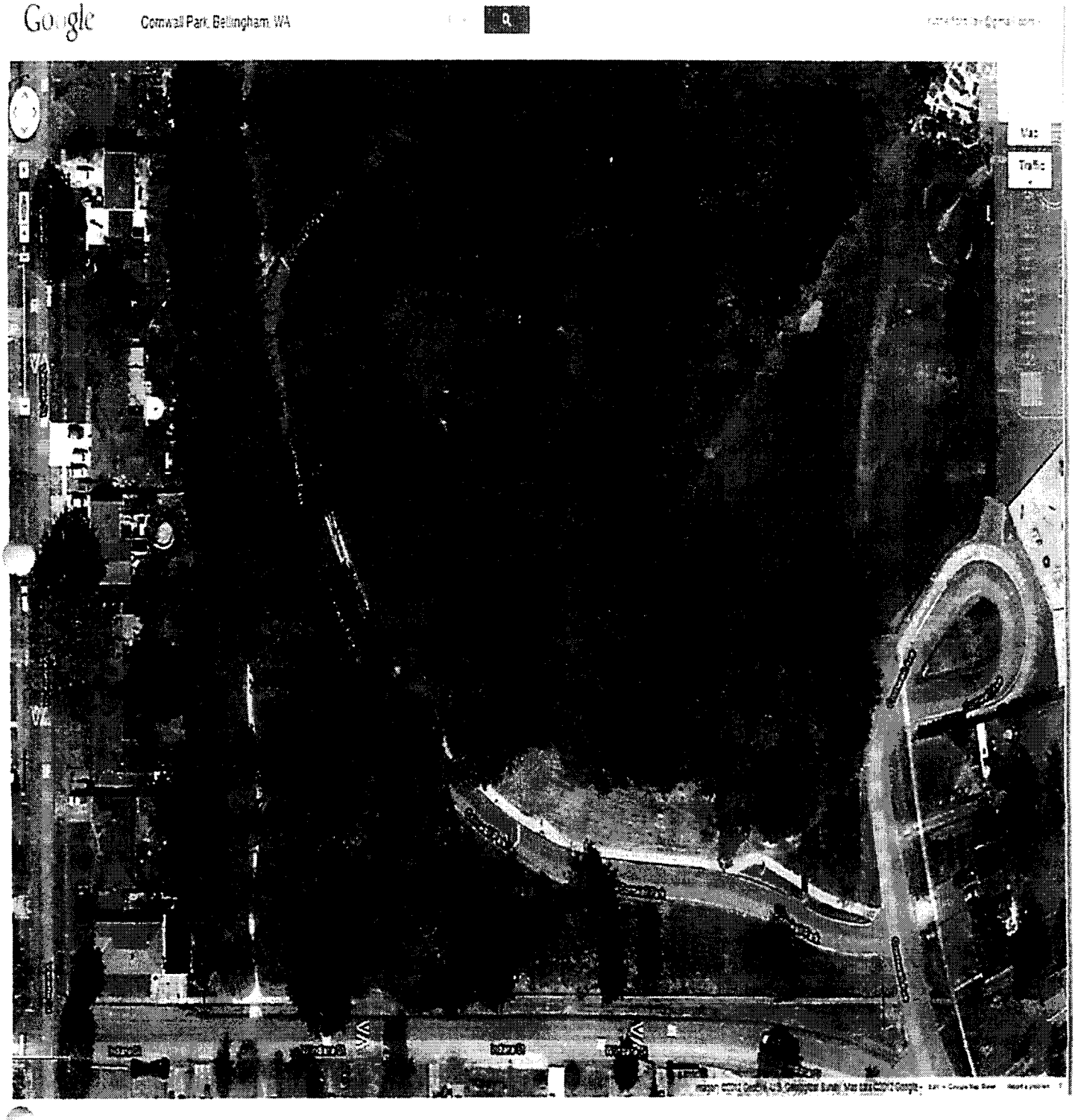


EXHIBIT A

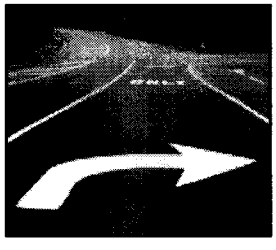
APPENDIX D

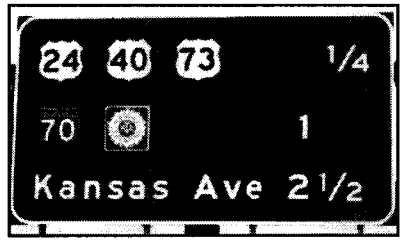
Manual on Uniform Traffic Control Devices

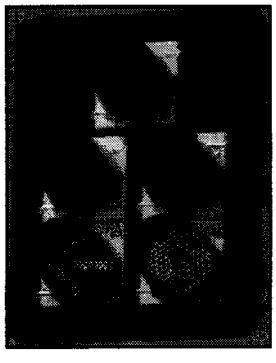
for Streets and Highways

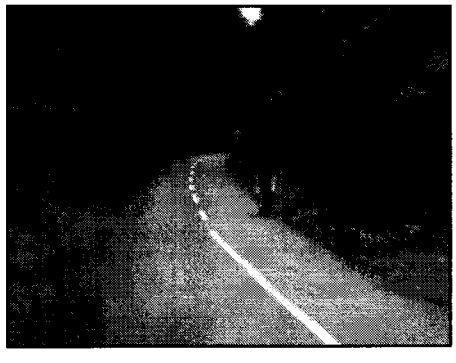
2003 EDITION

Including Revision 1 dated November 2004



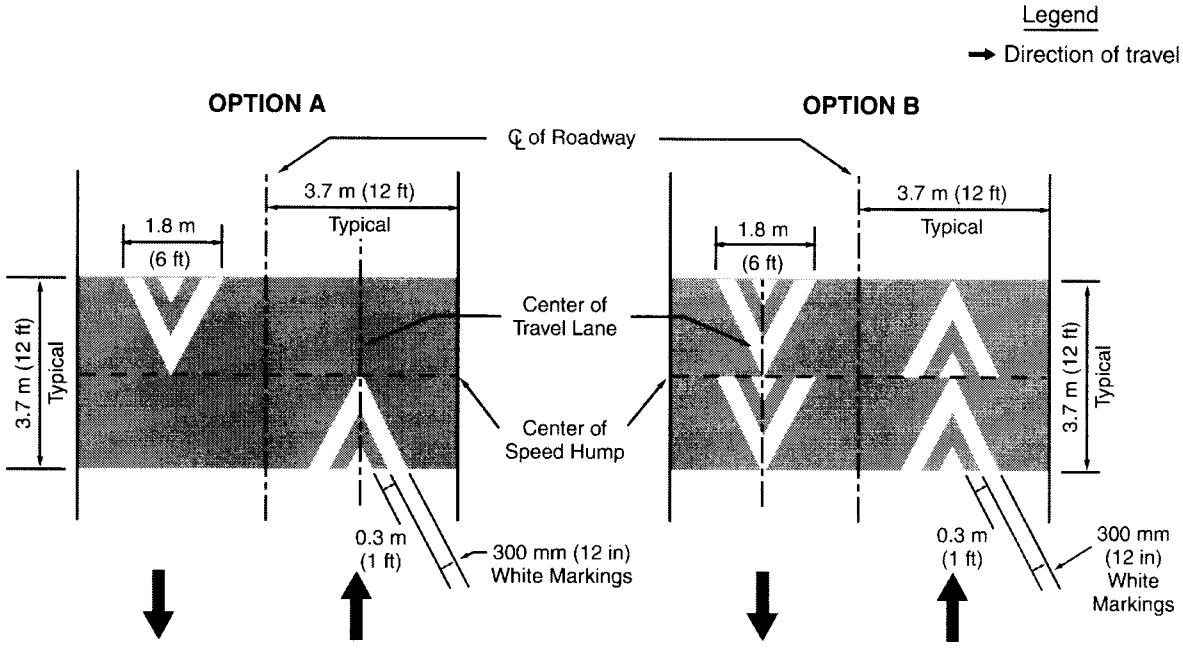






U.S. Department of Transportation
Federal Highway Administration

Figure 3B-29. Examples of Pavement Markings for Speed Humps Without Crosswalks



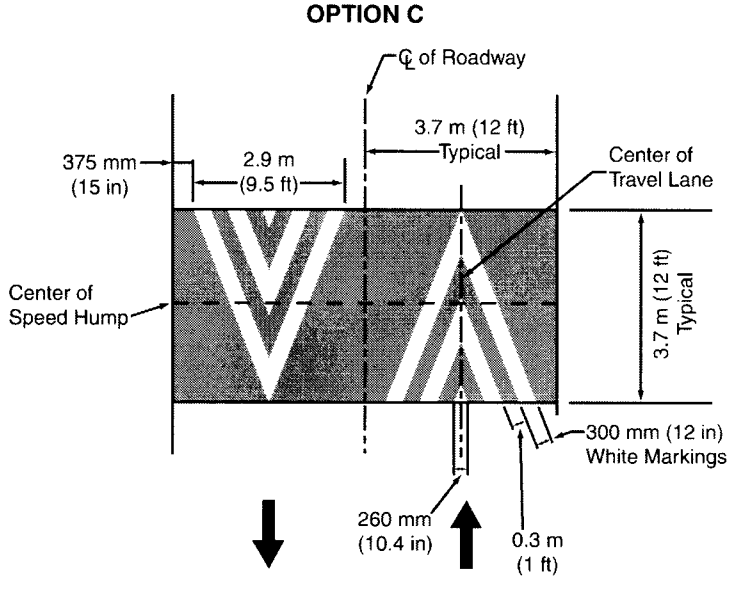
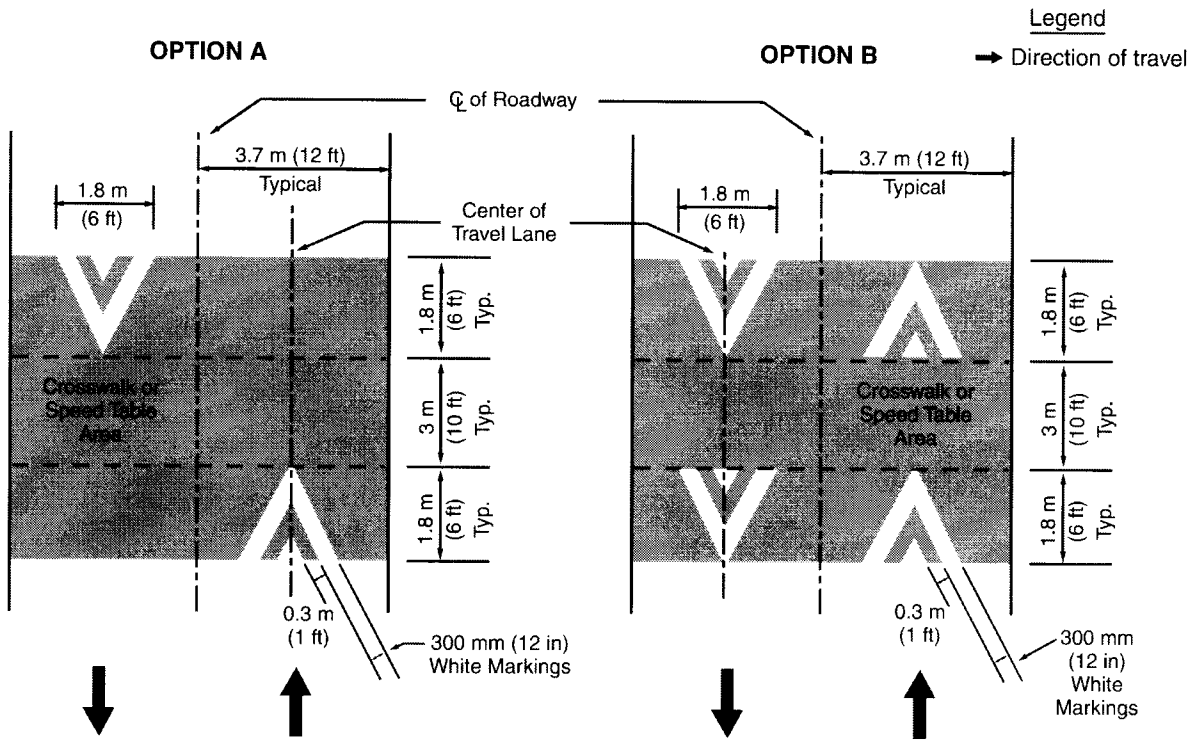


Figure 3B-30. Examples of Pavement Markings for Speed Tables or Speed Humps with Crosswalks



Option:

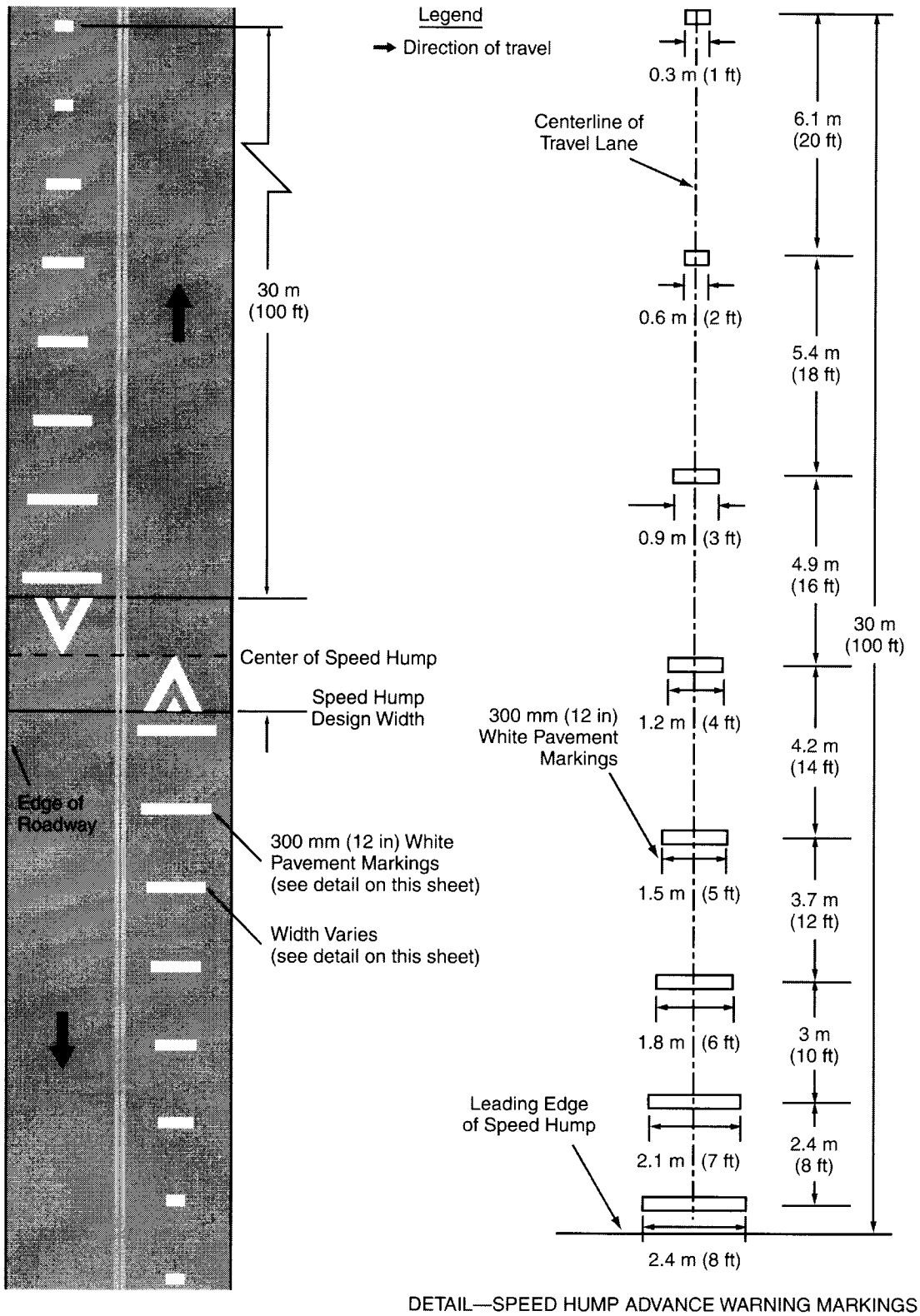
Advance speed hump markings may be used in advance of an engineered vertical roadway deflection where added visibility is desired or where such deflection is not expected (see Figure 3B-31).

Advance pavement wording such as BUMP or HUMP (see Section 3B.19) may be used on the approach to a speed hump either alone or in conjunction with advance speed hump markings. Appropriate advance warning signs may be used in conformance with Section 2C.24.

Guidance:

If used, advance speed hump markings should be installed in each approach lane.

Figure 3B-31. Examples of Advance Warning Markings for Speed Humps



DETAIL—SPEED HUMP ADVANCE WARNING MARKINGS

CHAPTER 3C. OBJECT MARKERS

Section 3C.01 Object Marker Design and Placement Height

Support:

Object markers are used to mark obstructions within or adjacent to the roadway.

Standard:

When used, object markers (see Figure 3C-1) shall consist of an arrangement of one or more of the following types:

Type 1—either a marker consisting of nine yellow retroreflectors, each with a minimum diameter of 75 mm (3 in), mounted symmetrically on a yellow (OM1-1) or black (OM1-2) diamond panel 450 mm (18 in) or more on a side; or on an all-yellow retroreflective diamond panel (OM1-3) of the same size.

Type 2—either a marker (OM2-1V or OM2-1H) consisting of three yellow retroreflectors, each with a minimum diameter of 75 mm (3 in), arranged either horizontally or vertically on a white panel measuring at least 150 x 300 mm (6 x 12 in); or on an all-yellow horizontal or vertical retroreflective panel (OM2-2V or OM2-2H), measuring at least 150 x 300 mm (6 x 12 in).

Type 3—a striped marker, 300 x 900 mm (12 x 36 in), consisting of a vertical rectangle with alternating black and retroreflective yellow stripes sloping downward at an angle of 45 degrees toward the side of the obstruction on which traffic is to pass. The minimum width of the yellow and black stripes shall be 75 mm (3 in).

Support:

A better appearance can be achieved if the black stripes are wider than the yellow stripes.

Type 3 object markers with stripes that begin at the upper right side and slope downward to the lower left side are designated as right object markers (OM-3R). Object markers with stripes that begin at the upper left side and slope downward to the lower right side are designated as left object markers (OM-3L).

Guidance:

When used for marking objects in the roadway or objects that are 2.4 m (8 ft) or less from the shoulder or curb, the mounting height to the bottom of the object marker should be at least 1.2 m (4 ft) above the surface of the nearest traffic lane.

When used to mark objects more than 2.4 m (8 ft) from the shoulder or curb, the mounting height to the bottom of the object marker should be at least 1.2 m (4 ft) above the ground.

Option:

When object markers or markings are applied to an object that by its nature requires a lower or higher mounting, the vertical mounting height may vary according to need.

Section 3C.02 Markings for Objects in the Roadway

Standard:

Obstructions within the roadway shall be marked with a Type 1 or Type 3 object marker. In addition to markers on the face of the obstruction, warning of approach to the obstruction shall be given by appropriate pavement markings (see Section 3B.10).

Option:

To provide additional emphasis, large surfaces such as bridge piers may be painted with diagonal stripes, 300 mm (12 in) or greater in width, similar in design to the Type 3 object marker.

Standard:

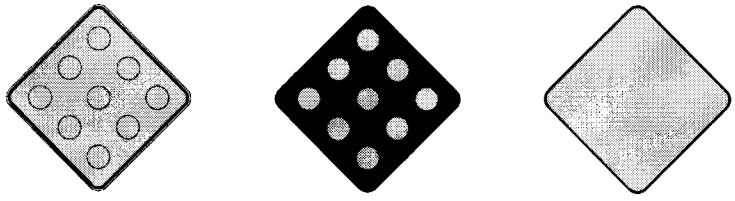
The alternating black and retroreflective yellow stripes (OM-3L, OM-3R) shall be sloped down at an angle of 45 degrees toward the side on which traffic is to pass the obstruction. If traffic can pass to either side of the obstruction, the alternating black and retroreflective yellow stripes (OM-3C) shall form chevrons that point upwards.

Option:

Appropriate signs (see Sections 2B.33 and 2C.20) directing traffic to one or both sides of the obstruction may be used instead of the object marker.

Figure 3C-1. Object Markers and End-of-Roadway Markers

Type 1 Object Markers



OM1-1 OM1-2 OM1-3

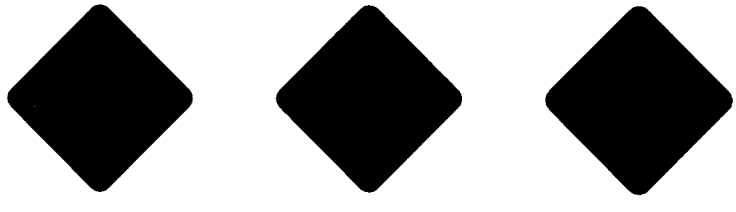
Type 2 Object Markers

OM2-1V OM2-2V OM2-1H OM2-2H

Type 3 Object Markers

OM-3L OM-3C OM-3R

End-of-Roadway Markers



OM4-1 OM4-2 OM4-3

Section 3C.03 Markings for Objects Adjacent to the Roadway

Support:

Objects not actually in the roadway are sometimes so close to the edge of the road that they need a marker. These include underpass piers, bridge abutments, handrails, and culvert headwalls. In other cases there might not be a physical object involved, but other roadside conditions exist, such as narrow shoulders, drop-offs, gores, small islands, and abrupt changes in the roadway alignment, that might make it undesirable for a road user to leave the roadway, and therefore would create a need for a marker.

Option:

Type 2 or Type 3 object markers may be used at locations such as those described in the preceding Support paragraph.

Standard:

If used, the inside edge of the marker shall be in line with the inner edge of the obstruction.

Guidance:

Standard warning signs (see Chapter 2C) should also be used where applicable.

Section 3C.04 End-of-Roadway Markers

Support:

The end-of-roadway marker is used to warn and alert road users of the end of a roadway in other than construction or maintenance areas.

Standard:

The end-of-roadway marker (see Figure 3C-1) shall be one of the following: a marker consisting of nine red retroreflectors, each with a minimum diameter of 75 mm (3 in), mounted symmetrically on a red (OM4-1) or black (OM4-2) diamond panel 450 mm (18 in) or more on a side; or a retroreflective red diamond panel (OM4-3) 450 mm (18 in) or more on a side.

Option:

The end-of-roadway marker may be used in instances where there are no alternate vehicular paths.

Where conditions warrant, more than one marker, or a larger marker with or without a Type III barricade (see Section 3F.01), may be used at the end of the roadway.

Standard:

The minimum mounting height to the bottom of an end-of-roadway marker shall be 1.2 m (4 ft) above the edge of the pavement.

Guidance:

Appropriate advance warning signs (see Chapter 2C) should be used.