Supreme Court No. 90319-1
Court of Appeals No. 69358-1-I

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STEVEN JEWELS,

Petitioner,

v.

CITY OF BELLINGHAM, a municipal corporation,

Respondent.

CITY OF BELLINGHAM'S ANSWER TO STEVEN JEWELS' PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals followed straightforward precedent in affirming summary judgment based on recreational immunity in this case. Plaintiff, Steven Jewels, was injured in a City of Bellingham park while riding his bicycle. He attempted to avoid a speed bump in a park access road by riding around it. The speed bump was in place to slow down traffic. As he rode around the speed bump, he encountered a water-diverter (an asphalt berm 1 to 2 inches in height) that was connected to the speed bump and crashed. The water diverter's purpose was to divert water run-off from the access road.

The trial court appropriately granted summary judgment for the City based on RCW 4.24.210 because the injury causing condition was not latent and because Plaintiff failed to show the water-diverter was a known danger. The Court of Appeals rightly affirmed the trial court based on the failure to show the injury causing condition was a known danger.

Plaintiff has failed to demonstrate that his petition for review meets the standards for review under RAP 13(b). The Court of Appeals' decision affirming summary judgment is entirely consistent

with precedent and does not deviate from previous decisions in Divisions I, II, or III. In fact, there are multiple decisions from each Division that are in accord with the Court of Appeals in this case. There are zero decisions in opposition. Thus, Plaintiff's petition fails under RAP 13(b)(2).

The Court of Appeals decision in this case is also in harmony with Supreme Court precedent and the entire body of case law interpreting RCW 4.24.210. Plaintiff's strained interpretation of recreational immunity case law falls short of showing there is a conflict with decisions of this Court and therefore fails to meet the standard under RAP 13(b)(1).

Finally, Plaintiff fails to demonstrate how, in the face of settled law, his decision to by-pass traffic calming measures so that he didn't have to slow down on his bicycle is of substantial public import under RAP 13(b)(4).

The Court should therefore deny the Petition for Review.

II. COUNTERSTATEMENT OF THE ISSUES

Whether the Court should accept review even though the Court of Appeals' decision follows precedent from all three Divisions of the Court of Appeals, is consistent with the Supreme Court's interpretation of RCW 4.24.210, and is of no public import.

Whether the Court should accept review of the issue regarding the knowledge element under RCW 4.24.210 when there are additional grounds to uphold summary judgment not reached by the Court of Appeals.

III. STATEMENT OF THE CASE

Cornwall Park is a City of Bellingham Park open to the public for use without a fee. CP 9, CP 15. One of the entrances to the park is an access road on the south side of the park. CP. 15. The southern access road is within the boundaries of the Park and serves a parking lot on the south side of the Park. CP 154. The south access road is not a City street. CP 153, CP 154. In fact, the access road is not in a dedicated public right-of-way, is not named, and can be closed to the public by a locking gate. CP 153-154. Accordingly, the road is nothing more than a driveway that provides an entrance to the Park. CP 154.

The southern access road has four speed bumps. CP 15. The road is also lined with curbs on each side. CP 16. The speed bumps do not extend from curb to curb and therefore leave a small gap in between the curbs and the speed bumps (with the exception of one side of the second speed bump as explained below). CP 15-16. The gaps between the speed bumps and the curbs exist to facilitate

drainage. CP. 16. The gaps are not designed to allow cyclists to bypass the speed bumps. CP 16. In fact, the speed bumps were installed to slow vehicles and bicycles down. CP 16.

The first speed bump is located just beyond the entry way to the park. CP 15, CP 95. The second speed bump is approximately 239 feet past the first speed bump. CP 15, CP 99. Approximately 60 yards past the second speed bump is a crosswalk. CP 15, CP 99. The crosswalk is an extension of one of the main park trails that crosses the access road. CP 15, CP 99. The second speed bump was purposefully placed before the crosswalk in order to slow vehicles and cyclists as they approached the crosswalk. CP 16.

There is a water-diverter, which is an asphalt berm approximately 1-2 inches high, that extends from one end of the second speed bump to the curb. CP 16, CP 19-25, CP 99-103. At the point where the water-diverter reaches the curb line, there is a curb "cut-out," which is a break in the otherwise continuous curb. CP 16, CP, 20, CP 22-25, CP 99-103. The water-diverter is designed to divert water off the road into and through the open space (the cut-out) in the curb to the grassy area adjacent to the curb line. CP 16.

On June 30, 2008, Mr. Jewels rode his bicycle into Cornwall Park using the southern access road. CP 91. Mr. Jewels rode over

the first speed bump fast enough to find it "jarring" and knocked his water bottle loose from its position on his bike. CP 91. Instead of slowing down, as Mr. Jewels approached the second speed bump, he decided to attempt to ride around the speed bump while readjusting his water bottle. CP 91-92. As he rode around the speed bump, he encountered the water-diverter and crashed his bike into the curb and curb cut-out. CP 92.

The speed bumps on the access road are painted yellow. CP 17. On the date of Mr. Jewels' injury, the water-diverter was not painted yellow. CP 16-17. However, the water-diverter is raised asphalt, black, and is a different color than the road itself. CP 16-17. The road and water-diverter are thus contrasting colors. CP 17.

Moreover, the water-diverter, curb, and curb cut-out are not hidden or obscured in any way. CP 17. The water-diverter and the condition of the curb can be seen by approaching park users from as far away as the first speed bump. CP 17. Prior to Mr. Jewels' accident, the City had no knowledge of any prior accidents at this particular location. CP 18. The City also had never received any complaints about this particular location in the park. CP 18.

On April 12, 2011, Mr. Jewels filed this lawsuit and alleged the City was negligent for not painting the water-diverter with yellow paint

and for "creating" the curb and curb cut-out next to the water-diverter. CP 6. On July 27, 2012, the trial court granted the City's motion for summary judgment based on recreational land use immunity because the injury causing condition was obvious and the City did not have actual knowledge of any danger. RP 17. Plaintiff appealed and on April 21, 2014 the Court of Appeals affirmed the trial court based on the City's lack of knowledge. Pet. for Rev. App. The record and law support the decisions of the trial court and the Court of Appeals.

IV. ARGUMENT

Plaintiff makes three arguments for why this Court should accept review. But, as explained below, each of Plaintiff's arguments fail. Therefore, this Court cannot accept review under RAP 13.4(b).

A. Review cannot be granted because the Court of Appeals decision is consistent with precedent across all three Divisions of the Court of Appeals.

Plaintiff argues that the Court of Appeals' decision to affirm summary judgment for the City conflicts with court precedent and created "lower court confusion." Pet. for Rev. at 7. In an attempt to support that argument, Plaintiff employs two unpersuasive strategies. First, Plaintiff offers a tortured explanation of the holding in *Tabak v. State*, 73 Wn.App. 691, 870 P.2d 1014 (1994). Pet. for

Rev. at 11-14. Second, Plaintiff dismisses clear, sensible holdings from applicable cases as "dicta." *Id.*

Contrary to Plaintiff's arguments, there is not a case in existence that contradicts the Court of Appeals' decision in this case. In fact, there are several cases throughout each Division of the Courts of Appeals that support the decision.

Twenty-five years ago, Division I decided *Gaeta v. Seattle City Light*, 54 Wn.App. 603, 774 P.2d 1255, *review denied*, 113 Wn.2d 1020 781 P.2d 1322 (1989). The *Gaeta* court analyzed the application of recreational immunity under RCW 4.24.210 and the statute's terms. *Gaeta* at 609, 774 P.2d at 1259. In order to overcome statutory recreational immunity, the plaintiff must show the injury was caused by a known dangerous artificial latent condition for which no warning signs were conspicuously posted. *Id.* In *Gaeta*, the court said: "In order to constitute a 'known' dangerous condition for purposes of the recreational use act, *the landowner must have actual, as opposed to constructive knowledge that a condition is dangerous.*" (emphasis added). *Id.* The *Gaeta* Court decided that case on the latency and danger elements of RCW 4.24.210 and did not ultimately decide the case on the knowledge issue. *Id.* But, the

issues and legal analysis included the knowledge element and encompassed RCW 4.24.210 as a whole. *Id.*

In *Tabak*, Division I said: "In order to constitute a 'known' condition for purposes of the Recreational Use Act, the landowners must have actual, as opposed to constructive, knowledge *that a dangerous*, latent condition exists." 73 Wn.App. at 696, 870 P.2d at 1017, *citing Gaeta.* (emphasis added). The *Tabak* Court held that because the dock which caused the plaintiff's injury had been repaired two times before the injury in question, there was enough evidence to infer actual knowledge of a dangerous condition. *Tabak* at 696-697, 781 P.3d at 1018.

Division II has given us two decisions that agree with *Tabak* and *Gaeta*. In *Cultee v. City of Tacoma*, 95 Wn.App. 505, 517, 977 P.2d 15, 23 (1999), Division II used the same legal standard as Division I and expressly stated actual knowledge of dangerousness was required to overcome recreational immunity. The *Cultee* court held that because there was evidence indicating the City of Tacoma internally recognized the condition (tidal waters covering a road edge) as dangerous, there was actual knowledge under the statue. *Id.*

In *State v. Davis*, 102 Wn.App. 177, 189, 6 P.3d 1191 (2000), *aff'd on different grounds, State v. Davis*, 144 Wn.2d 612, 30 P.3d 460 (2001), Division II similarly held that to "prove a 'known' condition" under RCW 4.24.210 there must be evidence of the landowner's actual, as opposed to constructive, knowledge that a dangerous latent condition exists."

Finally, Division III has rendered two decisions consistent with both Division I and II. In *Ertl v. State Parks & Recreation Commission*, 76 Wn.App. 110, 114, 882 P.2d 1185, 1187-1188 (1994), the court echoed *Gaeta*'s reasoning. The court held that the landowner had no actual knowledge that shade obscured a pothole and created a danger *Id*. Therefore, summary judgment was granted. *Id*.

In *Nauroth v. Spokane County*, 121 Wn.App. 389, 393, 88 P.3d 996, 997-998 (2004), Division III upheld summary judgment for Spokane County because there was no actual knowledge of a dangerous condition (a staircase in disrepair).

The Court of Appeals' decision based on proving knowledge under RCW 4.24.210, therefore, conforms to settled law across all three Divisions. There are no cases in conflict.

Plaintiff's only argument for why review should be accepted is that the bulk of *Gaeta* is dicta, even though the language in question is the court's legal interpretation and analysis of the recreational use statute. It's difficult to conceive of a scenario where a court's pronouncement of a legal standard would be dicta. Far from dicta, the *Gaeta* case and its interpretation of the recreational use statute is settled and unassailable. Plaintiff's assertion that *Gaeta's* legal analysis is irrelevant dicta belies history and reason.

Additionally, Plaintiff argues *Tabak* is a conflicting decision under RAP 13.4(b)(2). But, *Tabak* followed the same standard as the Court of Appeals here and required evidence of actual knowledge of a known danger to overcome recreational immunity. Accordingly, *Tabak* squarely supports the Court of Appeals' decision in this case and does not create a conflict within the Courts of Appeals under RAP 13(b)(2)

Finally, Judge Becker's dissent below, largely ignores the cases cited above. Pet. for Rev., App. at 13. To the extent Judge Becker does address these cases and their established precedent, she only offers distinctions that have no bearing. For example, both of the landowners in *Morgan v. US*, 709 F.2d 580 (9th Cir. 1983) and *Nauroth* knew of the conditions in those cases (like the City here).

The courts in those cases, however, correctly held there was no evidence of actual knowledge of danger.

Because there is settled precedent in each Division, and there are no cases standing in contrast, Plaintiff's petition for review fails under RAP 13(b)(2) and review must be denied.

B. The Court of Appeals' decision in this case is not in conflict with *Van Dinter* or any Supreme Court case law.

Plaintiff argues that the Court of Appeals' decision is in conflict with decisions of the Supreme Court. Pet. for Rev. at 7-11. To support that argument, Plaintiff curiously relies on *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 846 P.2d 522 (1993). But, the court's decision below does not conflict with *Van Dinter* or this Court's interpretation of RCW 4.24.210.

The *Van Dinter* decision is not a conflicting decision under RAP 13.4(b)(1). *Van Dinter* was concerned with, and sets the standard for, patent conditions with latent dangers. *Van Dinter* at 44-48, 846 P.3d at 525-527. In fact, *Van Dinter* had nothing to do with determining a known danger under RCW 4.24.210. Accordingly, the Court of Appeals' decision in this case does not conflict with the decision in *Van Dinter*.

Plaintiff attempts to argue there is a conflict with *Van Dinter* by calling out one single paragraph in the opinion. A paragraph that has nothing to do with known dangers under the recreational use statute. Under RAP 13.4(b)(1), Plaintiff must demonstrate that a *decision* of the Court of Appeals conflicts with a *decision* of the Supreme Court and not merely mine the opinion for single off-point paragraph. The *Van Dinter decision* concerns a separate, distinct issue and therefore does not conflict with the Court of Appeals' *decision* in this case. Plaintiff has fundamentally failed to raise an issue under RAP 13.4(b)(1) by not citing a case decision in conflict with the Court of Appeals.

Furthermore, Washington courts' interpretation of the terms "known dangerous artificial latent condition" in RCW 4.24.210 is not inconsistent with the courts' interpretation of what it means to show a known danger. While *Van Dinter* does discuss which terms modify the word "condition," the Court of Appeals' articulation of what it means to be "known" gives clear guidance on how the statute is to be interpreted. That is, generally the word "condition" is modified by the preceding words. But, when it comes to interpreting "known" it must be interpreted to mean "known danger" to uphold the intent of the statute, i.e. to give recreational landowners greater protections

than common law landowners (*see* section C below). *See* RCW 4.24.200 *and Ertl* at 114-115, 882 P.2d at 1188. There is no confusion about this statutory interpretation. After all, *Gaeta* thoroughly discussed how to interpret the statute many years ago. If anything, the Courts of Appeals in each Division have only clarified and reinforced this accepted law. The Court of Appeals' decision in this case does nothing to disturb this clarity.

Plaintiff has failed to present a case in conflict with this Court under RAP 13.4(b)(1). His petition must, therefore, be denied.

C. The Court of Appeals decision is good policy. Plaintiff's Petition for Review advocates bad public policy.

Plaintiff argues that the Court of Appeals' decision is bad policy and entitles review under RAP 13.4(b)(4) because it allows for "one free accident" for landowners. Pet. for Rev. at 14. Plaintiff's argument fails because it is flawed and ignores legislative intent.

The Court of Appeals decision does not give landowners "one free accident." Plaintiff and Judge Becker, respectfully, ignore the case law and other ways actual knowledge can be proven. Routine discovery can show that actual knowledge of danger existed before an accident. For example, discovery can produce admissions of a dangerous condition through depositions of the landowner and

agents. Actual knowledge can also be shown by obtaining prior recorded complaints from concerned citizens, or maintenance and repair records. That was the case in *Cultee* and *Tabak*, where both plaintiffs were able to show that the landowners considered the respective conditions dangerous before the accident or had previously attempted to fix a danger. Where an actual danger exists, it is quite likely that actual knowledge could be proven in some form other than an accident. *Cultee* and *Tabak* demonstrate this. Unfortunately for Plaintiff, no such record existed in this case.[1]

Moreover, Plaintiff's interpretation of the statute turns the law on its head. While Plaintiff devotes great attention to the passage in *Van Dinter* concerning the general discussion of "known dangerous artificial latent conditions" under RCW 4.24.210, he entirely ignores the case law and reasoning behind the cases that interpret what "known" means in the statute. *See supra*.

Courts have held that actual knowledge of a dangerous condition is necessary under RCW 4.24.210 to honor legislative intent: to encourage landowners to make their lands available to the public for recreational purposes by giving greater protection than

[1] Plaintiff's argument that a work-order to paint the water-diverter to enhance visibility *after* the accident is not relevant to this question, nor is it admissible.

common law landowners. RCW 4.24.200; *See also e.g. Riksem v. City of Seattle*, 47 Wn.App. 506, 509, 736 P.3d 275, 277 (1987); *and Ertl* at 114-115, 882 P.2d at 1188. Actual knowledge distinguishes the recreational land use act from common law liability for dangerous conditions about which the landowner knows or should know. *Ertl* at 114-115. If a court were to require the common law "known or should have known" standard to a recreational land use owner, the court would in effect "emasculate the statute." *Morgan* at 583.

The courts have understood that under the invitee and licensee standard, the landowner is liable for an injury causing condition if, inter alia, he/she has constructive knowledge of the condition and that it causes an unreasonable risk of harm. *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 138, 875 P.2d 621, 630 (1994) *quoting of the Restatement of Torts* §§ 342, 343. The courts have further understood the legislature's express intent under RCW 4.24.210. To distinguish recreational landowners from common law landowners and to preserve the express purpose of the statute, courts require actual knowledge of dangers for injuries on recreational lands.

While construing the statute to require constructive knowledge would undermine the statute (as the cases explain),

Plaintiff's argument offers greater harm by placing recreational landowners *below* the common law standards. Plaintiff argues that recreational landowners are only required to know of a condition (without regard to its dangerousness) and nothing more. The common law requires landowners to know or should know of a condition AND know that the condition was dangerous or unreasonably harmful. *See Tincani.* Thus, under Plaintiff's argument, recreational landowners would be open to liability by merely knowing of a condition and nothing more. A common law landowner would enjoy greater protection by requiring knowledge of the condition and its dangerousness/harmfulness.

Finally, proof of a landowner's knowledge of danger is axiomatic in premises law. For example, slip-and-fall cases generally require a plaintiff to show knowledge of the danger. *See Tincani; see also e.g. Fredrickson v. Bertolino's Tacoma, Inc.*, 131 Wn.App. 183, 127 P.3d 5 (2005). Plaintiff's argument that a recreational landowner should only be required to know of a condition without regard to its ability to be dangerous, besides being in violation of legislative intent, is unsupported by any premises law. Plaintiff's argument and, respectfully, Judge Becker's dissent, ignores well settled principles and advocates for an unheard of standard.

The Court of Appeals' decision is based on precedent, legislative intent, and good public policy. Plaintiff's petition argues for an untenable position that is contrary to legislative intent. Thus, there is no basis to accept review under RAP 13.4(b)(4).

D. The Court should not accept review because there are additional grounds to grant summary judgment for the City.

There are additional grounds to affirm summary judgment for the City under RCW 4.24.210: the condition was not latent or dangerous. While the Court of Appeals didn't reach the issue, the trial court found the condition was not latent. CP 142-144, RP 17. "Latent" under the statute means "not readily apparent to the recreational user." *Swinehart v. City of Spokane*, 145 Wn.App. 836, 848, 187 P.3d 345, 352 (2008). If a park user can take "visual reference" of the condition, it is not latent. *Id.* at 853, 187 P.3d at 351.

The physical evidence demonstrates that the condition was not latent; it was visible and not obscured. CP 19-25, CP 95-105. While it was unpainted at the time of Mr. Jewels' accident, a park user could still see the object in the road upon approach. The only cases in Washington to find that an object was latent involve an object that is underwater or not visible. See *Ravenscroft v. Washington Water Power Co.*, 136 Wash.2d 911, 969 P.2d 75

(1998), *Tabak*, and *Cultee*. Consistent with these cases and the latency standard, because the water-diverter could be seen if a user looked, it cannot be latent.

Judge Becker's insistence that the condition was "invisible" and that the pictures taken after it was painted have no value are, respectfully, not correct. First, the record demonstrates the condition was not "invisible." It can be seen with the naked human eye. Second, while the pictures do show the top of the water-diverter with paint on it, one can still assess the condition's visibility with or without the paint and recognize it is there. *See* CP 19-25, 95-105. The trial court had no problem looking at the pictures and seeing that, with or without paint, the object was there to be seen. RP 17. Plaintiff's arguments that the condition was latent are contradicted by the physical evidence and fail to raise an issue for summary judgment. *See Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, 1776 (2007).

The City also argued that Plaintiff provided no proof the condition was dangerous. CP 38. A condition that poses an unreasonable risk of harm is dangerous. *Cultee* at 518, 977 P.2d at 23, *quoting Gaeta*. Plaintiff failed to demonstrate how a 1-2 berm is unreasonably dangerous. *See Gaeta*. Certainly, an object in a park that is misused (riding around a purposefully placed traffic calming

measure) cannot be considered dangerous. The recreational use statute does not require recreational landowners to anticipate every possible way a person could become injured, especially when they disregard safety measures. *See Tennyson v. Plum Creek Lumber*, 73 Wn.App. 550, 556, 872 P.2d 524, 528 (1994).[2]

Plaintiff makes several inaccurate contentions on this point. First, the water-diverter is not an extension of the speed bump. CP 16. It's shorter in height than the speed bump and its purpose is to divert water. CP 14, CP 16, CP 91.

Second, per the unrefuted declaration from the City engineer, the access road in the park where the accident occurred is not and was not a street or road. CP 153. The access road was thus not subject to the rules of the road and uniform street standards (similar to a parking-lot or driveway). CP 153-154.

Third, the declarations from Plaintiff's alleged experts are inadmissible evidence. The declaration from the traffic engineer is *unsworn* and not admissible, *see* CR 56(e); and *Young Soo Kim, v.*

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[2] Plaintiff's assertion that City intended for bicyclists to ride around the speed bumps is wholly inaccurate and flatly contradicted by the record. *See* Pet. for Rev. at 17-18. Actually, the gaps and the water-diverter were installed solely to facilitate drainage. CP 16. Indeed, the purpose of the speed bumps was to slow traffic, not to allow cyclists to avoid them. This is particularly true of the speed bump Plaintiff avoided, which preceded a crosswalk. CP 16.

Choong-Hyun Lee, 174 Wn.App. 319, 300 P.3d 431 (2013), while the proposed declaration from the "cycling" expert lacks foundation (his opinions consisted of why Plaintiff made certain decisions). Fourth, there is no evidence there was a shadow obscuring the condition. No such fact exists in the record.

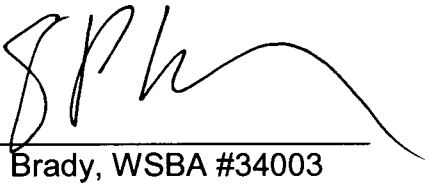
Thus, with these additional grounds to uphold the trial court, there is no need for this Court to review the "known" issue in this case.

V. CONCLUSION

Plaintiff has failed to show that the three Divisions of the Court of Appeals disagree on the interpretation of RCW 4.24.210. Plaintiff has further failed to show the Court of Appeals' decision conflicts with a Supreme Court decision. Finally, Plaintiff has failed to articulate a substantial public interest in this case. Therefore, there is no basis whatsoever for review under RAP 13(b).

For these reasons, this Court should deny review.

Respectfully submitted this 17th day of June, 2014.



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