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NO. 69358-1-I

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**COURT OF APPEALS FOR DIVISION 1**
**STATE OF WASHINGTON**

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STEVEN JEWELS
Plaintiff/Appellant,

vs.

CITY OF BELLINGHAM, a Washington municipal corporation,
Defendants/Respondent.

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# CITY OF BELLINGHAM'S RESPONSE BRIEF

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## I. INTRODUCTION

Steven Jewels injured himself riding a bicycle in Cornwall Park. Mr. Jewels has not disputed he was injured in the park. Cornwall Park is a City of Bellingham Park that is open to the public for use without a fee. Mr. Jewels injured himself when he attempted to ride around a speed bump on a park access road. As he attempted to ride around the speed bump, he rode over an asphalt berm that is connected to the speed bump and crashed his bicycle into the curb lining the access road. The asphalt berm Mr. Jewels encountered is a water-diverter, and is used to assist with drainage on the road and in the park. The water-diverter, speed bump, and curb lining the access road are visible and not obscured. Prior to Mr. Jewels' accident, the City had never received a complaint, nor had any knowledge of any accidents involving the speed bump or the water-diverter. Applying straightforward precedent, the Whatcom County Superior Court granted the City of Bellingham's Motion for Summary Judgment finding the City was entitled to recreational land use immunity under RCW 4.24.210 because the condition was not latent and the City did not have actual knowledge of any danger. This Court should affirm.

## II. 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. 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 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. 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 June 28, 2012, the City filed a motion for summary judgment based on recreational land use immunity under RCW 4.24.210. On July 27, 2012, the trial court granted the City's motion because the injury causing

condition was not latent and the City did not have actual knowledge of any danger. RP 17. The record supports the trial court's ruling.

## III. ARGUMENT

### A. SUMMARY OF ARGUMENT

Mr. Jewels was injured in a City park. Because he was injured in a City park, the City is entitled to recreational immunity pursuant to RCW 4.24.210. To overcome the City's recreational land use immunity, Mr. Jewels has to establish that the condition that caused his injury was a known, dangerous, artificial, latent condition for which no conspicuous warning signs were posted. The record shows that the condition that caused Mr. Jewels' injury was not a known, dangerous, or latent condition. Therefore, the trial court did not err in granting the City's motion for summary judgment.

Furthermore, this case is a premises liability case because Mr. Jewels was injured in a City park. Thus, Mr. Jewels' arguments based on the Manual on Uniform Traffic Control Devices (MUTCD) are irrelevant, misguided and contrary to law. Because he was injured in a park, all of Mr. Jewels' arguments regarding the MUTCD fail. This Court should therefore affirm the trial court.

## B. STANDARD OF REVIEW

When reviewing an order of summary judgment, the Court engages in the same inquiry as the trial court. *State v. Davis*, 102 Wn.App. 177, 184, 6 P.3d 1191, 1195 (2000). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Davis*, 102 Wn.App. at 184, 6 P.3d at 1195. The Court must consider all evidence and reasonable inferences therefrom in the light most favorable to the non-moving party. *Id.* If the plaintiff fails to establish the existence of an element essential to his or her case, there can be no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Id.*

## C. THE SCOPE AND PURPOSE OF THE RECREATIONAL LAND USE STATUTE IS TO ENCOURAGE LANDOWNERS TO OPEN RECREATIONAL LANDS

The express purpose of the recreational land use statute is to encourage landowners and others in lawful possession and control of land to make them available to the public for recreational purposes by limiting their liability towards persons entering thereon. RCW 4.24.200; *See e.g. Riksem v. City of Seattle*, 47 Wn.App. 506, 509, 736 P.3d 275, 277 (1987). In 2011 the legislature affirmed that there is an express legislative policy to increase the availability of recreational land. RCW 79A.80.005. A

landowner or others in possession and control of the land who allow members of the public to use them for purposes of outdoor recreation without charging a fee shall not be liable for unintentional injuries to users unless the injury was sustained by reason of a known dangerous artificial latent condition for which conspicuous warning signs have not been posted. RCW 4.24.210.

The recreational land use statute changed the common law by altering an entrant's status from that of a trespasser, licensee, or invitee to a new statutory classification of recreational user. *Davis* at 184, 6 P.3d at 1195. Lands used for bicycling are included in the statute. RCW 4.24.210; *See also Riksem v. City of Seattle.* For the purpose of determining whether the recreational land use statute applies, the Court is required to look at the intent of the landowner, rather than a particular user's intent. *Gaeta v. City Seattle Light*, 54 Wn.App. 603, 608-609, 774 P.2d 1255, 1258 (1989); *see also Cultee v. City of Tacoma*, 95 Wn.App. 505, 514, 977 P.2d 15, 21 (1999). If a landowner opens land for recreational use without a fee, the landowner has brought himself within the protection of the recreational land use statute. *Gaeta* at 609, 774 P.2d at 1258. The intent of the recreational user is immaterial. *Id.; see also Riksem* at 512, 736 P.2d at 278-279.

### D. THE CITY IS ENTITLED TO RECREATIONAL LAND USE IMMUNITY BECAUSE THE INJURY CAUSING CONDITION WAS NOT: (1) LATENT, (2) A KNOWN DANGER, OR (3) DANGEROUS.

Because Mr. Jewels undisputedly injured himself in a City park, the duty owed to him is defined by the recreational land use immunity statute. RCW 4.24.210. Under the statute, the City is entitled to immunity because Cornwall Park was open for recreational use without a fee the day Mr. Jewels was injured. RCW 4.24.210; and CP 15. Mr. Jewels can only overcome the City's immunity if he can establish the injury causing condition was a known, artificial, dangerous, and latent condition. *State v. Davis*, 144 Wn.2d 612, 616, 30 P.3d 460, 463 (2001). Mr. Jewels must demonstrate that each of the four elements is present in the injury-causing condition. *Id.* The elements of "known, dangerous, artificial, and latent" modify "condition," rather than modifying one another. *Id.* If any of the four elements is lacking, a claim cannot survive summary judgment. *Id.*

Mr. Jewels cannot overcome the City's immunity because the record establishes that the injury causing condition was not latent, the City had no actual knowledge of its alleged danger, and the condition itself was not dangerous.

## 1. LATENCY

### a) The water-diverter, curb, and curb cut-out was not latent.

"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 condition is obvious it cannot be latent and what a particular user sees is immaterial. *Id.* The "dispositive questions is whether the condition is readily apparent to the general class of recreational users, not whether one user might fail to discover it." *Id. quoting Ravenscroft v. Washington Water Power Co.*, 136 Wash.2d 911, 969 P.2d 75 (1998). If a park user can take "visual reference" of the condition, it is not latent. *Swinehart* at 853, 187 P.3d at 351.

As noted above the term "latent" modifies "condition." *Swinehart* at 848, 187 P.3d at 352. "Therefore injuries that result from latent dangers presented by a patent condition are not actionable under RCW 4.24.210." *Id., quoting Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 846 P.3d 522 (1993). The condition itself, not the danger it poses, must be latent. *Id.* Latency is a question of fact, but in situations where reasonable minds could reach but one conclusion from the evidence presented, questions of

fact may be determined as a matter of law and summary judgment is appropriate. *Cultee* at 522, 977 P.2d at 25.

The analysis to determine latency is effectively articulated in *Tennyson v. Plum Creek Lumber Co. LP*, 73 Wn.App. 550, 872 P.2d 524 (1994), *Gaeta v. Seattle City Light*, 54 Wn.App. 603, 774 P.2d 1255 (1989) and *Swinehart v. City of Spokane*. In *Tennyson* the plaintiff was injured when he fell off his off-road motorcycle after driving up a gravel mound that had been excavated on the other side. The plaintiff claimed the condition (excavated gravel mound) was latent because the excavated side was not obvious to him as he drove up the mound. *Id.* at 552, 872 P.2d at 525. The court rejected plaintiff's latency argument and held the condition was patent because it was in plain sight and "readily apparent to anyone who examined the gravel mound as a whole." *Id.* at 555, 872 P.2d at 527. The fact that some users (those who ride up the non-excavated side) may fail to recognize the condition does not render it latent under the recreational land use statute. *Id.* at 555-56, 772 P.2d at 527.

In *Gaeta* the plaintiff was riding his motorcycle over a road on top of Diablo Dam when he was injured. 54 Wn.App. at 606, 774 P.2d at 1257. The road had parallel tracks on the side of the road that related to raising damn flood gates. *Id.* The plaintiff did not notice the tracks until he was driving between them. *Id.* When he realized he was between the

tracks he attempted to cross them and fell off his motorcycle. *Id.* The Court of Appeals upheld the summary judgment dismissal of the action because the tracks were not latent or dangerous. *Id.* at 610, 774 P.2d at 1259.

In *Swinehart*, the plaintiff was injured after sliding down a slide and landing on the woodchip fill within a playground area. *Swinehart* at 839, 187 P.3d at 347. The plaintiff alleged the condition causing the injury (the woodchips) was latent because a park user could not determine how deep the woodchips were. *Id.* at 846-47, 187 P.3d at 351. The Court of Appeals held that although a user could not verify the depth of the woodchips, the condition was not latent because the woodchips themselves and the displacement of woodchips at the bottom of the slide was an obvious condition. *Id.* at 849, 187 P.3d at 352. The court noted that a user could take "visual reference" of the area and determine whether appropriate levels of fill were present at the bottom of the slide. *Id.* at 851, 187 P.3d at 353.

The record shows that the condition in this case, the water-diverter and curb area, was not latent because it was visible.[1] The visibility of the

[1] The Complaint makes it clear that Mr. Jewels asserted the injury causing condition was the water-diverter adjacent to the second speed bump and the curb area. See CP 4-7, and CP 91-93.

water-diverter and curb cut-out is depicted in the exhibits submitted by the parties. CP 19-25, CP 97-103. The pictures show that the water-diverter is a visible, raised asphalt bump next to the speed bump. CP 19-25, CP 97-103. The water-diverter itself is dark in color and therefore stands out against the gray asphalt road. CP 19-25, CP 97-103. Further, the second speed bump is 239 feet past the first speed bump which gives a user sufficient time to take visual reference of the area as they approach. CP 15, CP 20, CP 22, CP 99.

There is, in fact, nothing in the record to suggest the water-diverter was covered up or obscured. It was not hidden or covered. To the contrary, the pictures demonstrate it is visible and obvious. It is also clear from the pictures that even if the water-diverter was not painted with a yellow stripe (as it currently is) it is visible and can be seen. The trial court summed up the obviousness of the condition:

> It [the water-diverter] was within view. Mr. Jewels was - it's not something that he couldn't have seen had he looked, and that really is the standard under this statute....I do think that this bump even if not painted was large enough and wide enough that it was clearly obvious and clearly visible. So it's not a latent condition...

RP 17-18.

Mr. Jewels' argument that the condition was latent is based on the failed arguments in *Tennyson*. He asserts that the painted speed bump that

is connected to the water-diverter deceived him. CP 6. But, *Tennyson* defeats the argument that the water-diverter was deceptive and therefore latent. Much like the gravel mound in *Tennyson,* the water-diverter here could be seen and could have been examined to reveal that it was there and what its characteristics were. As the *Swinehart* court noted, a user could take "visual reference" of the water-diverter. *Swinehart* at 353, 187 P.3d at 851. Like the gravel mound in *Tennyson* and the woodchips in *Swinehart,* the water-diverter and cut-out was in plain sight. In fact, the condition here was more obvious than in *Tennyson* because a park user can see the condition as the speed bump is approached.[2]

That the condition was patent in this case is supported by the body of case law in Washington on latency. The ***only*** cases that have found a condition to be known, dangerous, artificial, and latent involved a condition submerged by water or a floating dock that had faulty bolts. One of these cases, *Ravenscroft v. Washington Water Power Co.*, involved an injury that resulted from a submerged stump in a man-made lake. The

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[2] Attached hereto in the appendix is a courtesy copy of *Tennyson v. Plum Creek Timber Co*. Notably, the last page of the opinion from Westlaw includes a picture of the condition (the gravel mound) in that case. The picture shows that from Mr. Tennyson's view point the other side of the mound could not be seen. That is in contrast to this case where a user can see the water-diverter and cut-out as you approach. The *Tennyson* court found the condition was patent. By analogy, if the *Tennyson* condition was patent then so must the condition in this case.

*Ravenscroft* court held that a submerged stump was not apparent or visible and was therefore latent. *Id.* at 926, 969 P.2d at 83.

In *Cultee v. City of Tacoma*, the "condition" involved the edge of a road that been obscured by tidal waters after a levee broke years earlier. In *Cultee,* a young girl wandered beyond the road edge that was covered by the water and fell into deeper water and drowned. *Id.* at 510, 977 P.2d at 19. The *Cultee* court held that the edge of the road could not be seen and was therefore latent. *Id.* at 523, 977 P.2d at 25.

In *Tabak v. State*, 73 Wn.App. 691, 870 P.2d 1014 (1994), the plaintiff was injured when a floating fishing platform on a lake he was walking on sank. The cause of the sinking platform was faulty bolts, which held the platform together. *Tabak* at 698, 870 P.2d at 1018-1019. The bolts were under the walking surface and not visible to users. *Id.* at 692. The broken bolts and the condition in general was not visible to users and was therefore latent. *Id.*

What *Ravenscroft*, *Cultee* and *Tabak* have in common is one important element: all three courts found latency based on the condition being completely hidden or out of plain sight. Every other published case that was decided on and dealt with the interpretation of latency under the recreational immunity statute has found the condition to be patent as a matter of law when the condition is not hidden or covered-up. This

includes *Tennyson*, where users could not see the other side of the mound, and *Swinehart*, where users could not discern the depth of the woodchips.

Based on the overwhelming case law and the record, the Court can only reach one conclusion: the water-diverter and curb area was patent as a matter of law. The water-diverter was there to be seen and readily apparent to the general class of park users. Any argument that the lack of paint on the water-diverter made the condition deceptively latent was rejected by the *Tennyson* court. Because of the obvious nature of the injury causing condition, Mr. Jewels cannot overcome the City's recreational land use immunity and the Court should affirm the trial court.

### b) Mr. Jewels has not raised a genuine issue of fact as to the latency issue and his arguments in support thereof fail.

Besides the established law on latency under RCW 4.24.210, the evidence presented by Mr. Jewels does not raise a genuine issue of material fact as to the obvious nature of the condition in this case. His arguments fail for several reasons.

First, "[w]hen opposing parties tell two different stories, one which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372,

380, 127 S.Ct. 1769, 1776 (2007). The mere existence of *some* alleged factual dispute between the parties will not defeat a motion for summary judgment; the requirement is that there is no *genuine* issue of fact. *Harris* at 380.

Here, the exhibits show that the water-diverter, curb, and curb cut-out was visible and not hidden. Although the water-diverter is painted in the pictures, it is easy to discern it is there without the paint. *See* CP 20-25. The water-diverter is visibly raised from the pavement on the road. CP 20-25. Despite Mr. Jewels' characterization that it blends in to the roadway, the pictures clearly show that water-diverter is darker in color and stands out against the lighter colored road. *See* CP 22, 23, 24, CP 100-103. Also, the second speed bump is approximately 239 feet past the first speed bump, which means a user has plenty of time to view the area upon approach. CP 15. Indeed, the pictures demonstrate the water-diverter is visible as the user approaches the second speed bump. CP 20, CP 22, CP 99.

In short, the pictures show that the condition in this case is visible and not latent. The evidence presented by Mr. Jewels cannot and does not dispute the obviousness in the pictures. Because Mr. Jewels description of the condition as latent is blatantly contradicted by the record, he has failed to raise a genuine issue of fact.

Second, Mr. Jewels implies that the expert declarations he produced precluded summary judgment. Appellant Br. 1. But, the standard for determining what is latent does not depend on expert testimony. It depends on whether the condition is "readily apparent to the general class of recreational users, not whether one user might fail to discover it." *Swinehart* at 848, 187 P.2d at 351. Because the standard for latency is determined by what a general class of recreational users would discover, an "expert" opinion does not create a genuine issue of fact on this issue. The court determines latency not on a what an expert says, but based on whether a general class of users would discover it. Thus, given the objective standard for determining latency, the opinions from Mr. Jewels' alleged experts do not by themselves create a genuine issue of fact that precludes summary judgment.

Additionally, Mr. Jewels incorrectly argues that latency should be determined from his perspective. Appellant Br. 23. This argument is contrary to law. Because latency is determined by an objective standard, Mr. Jewels' failure to see the condition does not create a genuine issue of fact. *Swinehart* at 848, 187 P.3d at 351.

Third, Mr. Jewels argues that a work-order from the City Parks department, prepared two days after the accident, serves as an admission by the City as to latency. Appellant Br. 27. To the contrary, the work-

order asked to "make it visible" and is nothing more than an improvement to *enhance* the visibility of the water-diverter. This does not ipso facto mean the condition was previously considered latent by the City.

Moreover, the work order does not state the condition is hidden or latent. Rather the work order states that "a cyclist did not see that it was part of the speed bump." CP 76. In context, the work order is not an admission as to latency, but rather a directive to paint the water-diverter because one cyclist (Mr. Jewels) did not notice it. Furthermore, the painting of the speed bump is a subsequent remedial measure under ER 702 and is not admissible to prove culpable conduct. Regardless, the language used by a parks employee in a work order after the accident does not change the fact that the condition is and was visible.

Finally, Mr. Jewels asserts several times that the area of the accident was in the "shade" or "shaded area." Appellant Br. 3, 8, 21, 28, 32and 35. But, there is no mention in the record that the area was shaded or in the shade. Mr. Jewels did not include this in his declaration, nor is it represented in any of the pictures of the area. See CP 90-105. This "fact" is just an adjective used in Mr. Jewels' brief without any support in the record. Similarly, Mr. Jewels asserts the water-diverter "blended" into the roadway. Appellant Br. 21. This assertion is also contradicted by the record, specifically the pictures. CP 19-25, 99-103. The Court should

therefore disregard any allegation that the area was in the shade or that the water-diverter blended into the road and that these factors somehow contributed to the alleged latency of the condition.

### c) The alleged expert opinions submitted by Mr. Jewels are inadmissible and otherwise do not create a genuine issue of fact.

Mr. Jewels submitted a declaration from Jim Couch and a letter from Edward Stevens in attempt to overcome summary judgment in regards to latency. *See* CP 70, CP 78-89, CP 107-109. These alleged expert opinions submitted by Mr. Jewels do not raise a genuine issue of fact because the opinions are inadmissible and should not be considered by the Court.

First, the letter submitted by Edward Stevens (CP 78-89) is inadmissible because it is unsworn. Unsworn documents offered in opposition to summary judgment do not create a genuine issue of fact. CR 56(e); and *Young Soo Kim, v. Choong-Hyun Lee*, ---P.3d ---, 2013 WL 1214988 (Wn.App.Div. 1). The document submitted by Edward Stevens is merely a letter addressed to an attorney and does not meet the standards of CR 56(e) which requires that documents be sworn. It is therefore not admissible evidence and not appropriate for consideration on summary judgment.

Mr. Jewels' attorney has, however, sworn that the letter is a true and accurate copy. CP 70. But, that merely provides authentication under ER 901 and does not make the document admissible and appropriate for consideration on summary judgment. *Young Soo Kim* at ---; *See also International Ultimate, Inc. v. St. Paul Fire and Marine Ins. Co.*, 122 Wn.App. 736, 87 P.3d 774 (2004) (attorney's declaration sufficient to *authenticate* report addressed to him). It is not enough to merely authenticate a document under CR 56(e). It must also be sworn. Edward Stevens' letter is therefore not appropriate for consideration by the Court and does not create a genuine issue of material fact.

Second, while being unsworn is fatal to the documents' ability to be reviewed, the Stevens letter is also inadmissible because it is conclusory, speculative, lacking foundation, and does not contain an adequate factual basis for any expert opinions. "It is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted." *Griswold v. Kirkpatrick*, 107 Wn.App. 757, 761 (2001). "Unsupported conclusional statements and legal opinions cannot be considered in a summary judgment motion." *Marks v. Benson*, 62 Wn.App. 178, 182 (1991). "It is not enough for the affiant to be 'aware of' or 'familiar with' the matter; personal knowledge is required." *Id. quoting Gunroth v. Rodaway*, 107 Wash.2d 170, 727 P.2d 982 (1986). In a

summary judgment hearing, "an expert must support his opinion with specific facts, and a court will disregard expert opinions where the factual basis for the opinion is found to be inadequate." *Rothweiler v. Clark County*, 108 Wn.App. 91, 100-101, 29 P.3d 758, 763 (2001).

The Stevens letter does not provide a factual basis for his opinions. The letter notes that he reviewed nine pictures of speed bumps at Cornwall Park, and two letters (subject and content of the letters unknown). CP 79. The Stevens letter does not state what information was reviewed to learn what happened. Indeed, in articulating how Mr. Jewels' accident occurred, the letter starts by merely stating, "*I understand* he [Mr. Jewels] came upon an inverted V-shaped, yellow painted speed bump which crossed the entire street except for approximately a 6-inch area adjacent to the outside of the curb." CP 78. [emphasis added]. Thus, the entire factual basis for Stevens' opinions are unknown as he only states his "understanding" of the incident.

A letter or report based on a mere "understanding," without detailing how that understanding came to be, is not admissible in the context of summary judgment. *Benson* at 182-183, 813 P.2d at 182. A declarant's "understanding of a fact is similar to being aware of it. It says nothing about personal knowledge and is inadmissible..." *Id.* If the specific facts upon which an understanding was based are not set forth, the

opinion is a conclusional statement unsupported by the facts and should not be considered on summary judgment. *Id* at 183, 813 P.2d at 182.

Based on his letter, all we know is that Stevens looked at nine pictures and read two letters of unknown substance. This cannot be the basis for an expert opinion. To that end, the letter only recites his understanding of the accidents and then describes studies relating to speed bumps and speed humps and that speed bumps are hazards in streets and highways. CP 78-83. Based on only this information, he then concludes the condition that injured Mr. Jewels was "deceptive" and that the City knew it was creating a hazard. CP 81. He also opines, even though he admits he is not an expert on the "human element," about why Mr. Jewels went around the speed bump. CP 79, CP 81. The findings in the letter are thus conclusory, speculative, and without a sufficient factual basis and should not be considered by the Court.

Third, the declaration of Jim Couch does not create a genuine issue of material fact. CP 107-109. Expert testimony is properly excluded where the expert lacks appropriate "scientific, technical or other specialized knowledge." ER 702. "A considerable amount of practical experience...does not obviate the need for a scientific basis" for an expert opinion. *State v. Pittman*, 88 Wn.App. 188, 198, 943 P.2d 713, 718 (1997).

The Couch declaration is defective because there is no basis or foundation for Couch's "expert" opinions. Couch opines about the construction of the speed bump and water-diverter, but there is no foundation to support he is an expert in bike accident reconstruction, park management, drainage, surface water, or traffic control signals. Specifically, there is nothing to support Couch has the training, education, knowledge, or experience to qualify as an expert in any of these areas. Further, Couch opines in his declaration about the decision made by Mr. Jewels. There is no foundation to support that Couch is a human factors expert or could otherwise offer an opinion about how or why Mr. Jewels made the decisions he did. Thus, Couch's recitation of the incident and the explanation for why the accident occurred is inadmissible hearsay and bare speculation. Because of the lack of foundation, the declaration of Jim Couch is inadmissible evidence and does not raise a genuine issue of fact.

Finally, besides the issues raised above, the Stevens letter is irrelevant to the issue before the Court. In the letter, Stevens discusses studies and standards relating to the "street element." CP 79. The duty of care in this case does not flow from the Manual of Uniform Traffic Control Devices, or case law relating to street maintenance. The duty in this case flows from RCW 4.24.210 because the accident indisputably

happened in a City park. Further, the accident did not occur on a dedicated City street. Thus, the entire Stevens letter is irrelevant.

For all of the above reasons, the trial court appropriately granted summary judgment in this case. The condition was visible and therefore not latent. Mr. Jewels has failed to offer genuine issue of fact in this regard. This Court should affirm the trial court.

## 2. ACTUAL KNOWLEDGE

### a) The City did not have actual knowledge that the condition was allegedly dangerous and is therefore entitled to immunity.

"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 the condition is dangerous." *Gaeta* at 609. Actual knowledge distinguishes the recreational land use act from common law liability for dangerous conditions about which the landowner knows or should know. *Ertl v. State Parks & Recreation Commission*, 76 Wn.App. 110, 114-15, 882 P.2d 1185, 1188 (1994). A landowner must know of the condition and must know it is dangerous in order to lose immunity. *Id.* Summary judgment is appropriate where a plaintiff presents no evidence the landowner had actual knowledge of the condition giving rise to the plaintiff's injury. *Cultee* at 517, 977 P.2d at 22.

In *Ertl*, the plaintiff was injured when he rode his bicycle over a pothole on a recreational trail. 76 Wn.App. at 112, 882 P.2d at 1186. The plaintiff alleged the defendant was negligent because the pothole was obscured by shadows from a nearby tree and by other road patches on the trail near the pothole. *Id.* at 112, 882 P.2d at 1186-87. The court held the defendant Parks Commission was entitled to recreational immunity because the plaintiff did not present any evidence the defendant knew the pothole was obscured by shadows and therefore could not overcome the "known" element of the recreational land use act exception. *Id.* at 115, 882 P.2d at 1187.

In *Nauroth v. Spokane County*, 121 Wn.App. 389, 88 P.3d 996 (2004), the plaintiff was injured when she slipped on a staircase that had a worn edge and a missing handrail. Spokane County presented evidence that there had been no prior injuries on the steps or no complaints regarding their condition. *Nauroth* at 393, 88 P.3d at 997-98. The plaintiff failed to present any evidence of actual knowledge. *Id.* Because there was no evidence of actual knowledge of dangerousness, the court affirmed summary judgment for the County. *Id.* at 393-94, 88 P.3d at 998.

Here, there is no evidence, direct or circumstantial, that the City had actual knowledge of the alleged dangerousness of the water-diverter and curb cut-out. Mr. Jewels failed to produce *any* evidence of prior

complaints or prior accidents. Similar to the defendant in *Nauroth*, the City had no record of any prior accidents caused by the water diverter and otherwise had never received a complaint about its condition. CP 17-18. Because the City produced evidence showing there were no prior complaints or accidents, and Mr. Jewels failed to contradict that evidence, he has failed to prove the City had actual knowledge.

Washington courts have articulated the importance of actual knowledge of dangerousness in determining summary judgment in recreational land use cases. *See Gaeta and Ertl supra*. Actual knowledge is what distinguishes the recreational land owner from the common law land owner. 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 v. United States*, 709 F.2d 580, 583 (1983). If actual knowledge is not required, the recreational landowner would in effect revert back to a common law landowner and the corresponding duty to public invitees. Such an interpretation is without question contrary to legislative intent.

The City had no actual knowledge of danger. Mr. Jewels failed to produce any evidence of prior accidents or complaints. The City is therefore entitled to recreational immunity because Mr. Jewels cannot prove this necessary element.

### b) Mr. Jewels arguments regarding knowledge are not supported by law and therefore fail.

Mr. Jewels' arguments regarding knowledge fail because they are not supported by law.

First, he argues that the Court should find that constructive knowledge is sufficient in this case because the City created the speed bump. Appellant Br. 14. But, actual knowledge is required to overcome recreational land use immunity. *See Ertl and Nauroth*. Notably, Mr. Jewels cites no authority for this position and instead argues constructive knowledge can somehow be found through the existence of the MUTCD. Appellant Br. 14. Because Mr. Jewels has failed to cite any authority that contradicts the straight forward law in this state (that actual knowledge is required to overcome recreational land use immunity) the Court should disregard this argument. *See Frank Coluccio Construction Company v. King County*, 136 Wn.App. 751, 779, 150 P.3d 1147 (2007) (where no authorities are cited the Court may assume counsel has found none).

Second, Mr. Jewels argues that because the speed bump was built within one year of the accident, constructive knowledge is all that is required. Appellant Br. 14. Again, Mr. Jewels cites no authority for this argument and the court should assume there is none. *See Coluccio* at 779, 150 P.3d at 1161. In fact, both *Ertl* and *Nauroth* indicate that the age of

the condition is not relevant. The courts in both cases only looked at whether there were prior complaints or prior accidents to determine actual knowledge. *See Ertl* at 115, 882 P.2d at 1188, and *Nauroth* at 393, 88 P.3d at 997-98. Mr. Jewels specious argument that constructive knowledge is sufficient to overcome recreational land use immunity is therefore contrary to law.

Third, Mr. Jewels reliance on the MUTCD and excerpts from the Washington State Department of Transportation to prove actual knowledge is misplaced. Mr. Jewels believes these manuals by themselves show the City had actual knowledge. Appellant's Br. 14-16. But, the record in this case shows that the road in question was not a City street; it was an access road and therefore not within the standards or guidelines of the MUTCD. CP 152-154. City engineer Rory Routhe submitted a sworn declaration stating that the MUTCD does not apply to driveways, parking lots, or access roads. CP 152-154. Mr. Jewels has failed to refute this fact. Thus, the MUTCD and other authorities that provide standards for streets and highways are inapplicable to this case. Moreover, the existence of street standards in the MUTCD do not show actual knowledge that the City knew the water-diverter and curb area was dangerous.

Finally, Mr. Jewels attempts to argue that he was an invitee and the City's duty to him was as an invitee. Appellant's Br. 16-18. This argument,

is not supported by law. Because Mr. Jewels was recreating in a park, he was a park user, and not a common law invitee or licensee. *Davis* at 184. In fact, Mr. Jewels recognizes a park user is not an invitee or licensee on page eight of his brief, but then contradicts himself by arguing later he was actually an invitee. *See* Appellant Br. 8 and 16-18.

In sum, it is unassailable that a person recreating in a park is a park user and recreational land use immunity applies. Under recreational land use law in this state, Mr. Jewels must show actual knowledge of dangerousness. He has failed to show any evidence, let alone disputed evidence, of actual knowledge in this case. The City is therefore entitled to recreational immunity on this basis and the Court should affirm.

## 3. DANGEROUSNESS

### a) <u>There is no evidence the condition was dangerous.</u>

In the absence of a statutory definition, a condition that poses an unreasonable risk of harm is dangerous. *Cultee* at 518, 977 P.2d at 23, *quoting Gaeta*. To define dangerous as anything less would be to increase the liability of a landowner which is contrary to the recreational land use act. *Gaeta* at 609, 774 P.2d at 1259. To survive summary judgment the plaintiff must provide sufficient evidence for a rational trier of fact to find

that the condition in question posed an unreasonable risk of harm. *Tabak* at 697, 870 P.2d at 1018.

There is nothing in the record to suggest that the water-diverter and cut-out in question posed an unreasonable risk of harm. The water diverter is a 1-2 inch high, asphalt berm that is in plain sight and visible by all who approach. The water-diverter and cut-out are no more dangerous than an ordinary curb or any other structure in a park that a user may not notice. For example, a curb, a bullard, a sign, or a post could be dangerous if not used appropriately or went unnoticed by a user. The mere possibility of injury by itself does not mean the object poses an unreasonable risk of harm. Likewise, that a user could attempt to circumvent a safety measure in the park and therefore come into contact with the object and sustain an injury does not automatically make the object dangerous.

The condition in this case is analogous to the tracks in *Gaeta*. The *Gaeta* court found that the tracks over the damn did not present an unreasonable risk of harm to users. *Gaeta* at 610, 774 P.2d at 1259. Like the *Gaeta* plaintiff, Mr. Jewels did not notice the condition in the roadway and was injured. The fact that an injury occurred does not make the object dangerous. There must be evidence of an ***unreasonable*** risk of harm.

The condition here is no more dangerous than the tracks in *Gaeta* and certainly not in the class of the dangers discussed in recreational land

use case law. When analyzing the litany of recreational land use cases in Washington and the dangers in those cases (e.g. the gravel mound in *Tennyson*, the sinking lake platform in *Tabak*, the stump in the middle of a lake used by ski boats in *Ravenscroft*, the tidal water in *Cultee)* the water diverter and cut-out do not compare. There is no evidence the water-diverter and cut-out pose an unreasonable risk of harm. Because Plaintiff cannot provide evidence in that regard, the City is entitled to recreational immunity.

### b) Mr. Jewels has presented no evidence the condition was dangerous.

Mr. Jewels' arguments regarding dangerousness have no merit. First, the traffic laws cited by Mr. Jewels did not "require" him to bypass the second speed bump (an argument he makes in regards to foreseeability). Appellant Br. 21. RCW 46.61.755 merely states traffic laws apply to bicycles in the road and Bellingham Municipal Code 8.04.060 states that bicycles can be ridden on City property. Neither of these statutes "required" Mr. Jewels to ride in any specific area in Cornwall Park.

Second, Mr. Jewels takes issue with the trial court's discussion about the terms "hazardous" and "dangerous." Appellant Br. 20. The trial court did not "contend" that these terms were different. Rather, the trial

court stated that, for the sake of argument, the terms may be different, but ultimately concluded the issue in this case was latency and knowledge. RP 10 (Motion to Reconsider Hearing). Thus, the trial court did not err as Mr. Jewels asserts.

Finally, Mr. Jewels cites case law that defines dangerousness for street standards. Appellant Br. 20. This argument is misguided because, as stated above, the reasonable care and duty the Court is required to look at is under RCW 4.24.210 because this accident irrefutably happened in a park.

### E. MR. JEWELS' REMAINING ARGUMENTS FAIL BECAUSE THE MUTCD IS NOT APPLICABLE

Mr. Jewels makes several ancillary arguments related to the MUTCD that are not directly addressed above. Mr. Jewels' arguments rely on the MUTCD and laws not relevant to this case. His arguments are nothing more than a "red-herring." Each argument fails and is discussed in turn below.

First, Mr. Jewels argues that the MUTCD sets the duty in this case because the City adopted the MUTCD by reference. Appellant Br. 10. But, as argued *supra*, the duty in this case stems from the recreational land use statute because the accident happened in a park. The duty does not flow from the MUTCD. As the trial court noted, Mr. Jewels was a recreational

user because the access road was clearly within the park boundaries and was "part of the park area." RP 16. Mr. Jewels has failed to provide any authority for his position that there is an exception to the duty of care owed to park users when the accident occurs in a park driveway, access road, or parking lot. Furthermore, City engineer Rory Routhe stated, without contradiction from Mr. Jewels, that the MUTCD does not apply to park driveways, access roads, and parking lots. CP 152-154.

Additionally, while Mr. Jewels continues to argue that the MUTCD applies because the MUTCD sets standards for traffic control devices, the water-diverter is in fact not a traffic control device. City park manager Tom Slack stated that the water-diverter was installed to facilitate drainage, not to control traffic. CP 16. Mr. Jewels has provided no evidence that the water-diverter is a "traffic control device" that is subject to MUTCD standards. For these reasons and the reasons articulated above, Mr. Jewels' arguments that the MUTCD establishes a duty for an accident in a City park fails.

Second, Mr. Jewels also argues that a City ordinance required him to bypass the speed bumps in Cornwall Park. Appellant Br. 18. Specifically, he argues a City ordinance required him to ride his bicycle as far right as practicable. Appellant Br. 18-19. However, Bellingham Municipal Code (BMC) 11.48.070 requires a bicyclists to ride to the right

on a "roadway." Chapter 11 of the BMC governs vehicles and traffic. Thus, 11.48.070 clearly applies to traffic on City streets, not driveways and access roads. Further, even if the ordinance did require him to ride his bicycle as far as practicable to the right on the Cornwall Park access road, that does not change the duty of care in a City park, which is defined by RCW 4.24.210.

Finally, despite his assertions (Appellant Br. 31), the evidence shows that the gaps at the end of the speed bumps were created for drainage purposes, not to allow for bicycles to go around them. CP 16. Indeed, Tom Slack said: "[t]he speed bumps are designed to stop short of the curb for drainage purposes. The gaps from curb to speed bump are not designed for bicyclists to bypass speed bumps." CP 16. The only evidence Mr. Jewels provided in regards to the reasons for the gaps is the declaration of Jim Couch. CP 107-109.

But Couch only states that, in his experience, there are gaps at the end of speed bumps and he believes the gaps exist for "things to pass such as motorcycles or cyclists." CP 108-109, Appellant Br. 27, 31. There is no foundation for this opinion. Couch is not an engineer, or any other type of expert who is qualified to discuss traffic control devices and drainage. While he apparently has seen gaps at the end of speed bumps, this does not qualify him to opine as to their purpose. Tom Slack ,on the other hand,

has personal knowledge as to why the gaps exist in Cornwall Park. CP 14. Thus, in regards to the reasons for the gaps at the end of the speed bumps, there is no genuine issue as to their purpose. Mr. Jewels argument that the gaps exist for bicycles is not supported by the record and therefore fails.

## IV. CONCLUSION

It is undisputed that Mr. Jewels' accident happened in a City park. Because it happened in a City park, recreational land use immunity applies. A reasonable juror would conclude, based on the evidence, that the water-diverter and curb area was visible and obvious. Further, there is no evidence the City had actual knowledge of an alleged danger. Finally, there is no evidence showing the water-diverter and curb area was unreasonably dangerous. For all of these reasons, the City is entitled to recreational land use immunity under RCW 4.24.210.

Furthermore, because the accident happened in the park, standards for streets and highways are irrelevant to this case. Mr. Jewels' arguments in this vain our not supported by law and are nothing more than a red-herring.

The trial court appropriately granted the City summary judgment based on straight forward precedent and dismissed the case with prejudice. The City respectfully asks this Court to affirm that decision.

Respectfully submitted this 24th day of April, 2013.

CITY OF BELLINGHAM

Shane P. Brady, WSBA No. 34003
AssistantCity Attorney

Court of Appeals of Washington,
Division 1.

Kevin **TENNYSON** and Tamara **Tennyson**, husband and wife, Appellants/Cross-Respondents,
v.
PLUM CREEK TIMBER CO., L.P., a partnership; C. Wyss & Son, Inc., a corporation; Lumsden Logging, Inc., a corporation, and Respondents/Cross-Appellants,
Blue Dot Excavating, Inc., a corporation, Respondent.

No. 32262-1-I.
April 4, 1994.

Motorcyclist injured in fall down excavated side of gravel mound brought action against landowner and contractors involved in excavation, seeking damages. The Superior Court, King County, J. Kathleen Learned, J., granted summary judgment in favor of defendants, and motorcyclist appealed. The Court of Appeals, Coleman, J., held that: (1) excavation was not "latent" condition within meaning of recreational land use statute and, thus, landowner was immune from liability; (2) immunity provided by recreational land use statute did not apply to contractors; but (3) completion and acceptance doctrine operated as defense to contractors' liability.

Affirmed.

Kennedy, J., filed partially dissenting opinion.

West Headnotes

**[1] Automobiles 48A ⚿17**

48A Automobiles
48AI Control, Regulation, and Use in General
48Ak17 k. Injuries from Defects in Private Premises. Most Cited Cases

Excavation of gravel mound, down which motorcyclist fell, was not "latent" condition within meaning of recreational land use statute and, thus, landowner was immune from liability for motorcyclist's injuries; excavation was in plain view and readily apparent to anyone who examined gravel mound as whole, and fact that some recreational users, i.e., those who approached from northwest and rode up mound without checking other side, might fail to discover excavation did not render it latent within meaning of statute. West's RCWA 4.24.210.



**[2] Negligence 272 ⚿1197**

272 Negligence
272XVII Premises Liability
272XVII(F) Recreational Use Doctrine and Statutes
272k1197 k. Willful or Malicious Acts; Gross Negligence. Most Cited Cases
(Formerly 272k37)

Reasonableness of particular recreational user's failure to discover condition has no bearing on whether condition is "latent" within meaning of recreational land use statute; dispositive question is whether condition is readily apparent to general class of recreational users, not whether one user might fail to discover it. West's RCWA 4.24.210.

**[3] Negligence 272 ⚿1193**

272 Negligence
272XVII Premises Liability
272XVII(F) Recreational Use Doctrine and Statutes
272k1193 k. Construction of Statutes in General. Most Cited Cases
(Formerly 272k37)

Under recreational land use statute, landowner is not required to anticipate various ways that people might use its property, nor is landowner required to predict possible scenarios in which user might fail to see patent condition. West's RCWA

4.24.210.

**[4] Negligence 272 ⚿1194**

272 Negligence
272XVII Premises Liability
272XVII(F) Recreational Use Doctrine and Statutes
272k1194 k. Property, Conditions, Activities and Persons Covered. Most Cited Cases
(Formerly 272k37)
Recreational land use statute applies if person in lawful possession and control of lands allows public to use them for recreational purposes without charging fee. West's RCWA 4.24.210.

**[5] Automobiles 48A ⚿17**

48A Automobiles
48AI Control, Regulation, and Use in General
48Ak17 k. Injuries from Defects in Private Premises. Most Cited Cases
Immunity provided by recreational land use statute did not apply to contractors who performed excavation of gravel mound leading to motorcyclist's injuries, as they did not satisfy "possession and control" requirement; contractors went onto property for purpose of fulfilling contractual obligations and left after those obligations were met and, under those circumstances, contractors had no continuing authority to determine whether land should be open to public, and extending immunity to them would not further statute's purpose of encouraging landowners to open their land by limiting their liability. West's RCWA 4.24.210.

**[6] Automobiles 48A ⚿17**

48A Automobiles
48AI Control, Regulation, and Use in General
48Ak17 k. Injuries from Defects in Private Premises. Most Cited Cases
Completion and acceptance doctrine operated as defense to contractors' liability for injuries sustained by motorcyclist in fall down gravel mound which contractors had excavated; in each instance, contractor completed work, which was then turned over and accepted by landowner, all substantially prior to incident involving motorcyclist.

****525*551** Eugene M. Moen, Seattle, for appellants.

J. Thomas Richardson, Cairncross & Hempelmann, Seattle, Bertil F. Johnson, Davies Pearson, Tacoma, Walter G. Meyer, Meyer & Fluegge; and James S. Berg, Yakima, for respondents.

***552** COLEMAN, Judge.

Kevin Tennyson appeals the trial court's grant of summary judgment in favor of Plum Creek Timber Co., C. Wyss & Son, Inc., Blue Dot Excavating, Inc., and Lumsden Logging, Inc., "the contractors." Tennyson contends that (1) the altered gravel mound was "latent" as a matter of law under RCW 4.24.210, [FN1] (2) the contractors may not claim immunity****526** under RCW 4.24.210, and (3) the completion and acceptance doctrine does not relieve the contractors from liability. We affirm.[FN2]

FN1. Former RCW 4.24.210 provided in part:

> "Any public or private landowners or others in lawful possession and control of any lands whether 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: ... Provided ... That nothing in this section shall prevent the liability of such 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[.]"

FN2. In determining whether an order of

> summary judgment has been properly entered, this court engages in the same inquiry as the trial court and views all evidence in the light most favorable to the nonmoving party. Summary judgment will only be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Rhea v. Grandview Sch. Dist. JT 116-200,* 39 Wash.App. 557, 559, 694 P.2d 666 (1985).

On August 4, 1991, Tennyson was injured while riding his off-road motorcycle on land owned by Plum Creek Timber Company. The injuries occurred when Tennyson fell after driving his motorcycle up a large gravel mound that had been substantially excavated on the other side.

Tennyson had ridden his motorcycle on the same mound 14 months before the accident. He alleges that, as he approached the pile from the northwest, it appeared to be in the same condition as earlier. There was still a trail going up the northwest face of the mound. However, when he reached the top of the mound he realized something was different and he attempted to stop. His motorcycle came to a stop at the edge of the drop off, but his front wheel broke through the edge and he tumbled down the hill, receiving serious personal injuries.

***553** In the period between when Tennyson last rode over the mound and the day of the accident, over one-half of the mound had been removed on the southeast side. The result was a sharp drop off from the top of the mound along the southeast side. There were no warning signs at the site; however, the drop off was clearly visible from all other directions except the northwest direction from which Tennyson approached.

[1] We first determine whether the excavation constituted a latent condition, thereby subjecting Plum Creek to liability under RCW 4.24.210.

The recreational land use statute, RCW 4.24.210, limits landowners' liability for injuries occurring on their property. Landowners, however, remain liable for injuries caused by "a known dangerous artificial latent condition". The purpose behind this limitation of liability is to encourage landowners to open their land to the public for recreational use. RCW 4.24.200.

In *Van Dinter v. Kennewick,* 64 Wash.App. 930, 931, 827 P.2d 329 (1992), *aff'd,* 121 Wash.2d 38, 44, 846 P.2d 522 (1993) (*Van Dinter I* ),[FN3] the appellant was injured by a protruding metal antenna attached to a caterpillar-shaped piece of playground equipment. The appellant did not dispute that the antenna was obvious but argued that the City should have anticipated that "persons using the park in the expected manner-running and playing-would have their attention distracted and would not discover the obvious." *Van Dinter I,* at 936, 827 P.2d 329.

> FN3. Throughout this opinion, we distinguish between the Court of Appeals' decision and the Supreme Court's decision by using the names *Van Dinter I* and *Van Dinter II.*

Analyzing RCW 4.24.210, the court concluded that the landowner (the City of Kennewick) was immune from liability. The court distinguished landowners' liability under the statute from landowners' liability under the common law, stating:

> *[A]bsent RCW 4.24.210,* the landowner is liable for injuries caused by an obvious condition of his land which he should ***554** expect the invitee will not discover because of the circumstances surrounding his use of the property. *If we were also to interpret RCW 4.24.210 to provide for landowner liability for injuries caused by patent conditions which the owner should expect the user not to discover, we would effectively convert recreational users back to their common law status as public invitees.* Such an interpretation would defeat the purpose of RCW 4.24.210[.]

(Italics ours.) *Van Dinter I,* at 935, 827 P.2d 329. Thus, the court concluded, the statute "immunizes the City from liability for injuries caused by obvious conditions, even if the ****527** plaintiff reasonably failed to discover the danger." *Van Dinter I,* at 936, 827 P.2d 329.

In *Van Dinter II,* the Supreme Court affirmed the Court of Appeals, using a different analysis. The court determined that the scope of the "condition" for purposes of the statute included the caterpillar's placement in the park-specifically, its proximity to the grassy area, as well as the antenna itself. *Van Dinter v. Kennewick (Van Dinter II),* 121 Wash.2d 38, 44, 846 P.2d 522 (1993).

The court then addressed Van Dinter's argument that the City should be liable because although the condition itself was patent, the danger it posed was latent. The court rejected this argument, stating that "RCW 4.24.210 does not hold landowners potentially liable for patent conditions with latent dangers. The condition itself must be latent." *Van Dinter II,* at 46, 846 P.2d 522. The court then concluded that although it may not have occurred to Van Dinter that he could injure himself the way he did, the proximity of the caterpillar to the grassy area was obvious and the dangerous condition was therefore not latent. *Van Dinter II,* at 46, 47, 846 P.2d 522.

In *Gaeta v. Seattle City Light,* 54 Wash.App. 603, 774 P.2d 1255, *review denied,* 113 Wash.2d 1020, 781 P.2d 1322 (1989), the appellant was riding his motorcycle on a roadway across the Diablo Dam that had specialized rail tracks on one side. He did not notice the tracks until he was between them. As he tried to steer his motorcycle out from between the tracks, his wheel lodged in a groove next to one of the tracks, and the appellant was injured. *Gaeta,* at 605-06, 774 P.2d 1255. Despite the fact that the ***555** appellant had not noticed the tracks, the court concluded that the tracks were obvious. *Gaeta,* at 610, 774 P.2d 1255.

Here, Tennyson claims that the excavation was not obvious to him and that "latency may well depend on the vantage point of the recreational user." Reply Brief of Appellant, at 4. He also argues that this court can affirm the summary judgment only if it concludes that "no reasonable juror could conclude that Kevin Tennyson acted reasonably in riding up the well-marked path on the northwest slope of the gravel mound."

[2] We disagree. Under the case law, what a particular recreational user reasonably did or did not see has no bearing on whether a condition is latent. In *Van Dinter I,* the appellant's primary argument was that the caterpillar's antennae were not apparent to a person using the park in the expected manner, *i.e.,* running and playing. *Van Dinter I,* 64 Wash.App. at 936, 827 P.2d 329. Rejecting this argument, the court specifically stated that under RCW 4.24.210, landowners should not be held liable for injuries caused by undiscovered patent conditions. *Van Dinter I,* at 935, 827 P.2d 329. Although in *Van Dinter II,* the Supreme Court relied on a different analysis and did not reach the arguments addressed in *Van Dinter I,* the Supreme Court did not disagree with or overrule the Court of Appeals' reasoning.

In addition, in *Gaeta,* the appellant did not discover the tracks until he was between them. Nonetheless, without concluding that the failure to notice the tracks was unreasonable, the court held that the condition was not latent. *Gaeta,* 64 Wash.App. at 605, 610, 774 P.2d 1255. Thus, as demonstrated by *Van Dinter I* and *Gaeta,* the reasonableness of a particular recreational user's failure to discover a condition has no bearing on whether the condition is latent. We believe that the dispositive question is whether the condition is readily apparent to the general class of recreational users, not whether one user might fail to discover it.

In the present case, the excavation was considerably larger and more conspicuous than either the antennae in *Van Dinter I* or the tracks in *Gaeta.* As the trial court noted, the excavation was in plain view and readily apparent to ***556** anyone who ex-

amined the gravel mound as a whole. The fact that some recreational users, *i.e.,* those who approach from the northwest and ride up the mound without checking the other side, might fail to discover the excavation does not render it latent within the meaning of the statute.

[3] As the *Van Dinter I* court pointed out, allowing liability "for injuries caused by patent conditions which the owner should expect the user not to discover ... would ****528** effectively convert recreational users back to their common law status as public invitees." We believe that under the statute, a landowner is not required to anticipate the various ways that people might use its property, nor is a landowner required to predict possible scenarios in which a user might fail to see a patent condition. Thus, we conclude that the statute relieved Plum Creek from the burden of anticipating that someone might attempt to ride up the mound from the northwest side without examining it.[FN4] The trial court correctly concluded that the excavation was not a latent condition within the meaning of the statute.

> FN4. To support his claim that the excavation was latent, Tennyson analogizes the excavation to a pit in a road which cannot be seen by drivers approaching from one side due to a curve in the road. However, the excavation in the present case differs from Tennyson's analogy in that this was not a situation where the condition was unexpected.
>
> The record reflects that Tennyson knew that the gravel pile was a stockpile and that gravel could be removed at any time. The fact that Tennyson knew the gravel pile was subject to change supports our determination that the condition was not latent and demonstrates the logic of the approach we have adopted.

We next address whether the trial court erred by applying the immunity of Washington's recreational land use statute to the contractors.

[4][5] RCW 4.24.210 applies if a person in lawful possession and control of lands allows the public to use them for recreational purposes without charging a fee. Here, the contractors argue that they are entitled to immunity under the statute because they had lawful possession and control of the land at the time the alleged negligent acts occurred. We disagree.

***557** In *Labree v. Millville Mfg., Inc.,* 195 N.J.Super. 575, 481 A.2d 286 (App.Div.1984), a subcontractor and a landowner entered into an agreement that allowed the subcontractor to excavate gravel and sand from the land "to the extent necessary" to construct a nearby road. The excavation resulted in the creation of a lake, which was used by the public for swimming. Several years after the excavation was completed, the plaintiff was injured when he dove into the water and hit his head on a submerged obstruction. *Labree,* 481 A.2d, at 288.

On appeal, the court interpreted a statute that immunized an "owner, lessee, or occupant" from liability for injuries incurred by recreational users of the land.[FN5] The court noted the general rule that immunity is not favored in the law and that statutory grants of immunity should be strictly construed. The court then determined that the word "occupant" as used in the statute was intended "to provide immunity for an entity with a degree of permanence in the occupancy, not merely one who is using the property, as was the case with [the subcontractor]." The court also emphasized that the subcontractor's license to use the land was limited to the purposes specified under the contract. *Labree,* 481 A.2d at 291.

> FN5. The New Jersey statute provides in part:
>
> a. An owner, lessee or occupant of premises, whether or not posted as provided in section 23:7-7 of the Revised Statutes, owes no duty to keep the premises safe for entry or use by others for sport and recreational activities, or to

> give warning of any hazardous condition of the land or in connection with the use of any structure or by reason of any activity on such premises to persons entering for such purposes[.]
>
> *Labree,* 481 A.2d at 289 (quoting N.J.S.A. 2A:42A-3).

We believe that the reasoning in *Labree* applies to the present case. The "possession and control" requirement clearly indicates a broader, more permanent interest in the land than was present here. As in *Labree,* the agreements between Plum Creek and the contractors were for purposes of excavation. There is no evidence that the contractors' activities went beyond those specified in their agreements.

In addition, as in *Labree,* these limited contractual rights expired when the contractors completed their work, which ***558** was many months prior to Tennyson's accident.[FN6] The record indicates that the contractors went onto the property for the purpose of fulfilling contractual obligations and left after these ****529** obligations were met. Under these circumstances, the contractors had no continuing authority to determine whether the land should be open to the public, and extending immunity to them would not further the purpose behind the act, which is to encourage landowners to open their land by limiting their liability. Therefore, we decline to extend immunity under RCW 4.24.210 to the contractors.

> FN6. The last contractor to excavate, Blue Dot Excavating, removed gravel in mid-October 1990, nearly 10 months prior to Tennyson's accident.

[6] Finally, we address whether the contractors are immune from liability under the doctrine of completion and acceptance.

The completion and acceptance doctrine operates as a defense to contractor liability. The rule has been phrased as follows:

> [W]here the work of an independent contractor is completed, turned over to, and accepted by, the owner, the contractor is not liable to third persons for damages or injuries subsequently suffered by reason of the condition of the work, even though he was negligent in carrying out the contract[.]

*Andrews v. Del Guzzi,* 56 Wash.2d 381, 388, 353 P.2d 422 (1960) (recognizing doctrine but finding contractors liable under exception for inherently or imminently dangerous conditions) (quoting 65 C.J.S. 613); *Donaldson v. Jones,* 188 Wash. 46, 50, 61 P.2d 1007 (1936) (recognizing the doctrine of completion and acceptance as the "well settled" general rule); *Axland v. Pacific Heating Co.,* 159 Wash. 401, 406, 293 P. 466 (1930) (recognizing general rule but finding that condition fell within exception).

We recognize that the completion and acceptance doctrine has been criticized.[FN7] However, in Washington the doctrine ***559** has continuing validity, and we conclude that it is applicable to the present case. In each instance, the contractor completed the work, which was then turned over and accepted by Plum Creek. This occurred substantially prior to the incident involving Tennyson. Accordingly, we affirm the trial court on this issue.[FN8]

> FN7. For example, 41 Am.Jur.2d *Independent Contractors* § 50 (1968) provides in part:
>
> > [I]t is now the generally accepted view that ... a contractor is held to the standard of reasonable care for the protection of third parties who may foreseeably be endangered by his negligence, even after acceptance of the work by the contractee, and the early theory that lack of privity of contract between the contractor and the injured third person was a valid defense no longer prevails.

(Footnotes omitted.)

FN8. Implicitly within this holding is also a rejection of Tennyson's and Plum Creek's argument that the inherent or imminent danger exception should apply. This exception was recognized by the four dissenters in *Andrews v. Del Guzzi, supra,* who stated: "Items which qualify as exceptions to the general rule have been limited by the courts to those having known dangerous propensities, such as dynamite, gun powder, dynamite caps, and firearms." *Andrews,* 56 Wash.2d at 392, 353 P.2d 422. A gravel pile, unlike dynamite, gun powder, or other flammable or explosive materials, does not have a known dangerous propensity.

The order of the trial court is affirmed.

WEBSTER, J., concurs.
KENNEDY, J., dissents in part and files opinion.

KENNEDY, Judge (dissenting in part).

I respectfully dissent from the majority's conclusion that the dangerous condition in this case is patent as a matter of law.[FN1] In order to clarify the basis of my disagreement, I must state some additional facts not mentioned by the majority. Most of these additional facts are undisputed; a few are disputed; all must be viewed in the light most favorable to Tennyson, for the purposes of this review. *Sea-Pac Co., Inc. v. United Food & Commercial Workers Local Union 44,* 103 Wash.2d 800, 802, 699 P.2d 217 (1985).

FN1. I fully concur with the majority opinion that the three independent contractors are not immune under the recreational land use act but that they are immune by virtue of the doctrine of completion and acceptance, to which this court is currently bound by virtue of the rulings of our Supreme Court. Accordingly, I would reverse and remand for a trial on the merits, but only as to Plum Creek Timber Company.

FACTS

Plum Creek Timber Company (Plum Creek) owns 3000 acres of land located in the vicinity of three towns in Kittitas County: ****530** Cle Elum, Roslyn and Ronald. All of this land is open ***560** to public recreational use, free of charge. On any given weekend from April to October in 1990 and 1991, some 2000 dirt bikers could be found in the vicinity of the gravel mound. Before the excavation of the southeast end of the mound, literally hundreds of dirt bikers were accustomed to riding up and over the northwest end of the mound and back down to ground level on the southeast end of the mound.

The gravel mound as originally constructed was rectangular in shape. It was 266 feet long on its longest, easterly and westerly sides, and 20 feet tall. It held 12,000 cubic yards of well-compacted gravel and dirt. It was flat on top. Its sides sloped inward and upward at about a 45 degree angle-flatter, however, than that at the northwesterly end. By 1990 when Tennyson first rode on the mound, weeds and grasses grew sparsely over the surfaces of the mound.

For its own business purposes, Plum Creek had built a network of gravel and dirt roads leading into, over and through its 3000 acres of land. Dirt bikers made free use of these roads. People coming onto the property from Cle Elum and travelling to the area of the gravel mound for business or recreational purposes most often arrived at the mound from the southeast, using one of Plum Creek's private roads, in that this was the most direct route to the mound from Cle Elum. Tennyson approached the mound from the southeast on Memorial Day weekend of 1990, the date of his first visit to the mound.

However, it was also possible to reach the mound from the opposite direction on that same roadway, as did Tennyson and five of his friends on August 4, 1991. Tennyson had come onto the prop-

erty from Roslyn/Ronald in August 1991, rather than from Cle Elum. Plum Creek did not restrict its recreational users to any particular route into or out of its property, or to any particular route to and from the gravel mound.[FN2]

FN2. A portion of the Roslyn town limits borders on a perimeter of Plum Creek's 3000-acre site. Although signs were posted discouraging dirt bikers whose vehicles were not licensed and equipped for public-street use from straying onto the streets of Roslyn, recreational users were not restricted from entering Plum Creek's property from the streets of Roslyn.

***561** It is undisputed that dirt bikers who arrived at the mound from the southeast, following the excavation which was done in October 1990, could clearly see that the southeast end of the mound had been excavated away and that the excavation ended in a sheer, man-made cliff with a 20-foot vertical drop. As to riders arriving from the southeast, there can be no question that this condition was patent. It is equally clear from the record that dirt bikers arriving at the mound on this same roadway but from the northwest could not see the man-made cliff unless and until they continued far enough along that same roadway, which runs parallel to the easterly, long side of the rectangular mound, to enable them to view the mound in profile from its broad side.[FN3] This is so even though the mound, which had originally been some 266 feet long on its easterly and westerly sides, was reduced by the excavation to a rectangle with long sides of some 136 feet.

FN3. In this sense, the majority correctly states that the drop-off at the southeast end of the mound was clearly visible from three of its four sides. Majority, at 526.

Gary Sloan, Ph.D., a psychologist who obtained his Ph.D. degree in ergonomics with a minor in industrial engineering, and who specializes in human factors and ergonomics, explained why this is so in a declaration prepared for the summary judgment proceeding.[FN4] There were no visual cues from the northwest end of the mound to give a dirt bike rider, and particularly a rider who had safely ridden on the mound before the excavation was done, any indication that the southeast end of the mound now ended in a ****531** steep man-made cliff. The coloration of the mound provided very little contrast to the background. A well-worn trail, made by literally hundreds of dirt bikers, led directly from the roadway at the northwest end of the mound to the mound itself and ***562** then continued up and over the mound.[FN5] It was this well-worn trail that Tennyson followed on the day of his accident. *See* Appendix A to this dissenting opinion-a photocopy of two photographs of the mound which depict what Tennyson would have seen as he approached the mound on August 4, 1991. The overall appearance of the mound when viewed from its northwest end, including the well-marked trail and the amount of vegetation on the mound, was unchanged between Memorial Day 1990, when Tennyson first rode there, and August 4, 1991, the day of his fall.

FN4. Dr. Sloan's credentials are included in the record. He clearly could qualify to give expert opinion testimony based on his training, education, professional experience and investigation of this accident. Dr. Sloan reviewed all the depositions and declarations which are contained in the record for this appeal. He also visited the gravel mound, made observations and took extensive photographs and measurements before formulating his opinion. His declaration and credentials are found at CP 466-76, inclusive.

FN5. It is undisputed that regardless of the direction from which they might have arrived at the mound initially, most dirt bikers made their runs for the top from the northwest end of the mound and then, until the time of the excavation, went over the

> top and back down to ground level over the southeast end of the mound. Plum Creek was fully aware of this. Mr. Larry Spear, Plum Creek's production superintendent, was himself a recreational dirt biker who often rode in the vicinity of the mound.

Given predictable human behavior, Dr. Sloan opines that a rider such as Tennyson who had ridden safely on the mound before would likely expect that he could ride safely on the mound again because there were no visual cues to alert him that the mound had been so drastically changed at its southeast end. Riders who are totally unfamiliar with the terrain they are travelling through will probably focus on the part of the trail that is 2 to 2 1/2 seconds ahead of them, so that they will have sufficient time to make complex decisions, such as turning around or heading in another direction. Bike riders who are familiar with the area in which they are riding are more likely to focus on that portion of the trail which is 1 to 1 1/2 seconds ahead of them, so that if they see a rut or another obstacle, they can steer around it. The shorter the preview time, the less information is obtained by a rider about distant conditions, obstacles and hazards.

Dr. Sloan also opines that once reaching the top of the mound and even after perceiving that the top of the mound had been shortened and that there was an edge looming, such a rider would not be warned that the edge ended in a ***563** 20-foot vertical drop, because "there is always the appearance of an edge when the slope [of a mound] changes at an angle greater than that from the rider's eyes to the point of change of the slope". CP 470.

Tennyson was able to bring his bike to a complete stop at the edge of the drop-off, but there was yet another latent aspect to this condition. There was a lip at the edge of the mound which obscured the steepness of the drop-off as viewed from the top of the mound. The lip was inadequate to support the weight of both the rider and his bike. Thus, Tennyson "quickly experienced the startling sensation of the front wheel of his bike breaking through the soil." CP 470. Dr. Sloan opines that Tennyson could not, while stopped at the edge of the drop-off, have perceived that the drop-off was as steep as it was or that the soil beneath his front wheel was as unstable as it was.

Dr. Sloan also points out that expectancy plays a large role in the ability of human beings to detect and respond to situations. He opines that the cliff was not readily apparent to Tennyson, until it was too late to save himself, due to a combination of expectancy (based on prior safe use of the mound), the lack of visual cues from the northwest end of the mound, the well-used trail leading to, and up and over the mound, and the physical factors that made it impossible for one in Tennyson's position to detect the steepness of the cliff and the instability of the soil, from the top of the mound.

Finally, and as is also referred to elsewhere in the record as well, Dr. Sloan notes and finds it to be statistically significant in terms of both the dangerousness of the condition and its latency as to some users, that Tennyson was not the first dirt biker to approach the mound from the northwest and to ride up the northwest end of the mound only to fall over the edge of this cliff. Another young man who had also earlier safely ****532** ridden this same trail arrived from the northwesterly direction as did Tennyson, after the excavation was done. Like Tennyson, he rode his bike up the northwest end ***564** of the mound. He and his bike went over the cliff. Unlike Tennyson, this other rider was able to get up and walk away afterward. Tennyson was not so fortunate. As the result of his fall, Tennyson is a permanent paraplegic. FN6

> FN6. Although the record reflects that this other rider fell before Tennyson did, it is not clear from the record whether Plum Creek learned about the other rider's fall before Tennyson fell, or only after the current litigation began.

DISCUSSION

It is undisputed in the record before us that

Plum Creek knew about the artificial condition, knew that it was dangerous to dirt bikers, knew that some 2000 dirt bikers swarmed in the vicinity of the gravel mound every weekend from April to October, knew that hundreds of those bikers were accustomed to riding on the mound, and knew that some bikers could and did reach the mound from the northwesterly direction on a roadway built by Plum Creek.

If it is generally true that a landowner need not "anticipate" the various ways that recreational users might use its property, majority at 528, it must also be true that the landowner cannot ignore that which it already knows about the ways that recreational users *are in fact* using the property, when it comes to the question of a duty to warn of a known, dangerous condition, and I would so hold.

By the terms of the recreational land use statute, a landowner who has opened his land to public recreational use without charging a fee and who knows about a dangerous, artificial condition that exists on the land, need do only two things in order to secure statutory immunity for injuries by reason of the dangerous condition: (1) determine whether the condition is "latent" as that term is used in the statute; and (2) if it is, post a conspicuous warning sign to alert recreational users to the "not readily apparent" danger.

A latent condition is one which is not readily apparent to the recreational user. *Morgan v. United States,* 709 F.2d 580, 583 (9th Cir.1983); *Van Dinter v. Kennewick,* 121 Wash.2d 38, 44-45, 846 P.2d 522 (1993). A person who takes ***565** advantage of the opportunity to use another's land for recreational purposes without paying a fee does so at his or her own risk, *except* that he or she is entitled to expect to be warned by means of a conspicuous sign of any man-made, dangerous condition on the property of which the landowner is aware and which is not readily apparent to the recreational user.[FN7]

FN7. Tennyson testified that at a gravel pit near Bothell, Washington, where he had also gone dirt biking, and where trails led to the edge of the gravel pit, he had seen signs warning bikers and other recreational users when excavations at the pit resulted in steep drop-offs. As Tennyson put it during his deposition, these signs "seemed to work." CP 67. Ironically, where some landowners pay heed to the law and post warning signs as provided by the recreational land use act, the expectations of recreational users that other landowners will also obey the law may well be increased. By the majority's reasoning, however, the owner of the gravel pit near Bothell could remove the warning signs with impunity. No doubt a recreational user could see a dangerous excavation anywhere in the pit, simply by walking or riding all around the circumference of the pit, so as to view it from every angle. By the reasoning of the majority, it would seem that steep excavations at the Bothell site would be patent conditions as a matter of law.

Tennyson analogizes the well-worn dirt bike trail that led to and up and over the northwest end of the mound to a dirt road located on hypothetical recreational land. Unbeknownst to a recreational user who is travelling on that roadway, a deep pit has been dug in the roadway, just beyond a blind curve. The curve blocks the user's view of the pit, although the pit is clearly visible and thus readily apparent to a recreational user who is coming from the opposite direction. As to this hypothetical, Tennyson, Plum Creek and this court all agree: the pit in the roadway would be patent as to the user whose view of it was not obstructed, but latent as to the user whose view was obstructed by the blind curve, and it would not matter if *most* users of the road approached from the direction from which they could see the pit well in advance. Thus, it appears that a condition *may* be patent as to some recreational users but latent as to others. ****533** Why then, can that not be so with respect to this case? I

think that it can.

***566** The majority nevertheless disposes of Tennyson's analogy at p. 8 of the majority opinion, n. 4, by stating that Tennyson, who admitted at his deposition that he knew the gravel mound was a stockpile and that gravel can be removed from a stockpile at any time, *expected* the condition to occur, whereas a user on the roadway in the hypothetical example would not *expect* there to be a pit in the road. There are several problems with this reasoning, logically and jurisprudentially.

First, being aware that stockpiled gravel can be removed at any time is a far cry from expecting that if, as and when the gravel is removed, the mound will not be reshaped to its earlier symmetry,[FN8] especially when the mound is located on property where 2000 dirt bikers are known to ride on each and every weekend between April and October. Expecting that stockpiled gravel can be removed at anytime is a far cry from expecting that if, as and when the gravel is removed, there will be left a 20-foot, man-made cliff right in the middle of a well-worn, heavily travelled dirt bike trail which literally hundreds of dirt bikers are accustomed to using each and every weekend from April to October. Expecting that stockpiled gravel can be removed at anytime is a far cry from expecting that if, as and when the gravel is removed and if, as and when a 20-foot man-made cliff is left in the middle of a well-work bike trail, there will be no warning sign conspicuously posted, especially when the mound is the known and accustomed playground of hundreds of dirt bikers who come each and every weekend from April to October, and not all of them from the same direction.

> FN8. The undisputed evidence is that gravel mounds usually are made symmetrical, simply because that makes it easier to calculate the cubic yardage contained in the mound at any given time.

What Mr. Tennyson truly "expected" is a disputed issue of fact. Dr. Sloan provides a rational explanation of why Tennyson and at least one other hapless biker "expected" nothing more on the days of their respective falls than what they had ***567** experienced before, a safe ride on the gravel mound. The majority has usurped for itself the role of the trier of fact in a case where reasonable minds can differ as to the latency of the dangerous condition to the recreational user who comes to the mound from the northwesterly direction. I believe that Tennyson's analogy to the pit in the road is apt. The well-worn trail leading to, up and over the northwest end of the mound looks very like a road. *See* Appendix A.

The question of whether a reasonable and prudent dirt biker would have taken the precaution of inspecting the mound from every angle before riding on it is a legitimate question, but not one that relates to the latency of the condition. Rather, if the trier of fact were to find that the known, dangerous artificial condition was also latent so that there was a duty to post a warning sign and a breach of that duty, there would next arise the issues of proximate cause and contributory negligence.[FN9] The trial court was not asked to address proximate cause and contributory negligence. These issues are not before us, either.

> FN9. Tennyson understands this very well, and, contrary to the statement of the majority at p. 527, Tennyson has never argued that the latency/patency issue depends upon whether he acted reasonably in riding up the mound. The majority misunderstands Tennyson's argument and quotes him out of context. It is Plum Creek which has continuously confused latency/patency with contributory negligence. Tennyson, in his reply brief was merely pointing out the fallacy of Plum Creek's reasoning and arguing that, if, but only if this court were to accept Plum Creek's fallacious argument then it *would* follow that we could affirm the trial court only if we were to conclude that "no reasonable juror could conclude

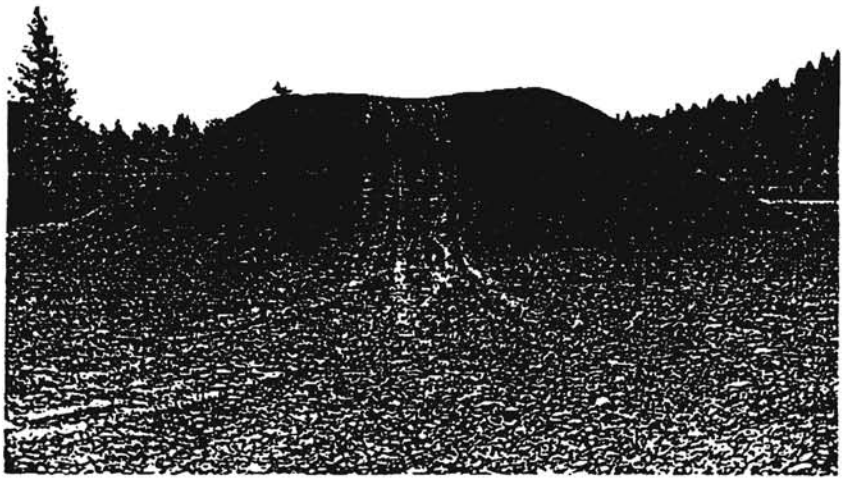
> that Kevin Tennyson acted reasonably in riding up the well-marked path on the northwest slope of the gravel mound." Reply brief of appellant, at 3-4; majority, at 527.

It is potentially misleading to say, as the majority does at 527, that what a recreational user reasonably did or did not see has *no* bearing on whether a condition is latent. There is a relationship of sorts. Certainly if a condition is latent, it is not unreasonable for the recreational user not to have seen it. If it is patent, then, per se, it is unreasonable for the recreational user *not* to have seen it. ****534** It would be better to say that patency/latency is the *status* of being ***568** readily apparent, or not, to the recreational user. If the condition is patent, the landowner is immune from liability and the inquiry ends. If the condition is latent and there is no warning sign, there may still be an issue as to the recreational user's contributory negligence but only for the purpose of determining the percentage, if any, by which the injured user's damages should be reduced. Any contributory negligence would not arise for failure to *see* the latent condition, but rather for acting in a given way or failing to act in a given way which could be deemed contributorily negligent. For example, if a reasonable dirt biker who had not ridden this mound in over a year, would have checked in advance to be sure there was *not* a latent, dangerous condition lurking, before venturing onto the mounds, then Tennyson was contributorily negligent, but that is a separate issue from the latency of the condition. I believe that the majority understands the distinction intellectually, but stumbles into error in the course of actual application.

In this case, on the evidence presented I believe that a rational trier of fact could and probably would find the condition to have been latent as to Tennyson and other users approaching the mound from the northwest, and very well might find that dirt biking is the type of activity which would require a biker who had not ridden on the mound for 14 months to inspect the mound before riding it again-notwithstanding Dr. Sloan's testimony. Alternatively, a jury could find Dr. Sloan's testimony very persuasive, not only with respect to latency but also with respect to contributory negligence. The point is, it is not *our* task to weigh the evidence, but only to determine whether it raises genuine issues of material fact.

Believing that it does, I dissent. I would reverse as to Plum Creek and remand for a trial on the merits.

****535 *569** APPENDIX A



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