Supreme Court Case No. 90319-1

Court of Appeals No. 69358-1-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STEVEN JEWELS,

Petitioner,

v.

CITY OF BELLINGHAM,

Respondent.

PETITION FOR REVIEW

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INTRODUCTION AND SUMMARY OF GROUNDS FOR REVIEW

Petitioner Steven Jewels, an experienced cyclist, was riding his bicycle on a paved road in a Bellingham city park. After encountering one speed bump that jarred him severely even though he went over it at a slow speed, he saw a second speed bump ahead. He headed for what looked like a gap between this second speed bump and the curb, but what looked like a gap was actually an unpainted extension of the speed bump. The deflected his front tire into the curb and ejected him from his bicycle. Jewels sustained a huge laceration on his leg and other injuries, and was taken to the emergency room for treatment. Less than a year earlier, the City of Bellingham had installed the speed bump that caused Jewels' accident. CP 16, ¶ 9; CP 72-73; CP 76; CP 90–92, ¶¶ 2, 7–13.

Jewels filed suit against Bellingham, alleging negligence in the design and installation of the speed bump. The trial court dismissed his action on summary judgment, and a divided Court of Appeals affirmed in a published opinion. The court held that Jewels' claim was barred by the recreational use statute, RCW 4.24.210. That statute provides that a landowner who allows the public to use its land for outdoor recreation may be liable "for injuries sustained to users by reason of a known dangerous artificial latent condition for which warning signs have not been

conspicuously posted." RCW 4.24.210(4)(a).[1] The Court of Appeals did not disagree that because Bellingham created the unpainted extension of the speed bump, it was presumed to know that the condition existed. It held, however, that the condition was not "known" because Bellingham did not know that the condition was dangerous.

That holding conflicts with this Court's settled interpretation of the recreational use statute's key phrase, "known dangerous artificial latent condition." RCW 4.24.210(4)(a). The four adjectives in this phrase, this Court has held, "modify 'condition,' not one another." *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 46, 846 P.2d 522 (1993). Here, however, the Court of Appeals interpreted the statute as if "known" modifies "dangerous," such that the landowner must know not only the condition's existence but also the danger it poses. This interpretation is irreconcilable with this Court's interpretation of the statute, and thus warrants review under RAP 13.4(b)(1).

Review is also warranted because the lower courts have issued contradictory decisions on when a condition is "known." RAP 13.4(b)(2). While one Court of Appeals decision did not require the landowner to

[1] RCW 4.24.210 has been amended since Jewels' injury, but the operative terms were not changed. The present version of the statute is cited here.

know more than the condition's existence, other decisions have required a landowner to know that the condition is dangerous.

Review is needed, finally, because the Court of Appeals' interpretation of the recreational use statute raises issues of substantial public policy interest. *See* RAP 13.4(b)(4). As Judge Becker pointed out in her dissent, exonerating landowners who know that a condition exists, but claim not to appreciate that the condition is dangerous, allows landowners "to cause one free accident before liability arises." App. A, dissent, at 4. Extending immunity to such landowners is particularly unjustified where, as here, the landowner has created the injury-causing condition.

IDENTITY OF PETITIONER

Steven Jewels, Plaintiff and Appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review.

CITATION TO COURT OF APPEALS DECISION

A copy of the published Court of Appeals decision, filed April 21, 2014, is attached as Appendix A to this Petition.

ISSUE PRESENTED FOR REVIEW

The recreational use statute, RCW 4.24.210, provides that landowners who allow the public to use their land for outdoor recreation may be liable "for injuries sustained to users by reason of a known dangerous artificial latent condition for which warning signs have not been

conspicuously posted." RCW 4.24.210(4)(a). The Court of Appeals held that for a condition to be "known," the landowner must know not only that the condition exists, but also that it is dangerous. The issue presented is:

> Is a condition "known" if the landowner created the condition and knows of its existence, even if the landowner claims not to have appreciated the danger that it posed?

STATEMENT OF FACTS AND PROCEDURE

On appeal from summary judgment, the facts are recited in the light most favorable to Jewels, with all his evidence accepted as true and all reasonable inferences drawn in his favor. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484-85, 258 P.3d 676 (2011). Where material facts regarding immunity are disputed, summary judgment is inappropriate. *Camicia v. Howard S. Wright Const. Co.*, 179 Wn.2d 684, 693, 317 P.3d 987 (2014).

I. Facts

On June 30, 2008, Steven Jewels was riding his bicycle through Bellingham. CP 91, ¶ 3. He noticed he was near Cornwall Park and decided to enter it via a paved roadway. CP 91, ¶¶ 4, 7. The City of Bellingham owns and maintains Cornwall Park. CP 9, ¶ 4. It had been at least ten years since Jewels had been in the Park. CP 91, ¶¶ 4-5.

In 2007, the City of Bellingham had installed speed bumps in the park. CP 16, ¶ 9; CP 10, ¶ 9. Jewels encountered two of them. He

encountered the first one at five to ten miles per hour. CP 91, ¶ 7. Striking the four-inch-high speed bump felt like "hitting a curb." CP 91, ¶7. It jarred him badly and knocked his water bottle out of position. CP 91, ¶ 7.

Jewels then saw a second speed bump, with what looked like a gap between the curb and the speed bump. CP 91, ¶¶ 7-8. A gap between a curb and a speed bump is common. CP 90-91, ¶¶ 2, 8. In fact, there had been a gap between the first speed bump and the curb. CP 91, ¶ 8. Jewels' expert roadway design engineer, Edward Stevens, PE, opined that speed bumps are "extra hazardous for bicycle traffic" and that in the past "gaps were designed within the speed bump length to allow bicyclists to traverse through the speed bump area." CP 81. Similarly, Jewels' expert Jim Couch, the owner of a Tacoma bicycle shop and a cycling coach who has biked throughout the state, testified that most of the speed bumps that he had seen are marked, do not take up the entire roadway, and instead have gaps between themselves and the curb for bicycles to use. CP 107-08.

But as Jewels approached what "looked like bare, flat pavement between the curb and speed bump," he instead encountered and struck an unpainted extension of the second speed bump. CP 92, ¶ 9. As a result, his front tire was deflected into a v-shaped notch in the curb at the end of the unpainted extension. CP 92, ¶ 10. The notch trapped his wheel and broke it. CP 92, ¶ 10. Jewels was thrown off the bike onto the cement, where he

suffered a serious laceration on his leg and other injuries. CP 92, ¶ 10. A nearby pedestrian found Jewels, used her shirt to staunch the bleeding of his leg, and called 911. CP 92, ¶ 11.

After learning of Jewels' injury, the City prepared a work order to correct what it identified as a "Safety Hazard," which it referred to as "Speed bump-2nd one in Cornwall S partly unpainted." CP 76. Noting that the "speed bump" was "only partly painted," the City ordered that the extension be painted yellow like the rest of the speed bump to "make it visible." CP 76. After Jewels sued the City, it conceded that it installed the speed bumps and the extension in the park, and that it did not paint the extension, though in litigation it now calls the speed bump an "asphalt water diverter adjacent to a speed bump." CP 10, ¶ 9.

II. Procedural history

In a published opinion, the Court of Appeals affirmed the trial court's grant of summary judgment. The majority held that Bellingham was immune under the recreational use statute, RCW 4.24.210, because Jewels had failed to show that "the City knew of the condition *and also knew* that it was dangerous and latent." App. A at 6 (emphasis added). The majority noted the City's claim that it had "no knowledge of any other accidents involving" the condition, and held that Jewels had presented no evidence to refute that claim. *Id.* at 6-7.

In dissent, Judge Becker would have held that because Bellingham had created the dangerous condition, it was presumed to have knowledge of it. *Id.*, dissent, at 1, 5. She rejected the majority's holding that under RCW 4.24.210 a landowner must know not merely of a condition's existence but also that the condition is dangerous. *See id.* at 5-6.

ARGUMENT

I. Review is warranted because the Court of Appeals' interpretation of the recreational use statute is irreconcilable with this Court's settled interpretation, adds to existing confusion in the lower courts, and is bad policy.

RCW 4.24.210, the recreational use statute, provides that a landowner is not immune "for injuries sustained to users by reason of a *known dangerous artificial latent condition* for which warning signs have not been conspicuously posted." RCW 4.24.210(4)(a) (emphasis added). The question here is what the statute's use of "known" means. The Court of Appeals interpreted it to mean that the landowner knows not merely of a condition's existence, but also that the condition is dangerous. That interpretation, however, conflicts with this Court's precedents, perpetuates lower court confusion, ignores grammar, and creates bad policy.

A. Under this Court's interpretation of the recreational use statute, a condition is "known" if its *existence* is known—its dangerousness does not have to be known.

Under this Court's precedents, the adjective "known" in the recreational use statute modifies the noun "condition," rather than the

other adjective "dangerous." Thus, under the statute, a condition is "known" if its existence is known. A landowner that knows of a condition, here because the landowner created it, cannot escape liability by claiming that it did not appreciate the danger that the condition posed.

These conclusions are foreordained by *Van Dinter v. City of Kennewick*, 121 Wn.2d 38. There, Van Dinter suffered injury at a Kennewick park by running into the metal "antennae" of a "caterpillar," a piece of playground equipment. He argued that while the caterpillar itself was obvious, "its injury-causing aspect" was "latent." *Id.* at 45. For that reason, Van Dinter argued, Kennewick was not immune under the recreational use statute. *Id.* This Court disagreed. The Court was willing to concede that "the present situation is one in which a patent condition posed a latent, or unobvious, danger." *Id.* at 46. But the statute does not hold landowners potentially liable for "latent dangers." *Id.* Rather, the "condition itself must be latent." *Id.*

This conclusion, the Court said, "follows from the language of the statute," because "the four terms—'known,' 'dangerous,' 'artificial,' and 'latent'—modify 'condition,' not one another." *Id.* Thus, "'latent' modifies 'condition,' not 'danger.' Therefore injuries that result from latent dangers presented by a patent condition" do not create potential liability under the recreational use statute. *Id. Van Dinter*'s holding that

the statute's four adjectives modify "condition" rather than one another has been reaffirmed in the years since. *See Ravenscroft v. Wash. Water Power*, 136 Wn.2d 911, 924, 969 P.2d 75 (1998) ("This court has held that each of the words—'known,' 'dangerous,' 'artificial,' and 'latent,'—modifies condition. . . . The condition itself, not the danger it poses, must be latent." (citation omitted)).

The Court of Appeals' interpretation of the recreational use statute is irreconcilable with *Van Dinter* and its progeny. Under the Court of Appeals' interpretation, the statute confers immunity unless the landowner "knew of the condition and *also knew that it was dangerous and latent.*" App. A at 6 (emphasis added). This interpretation, in other words, means that "known" modifies both "dangerous" and "latent." This Court has unequivocally held this interpretation to be wrong: "the four terms—'known,' 'dangerous,' 'artificial,' and 'latent'—modify 'condition,' not one another." *Van Dinter*, 121 Wn.2d at 46. Because "known" modifies condition, rather than "dangerous," it is "[t]he condition itself, not the danger it poses," that "must be [known]." *Ravenscroft*, 136 Wn.2d at 924.

This Court's interpretation of the recreational use statute is not just settled law, it is also the only interpretation that makes grammatical sense. Adjectives like "known," "dangerous," "artificial," and "latent" cannot modify other adjectives; only adverbs can modify adjectives. *See* Jane

Straus, *The Blue Book of Grammar and Punctuation* 10 (10th ed. 2008). Adjectives can only modify nouns like "condition." *See id.*

By dismissing Jewels' claim on the ground that Bellingham did not know that the speed bump extension was dangerous, the Court of Appeals created a direct conflict with this Court's precedents. RAP 13.4(b)(1). The Court of Appeals also created a double standard. In *Van Dinter*, this Court held that a condition is "latent" if users should be aware of its existence—even if they are not aware of the condition's dangerousness. It is not enough for users to show that a condition's danger was not readily apparent to them—rather, they must show that the condition's existence was not readily apparent to them. Here, on the other hand, the Court of Appeals has relaxed the standard when the issue is the landowner's awareness. Knowing of a condition's existence is not enough to expose the landowner to liability, but rather the landowner must also be shown to subjectively appreciate that it is dangerous.

Review is all the more warranted because this Court has addressed the relevant provision of the statute only three times since the statute's enactment in 1967—the last time more than a decade ago—but did not construe the term "known." *Davis v. State*, 144 Wn.2d 612, 30 P.3d 460 (2001); *Ravenscroft*, 136 Wn.2d 911; *Van Dinter*, 121 Wn.2d 38. *Davis* and *Ravenscroft* construed the meaning of the term "artificial," and *Van*

Dinter construed "latent" and "dangerous." The time is ripe for the Court to provide authoritative guidance on this issue.

B. The lower courts have reached contradictory results on when a condition is "known."

The Court of Appeals purported to rely on several earlier Court of Appeals cases, *Cultee v. City of Tacoma*, 95 Wn. App. 505, 977 P.2d 15 (1999), *Ertl v. Parks & Recreation Commission*, 76 Wn. App. 110, 882 P.2d 1185 (1994), *Tabak v. State*, 73 Wn. App. 691, 870 P.2d 1014 (1994), and *Gaeta v. Seattle City Light*, 54 Wn. App. 603, 774 P.2d 125 (1989). *See* App. A at 4 n.9, 5 nn.10-11, 6 n.15, 7 n.16. *Tabak*, however, conflicts with the Court of Appeals' decision here, as well as with the other decisions. The other decisions have stated, sometimes in dicta and sometimes in holdings, that a condition is "known" only if a landowner knows the dangerousness of a condition in addition to its existence. These statements conflict with *Van Dinter*. This Court should grant review to end the conflict and confusion in the lower courts.

The notion that a landowner must know the dangerousness of a condition in addition to its existence is ultimately attributable to dicta in *Morgan v. United States*, 709 F.2d 580 (9th Cir. 1983), where the Ninth Circuit applied RCW 4.24.210 to a claim arising under the Federal Tort Claims Act. Gary Morgan was killed when an irrigation pump shorted and

discharged electricity into Lake Roosevelt. 709 F.2d at 581. The court affirmed dismissal because there was "nothing in the record to indicate that the Government had knowledge of any danger or any malfunction." *Id.* at 584 (quotation omitted). In *Morgan*, however, there was no evidence that the landowner knew of the condition of electricity being discharged into the lake, so the Ninth Circuit's suggestion that a landowner must subjectively appreciate that the condition would be dangerous was unnecessary to the resolution of the case. *Morgan*'s dicta were first repeated, also in dicta, in *Gaeta*. There, Division One cited *Morgan* and stated that "the landowner must have actual as opposed to constructive knowledge that a condition is dangerous," but concluded that the injury-causing condition was neither latent nor dangerous—making its citation to *Morgan* explicit dicta. 54 Wn. App. at 609, 610-11.

In contrast, in *Tabak*, which was decided after and in reliance on this Court's decision in *Van Dinter*, Division One found issues of fact precluding summary judgment based on the landowner's knowledge that a condition "exist[ed]." In *Tabak*, a landowner learned that bolts holding together a fishing float were broken. The court did not infer or suggest the landowner knew this condition to be dangerous, and instead held that for a condition to be "known," the "landowner must have actual, as opposed to constructive, knowledge that a dangerous, latent condition *exists*." *Id.* at

696 (emphasis added). Summary judgment was denied because "a rational trier of fact could reasonably infer actual knowledge *of the condition* which caused Mr. Tabak to fall." *Id.* at 696-97 (emphasis added). Thus, consistent with *Van Dinter*, *Tabak* found it sufficient that a landowner knew of the injury-causing condition, without requiring that the landowner subjectively appreciate its dangerousness.

The first case to hold explicitly that subjective appreciation of dangerousness was required was Division Three's decision in *Ertl*. Ertl was injured when he struck a pothole while bicycling in a Spokane County park. 76 Wn. App. at 112. He presented evidence that earlier that year, "a park ranger noticed" the pothole. *Id. Ertl*, based on the *Morgan* and *Gaeta* dicta, held that the pothole was not "known" because "[a] landowner must know of the condition and must know it is dangerous and latent." *Id.* at 115. It apparently did not notice that in modifying both "dangerous" and "latent" with "known," it was establishing a rule directly contrary to this Court's holding in *Van Dinter*. Following *Ertl*, Division Two found subjective knowledge of dangerousness to be required in *Cultee*.[2]

Here, too, the Court of Appeals followed *Ertl* by applying a rule that originated in pre-*Van Dinter* dicta while overlooking *Van Dinter*

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[2] The court below also relied on *Nauroth v. Spokane County*, 121 Wn. App. 389, 88 P.3d 996 (2004), but *Nauroth* is ambiguous as to whether it turned on knowledge of the existence of the injury-causing condition or knowledge of its dangerousness.

itself. The decision here cannot be reconciled with *Tabak*, which applies *Van Dinter* correctly. Review under RAP 13.4(b)(2) is thus warranted.

C. The Court of Appeals' holding is bad policy.

The Court of Appeals' imposition of a new knowledge standard also creates bad policy. A landowner will not typically gain irrefutable actual knowledge that a condition is dangerous until experience—that is, an injury or death—shows it to be dangerous. Thus, as Judge Becker emphasized, requiring a plaintiff to prove that a landowner subjectively knows both that a condition exists and that it is dangerous will allow landowners "to cause one free accident" before they lose their immunity from suit. App. A, dissent, at 4. So dramatic an expansion of immunity raises an issue of substantial public interest. RAP 13.4(b)(4).

The Court of Appeals' holding also leads to unjustifiable results. When the recreational use statute was debated, a senator offered the illustration to explain the word "known" in the statute:

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

> shouldn't be liable for something on this land that he doesn't know about.

Van Dinter, 121 Wn.2d at 45 n.2 (emphasis added) (quoting Senate Journal, 40th Legislature (1967), at 875). As the Court of Appeals has now interpreted the statute, however, a landowner who knows of an open well and understands the danger that it poses would be liable; but a landowner who knows of the well but does not understand that it is dangerous would be immune. No Legislature would want to subject the more competent landowner to liability while immunizing the less competent. When a landowner admittedly knows a condition's existence, it creates absurd results if immunity depends on the landowner's subjective appreciation of the condition's dangerousness.

II. Bellingham knew of the speed bump extension's existence because it created the extension.

The right question, therefore, is whether Bellingham knew of the speed bump extension's existence. It did. It installed the speed bump. CP 10, ¶ 9; CP 16, ¶ 9. Jewels encountered, and was injured by, that condition as it had originally been created. Because Bellingham created the injury-causing condition, its knowledge is presumed. *See Falconer v. Safeway Stores, Inc.*, 49 Wn.2d 478, 480, 303 P.2d 294 (1956) (holding, in a premises liability case, that since "notice is for the purpose of showing that the occupant was aware of the condition," the "rule requiring such

notice is not applicable" when the occupant itself created the condition); *see also, e.g., Iwai v. State*, 129 Wn.2d 84, 102, 915 P.2d 1089 (1996).

III. The unpainted speed bump extension was dangerous.

Under the recreational use statute, a condition is "dangerous" if it "poses an unreasonable risk of harm." *Cultee*, 95 Wn. App. at 518; *Gaeta*, 54 Wn. App. at 609. Jewels created a genuine issue of fact as to whether the speed bump extension posed an unreasonable risk of harm.

Jewels' expert Edward Stevens, a highway and traffic engineer, CP 83-89, opined that the speed bump extension was extremely hazardous. In his expert report, Stevens said that "[w]hen bicycles are allowed and expected to use" a roadway, "[a]brupt deviations in roadway profile," such as a speed bump, "are not only not allowed but are considered to be extra hazardous." CP 79. Stevens also referenced a San Jose study that found short speed bumps[3] to be unacceptably hazardous on public roadways. CP 80. The study specifically noted that speed bumps "present[ed] an immediate and specific hazard" to bicycles. CP 80; *see also* CP 81.

The fact that gaps are often left in speed bumps also provides evidence that the speed bump extension posed an unreasonable risk of harm. "In past years," Stevens observed, "gaps were designed within the

[3] The technical literature distinguishes between speed bumps and speed humps; the former are narrow and abrupt, while the latter are wider and more gradual. CP 80.

speed bump length to allow bicyclists to traverse through the speed bump area without encountering it." CP 81. This observation comports with the experience of both Jewels and his expert witness Jim Couch. Both testified that gaps on the edges of speed bumps allow cyclists pass through safely. CP 91, ¶ 8; CP 107-08. In fact, there were gaps on the side of the first speed bump that Jewels encountered in the park, CP 91, ¶ 8, and a gap on the *other* side of the speed bump that caused the accident, CP 92, ¶ 15.

Not surprisingly, given the frequency of these gaps, cyclists are *supposed* to go around speed bumps, as did Jewels here. Both Bellingham and Washington law required Jewels to stay as near to the right side of the roadway as practicable. Bellingham Mun. Code § 11.48.070(A); RCW 46.61.770(1).[4] Thus, contrary to the Court of Appeals majority, Jewels did not "deviate from the traveled roadway to avoid" the speed bump. App. A at 6. Rather, he was simply following the law by staying on the roadway and traveling as far to the right as practicable. By installing an unpainted speed bump extension precisely where bicyclists were supposed to go,

[4] Bellingham has incorrectly claimed that these rules of the road did not apply in the Park because it did not contain a "roadway." State law defines a "roadway" as "that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the sidewalk or shoulder." RCW 46.04.500. A "highway," in turn, means "the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel." RCW 46.04.197. Hence the road that Jewels was using was a "roadway" under state law. It was also a "roadway" under Bellingham law, since that law must be construed *in pari materia* with state laws on the same subject. Bellingham Mun. Code § 11.03.100.

Bellingham created an unreasonable risk of harm. Jewels has demonstrated a genuine issue of fact on whether the unpainted speed bump extension was dangerous.

IV. The unpainted speed bump extension was latent.

Under the recreational use statute, a condition is "latent" if it is "not readily apparent to the recreational user." *Van Dinter*, 121 Wn.2d at 45. Jewels has created a triable issue of fact on latency.

First, of course, there is Jewels' testimony, corroborated by two the declarations of his expert witnesses, who had both examined photographs of the scene. Jewels testified that while he "did look at the gap," it simply "looked like bare, flat pavement," since it was unpainted. CP 92, ¶ 9. Jewels' expert witness, engineer Edward Stevens, opined that the condition was "latent and deceptive at the time of" Jewels' accident because "[t]here was no warning including paint striping . . . to focus the attention of street users on the hazard while there was still time to react" and that the condition was "inherently dangerous, latent, and deceptive." CP 82. Jewels' second expert witness, bicycling expert Jim Couch, said that because speed bumps "are usually marked by warnings on the roadway such as yellow paint and/or through signage to give people notice." CP 107. Thus, Couch concluded, the unpainted extension "created a deceptive and latent dangerous condition for bicyclists." CP 108. Trees

shading the road and the curve in the road itself also helped to decrease the visibility of the unpainted extension. *See* CP 19-22. All of this evidence creates a triable issue. *See Ravenscroft*, 136 Wn.2d at 925.

Bellingham, however, has relied on photographs in the record and a declaration by an employee of defendant, stating that the extension was visible. As Judge Becker pointed out, however, the employee's observations and the photographs in the record were made *after* the speed bump extension was painted and after Jewels had filed his claims. App. A, dissent, at 3.

Indeed, that post-accident painting also demonstrates that the speed bump extension was latent. The City's work order for the paint job states: "Please paint entire speed bump *and make it visible*." CP 76 (emphasis added). This statement, of course, necessarily means that the speed bump extension was *not* visible before it was painted.

The Court of Appeals majority rejected the evidence of the paint job as a subsequent remedial measure that is inadmissible under ER 407. App. A at 7. But ER 407 merely provides that evidence of subsequent remedial measures are "not admissible to prove negligence or culpable conduct in connection with the event." Evidence of subsequent remedial measures are *not* excluded "when offered for another purpose." ER 407. Here, Jewels offered evidence of the paint job not to prove negligence or

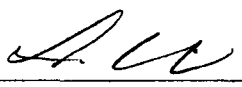
culpable conduct, but "for another purpose." The evidence was offered for another purpose in two different ways. First, he offered the evidence to show that the condition is *latent*: to show the condition's nature rather than the City's lack of care. Second, he offered evidence of the paint job to prove that the City is *not immune*. The language in the work order characterizes the portion that Jewels encountered as part of the speed bump, not a water diverter, and that the city knew of the speed bump because it installed it. CP 76. Jewels has demonstrated a genuine issue of fact on whether the unpainted speed bump extension was latent.

CONCLUSION

The Court of Appeals' decision squarely conflicts with this Court's interpretation of the recreational use statute. It perpetuates existing conflict in the lower courts. It raises issues of substantial public interest. Review should therefore be granted under RAP 13.4(b)(1), (b)(2), and (b)(4).

Respectfully submitted this May 21, 2014.

KELLER ROHRBACK L.L.P.



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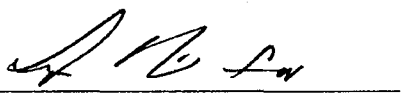

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No. 69358-1-I

COURT OF APPEALS

OF THE STATE OF WASHINGTON

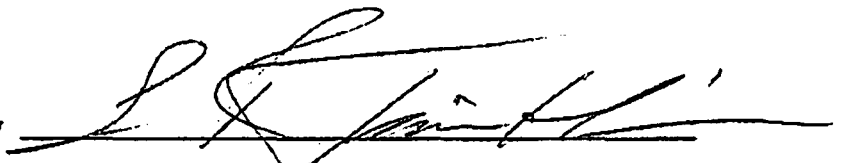
DIVISION I

STEVEN JEWELS, a single MAN, Appellant, vs. CITY OF BELLINGHAM, Respondents	Certificate of Service

I HEREBY DECLARE under penalty of perjury under the Laws of the State of Washington that on the below date, I served the Petition for Review via hand delivery to:

Shane P. Brady
Assistant City Attorney
City of Bellingham
210 Lottie Street
Bellingham, WA 98225

Dated this 21st of May 2014.

By 

Eve M. Rutherford-Timblin

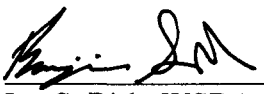
COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

STEVEN JEWELS,	)	
	)	
Petitioner,	)	Court of Appeals No. 69358-1-I
	)	
	)	Supreme Court No. _____
v.	)	
	)	PRAECIPE
	)	
	)	
CITY OF BELLINGHAM,	)	
	)	
Respondent.	)	

Petitioner respectfully submits this praecipe relating to his Petition for Review, timely filed yesterday, May 21, 2014. The Petition for Review as filed omitted the Court of Appeals opinion, attached hereto as Appendix A to the Petition. Petitioner respectfully requests that Appendix A be forwarded to the Supreme Court along with the Petition for Review.

Respectfully submitted this 22nd day of May, 2014.

KELLER ROHRBACK L.L.P.



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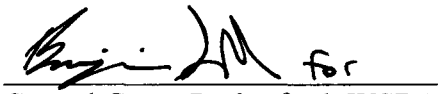

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CERTIFICATE OF SERVICE

The undersigned certifies that on this May 22, 2014, I caused the within document to be served to the following by electronic means, pursuant to RAP 18.5(a) and CR 5(b), to:

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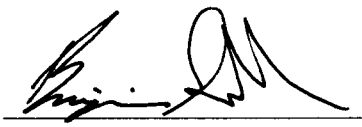

Benjamin Gould

APPENDIX A

Court of Appeals Decision

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STEVEN JEWELS, Appellant, v. CITY OF BELLINGHAM, Respondent.	)	NO. 69358-1-I DIVISION ONE PUBLISHED OPINION FILED: April 21, 2014

LEACH, J. — Steven Jewels appeals trial court orders granting summary judgment to the City of Bellingham (City) under the recreational land use statute, RCW 4.24.210, and denying his motion for reconsideration. Jewels claims that the unpainted extension of a speed bump that he hit while riding his bicycle was a "known dangerous artificial latent condition" under the statute. Because Jewels fails to show that the City had actual knowledge of the injury-causing condition, we affirm.

FACTS

Cornwall Park is a park open to the public for recreational use without charge. The City owns and maintains the park. On June 30, 2008, while riding his bicycle on a road located in Cornwall Park, Steven Jewels rode over a speed bump at a velocity sufficient to dislodge his water bottle. As he approached a

second speed bump, instead of slowing for it, he attempted to ride around it. As he did this, he encountered an asphalt berm, one to two inches high, that was connected to the second speed bump. The asphalt berm (also known as a water diverter) channels water into a cutout portion of the curb, facilitating drainage off the road. On the date of the accident, the asphalt berm was black: darker in color than the road itself but unpainted. When Jewels tried to bypass the speed bump by going through what he believed was a gap between the speed bump and the curb, the force of the front tire hitting the berm caused him to lose control of his front wheel, which caught in the cutout portion of the curb. This sudden stop threw Jewels from his bicycle and onto the asphalt and curb, broke his front wheel, and caused him injury.

On April 12, 2011, Jewels filed a complaint for personal injuries and damages against the City of Bellingham. The City moved for summary judgment, claiming immunity under the recreational land use statute. The superior court granted the City's motion for summary judgment, finding that the water diverter did not create a known, dangerous, latent condition. On August 24, 2012, the court denied Jewels's motion for reconsideration.

Jewels appeals.

STANDARD OF REVIEW

This court reviews an order of summary judgment de novo, performing the same inquiry as the trial court.[1]

ANALYSIS

Jewels argues that the City cannot claim immunity under the recreational land use statute because the water diverter was a "known dangerous artificial latent condition for which warning signs have not been conspicuously posted."[2] To establish a landowner's liability under this statute, a plaintiff must show that each of the four elements—known, dangerous, artificial, and latent—was present in the injury-causing condition.[3] "If one of the four elements is not present, a claim cannot survive summary judgment."[4] Jewels claims that the injury-causing condition was "clearly latent and deceptive and falls squarely within the statutory exception."

The Washington Legislature enacted the recreational land use statute in 1967 to encourage private and public landowners to open recreation areas to the public without fear of liability for unintentional injuries.[5] This statute "changed the

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[1] Smith v. Safeco Ins. Co., 150 Wn.2d 478, 483, 78 P.3d 1274 (2003) (citing Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002)).

[2] Former RCW 4.24.210(4) (2003).

[3] Davis v. State, 144 Wn.2d 612, 616, 30 P.3d 460 (2001).

[4] Davis, 144 Wn.2d at 616.

[5] Ertl v. Parks & Recreation Comm'n, 76 Wn. App. 110, 113, 882 P.2d 1185 (1994); Nauroth v. Spokane County, 121 Wn. App 389, 392, 88 P.3d 996 (2004).

common law by altering an entrant's status from that of a trespasser, licensee, or invitee to a new statutory classification of recreational user."[6] This court construes this statute strictly.[7]

RCW 4.24.210(1) states,

> [A]ny public or private landowners . . . in lawful possession and control of any lands . . . who allow members of the public to use them for the purposes of outdoor recreation, which term includes, but is not limited to, . . . bicycling . . . without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users.

"This statute gives landowners immunity from liability unless (1) a fee is charged, (2) the injury inflicted was intentional, or (3) the injury was caused by a known dangerous artificial latent condition and no warning signs were posted."[8] Jewels bicycled as a recreational user through Cornwall Park, a public park that charges no fee. Therefore, RCW 4.24.210, not the common law, controls here.

Washington courts have construed this statute to require that a plaintiff establish actual knowledge, as opposed to constructive knowledge, that a condition is dangerous.[9] A plaintiff must "'come forward with evidentiary facts

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[6] Van Dinter v. City of Kennewick, 64 Wn. App. 930, 934-35, 827 P.2d 329 (1992).

[7] Matthews v. Elk Pioneer Days, 64 Wn. App. 433, 437, 824 P.2d 541 (1992).

[8] Van Scoik v. Dep't of Natural Res., 149 Wn. App. 328, 333, 203 P.3d 389 (2009) (citing Davis, 144 Wn.2d at 616).

[9] Gaeta v. Seattle City Light, 54 Wn. App. 603, 609, 774 P.2d 1255 (1989).

from which a trier of fact could reasonably infer actual knowledge, by a preponderance of the evidence.'"[10] A plaintiff may rely upon circumstantial evidence to establish actual knowledge.[11] When considering whether the condition is dangerous, the court examines "the specific object or instrumentality that caused the injury, viewed in relation to other external circumstances in which the instrumentality is situated or operates."[12] Thus, the water diverter must be viewed in the context of its proximity to the curb cutout to evaluate whether it was a known, dangerous condition. Knowledge in this context would mean that the City knew that the water diverter in proximity to the curb cutout posed a danger to a cyclist choosing to avoid the speed bump to circumvent its speed-reducing effect because riding over the diverter could cause a loss of control resulting in a front wheel becoming trapped in the cutout, producing injury.

Jewels contends that this knowledge can be imputed to the City because it was required to comply with the Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD). The MUTCD applies to traffic control devices, which it defines as "all signs, signals, markings, and other devices used to regulate, warn, or guide traffic, placed on, over, or adjacent to a street, highway,

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[10] Nauroth, 121 Wn. App. at 393 (quoting Tabak v. State, 73 Wn. App. 691, 696, 870 P.2d 1014 (1994)).

[11] Nauroth, 121 Wn. App. at 393.

[12] Ravenscroft v. Wash. Water Power Co., 136 Wn.2d 911, 921, 969 P.2d 75 (1998).

pedestrian facility, or bikeway by authority of a public agency having jurisdiction."[13]

The water diverter's purpose is to facilitate drainage; it was not designed as a means for bicyclists to bypass the speed bump. We decline to adopt Jewels's apparent theory that the City has a responsibility to design a safe way for drivers and riders to deviate from the traveled roadway to avoid its own traffic control measures. Because the injury-causing condition, the water diverter and curb cut in close proximity, was not a traffic control device, the MUTCD standards do not apply here, and we do not impute knowledge to the City from them.[14]

Jewels also argues that the City had actual knowledge that the water diverter was dangerous because the City created this condition. But to establish that the water diverter with an adjacent curb cut was a known condition, Jewels must show that the City knew of the condition and also knew that it was dangerous and latent.[15] The City maintains that it had no knowledge of any other

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[13] FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES FOR STREETS AND HIGHWAYS, at I-1 (2003 ed., rev. Nov. 2004). This is the edition that applied on the date of the accident.

[14] The MUTCD applies only to public roads. Allemeier v. Univ. of Wash., 42 Wn. App. 465, 471, 712 P.2d 306 (1985). The MUTCD likely applies to the speed bump itself because the road was open to the public and the speed bump functions as a traffic control device. While the parties dispute whether the road is public or private, the issue is irrelevant because the water diverter is not a traffic control device.

[15] Ertl, 76 Wn. App. at 115.

accidents involving the water diverter and the curb cutout. Jewels presents no evidence to refute the City's assertion that it had no actual knowledge of a dangerous, latent condition. The mere fact that an unfortunate event occurs, without more, does not demonstrate knowledge of latent danger.

Where courts have found that a landowner had knowledge of the injury-causing condition, there was evidence that the landowners knew that the condition was dangerous before the condition caused the plaintiff's injury.[16] While Jewels asserts that the City knew that the water diverter needed to be visible because it issued a work order to paint it after his accident, this evidence of subsequent remedial measures is inadmissible under ER 407. Moreover, it does not establish the City's knowledge of any dangerous condition before Jewels's accident.

The dissent assumes that the unpainted diverter alone was a dangerous condition. This position ignores the role of the curb cut and its proximity to the diverter. In other words, the dissent focuses exclusively upon the diverter and fails to examine "the specific object or instrumentality that caused the injury, viewed in relation to other external circumstances in which the instrumentality is situated or operates,"[17] as required by the applicable case law.

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[16] Cultee v. City of Tacoma, 95 Wn. App. 505, 517-18, 977 P.2d 15 (1999); see also Tabak, 73 Wn. App. at 696-97.

[17] Ravenscroft v. Wash. Water Power Co., 136 Wn.2d 911, 921, 969 P.2d 75 (1998).

Because Jewels cannot establish actual knowledge, his claim fails, and we need not reach the issue of whether the condition was latent or dangerous.[18]

CONCLUSION

Because the recreational land use statute applies to this case and Jewels fails to demonstrate the City's actual knowledge of any dangerous, latent condition, we affirm.

Leach, J.

WE CONCUR:

Cox, J.

[18] See Ertl, 76 Wn. App. at 115.

Jewels v. City of Bellingham, 69358-1-I

BECKER, J. (dissenting) — I respectfully dissent from the majority's conclusion that Steven Jewels' negligence suit against the City of Bellingham is barred by the recreational use immunity statute, RCW 4.24.210. As the majority opinion interprets the requirement of actual knowledge, a landowner will never be liable for injury on recreational land until a previous accident or complaint shows a known condition is dangerous. This is not the law. Actual knowledge exists where, as here, the landowner itself creates the dangerous condition.

The southern access road into Cornwall Park, a city park in Bellingham, runs slightly downhill into a parking lot about 1,000 feet from the entrance gate. In 2007, the City of Bellingham placed a series of asphalt speed bumps lengthwise across the road as a traffic calming measure. The speed bumps were painted bright yellow. As is typical of such speed bumps, there was a gap of a little more than a foot between each end of the speed bump and the adjacent curb.

At some point after installing the speed bumps, the City decided to address a drainage issue by diverting water on the road off to the right side through a hole in the curb. The City accomplished this by extending one end of the second speed bump to the curb, closing the gap. The second speed bump, about 600 feet in from the main road, is in a location shaded by overhanging tree branches. Inexplicably, the City did not paint the extension yellow to match the rest of the speed bump.

On June 30, 2008, cyclist Steven Jewels rode into the southern entrance to the park. Traveling at an appropriate speed, he went over the first speed bump and was jarred by the abruptness of the impact. As he approached the second speed bump, he did not see the unpainted extension. He steered his bicycle rightward, toward the perceived gap, to avoid having to go over the speed bump. When he rode into the unpainted section, the force pushed his front wheel sideways into the curb cut. Jewels was launched off of his bicycle and landed violently on the cement road.

The next day, July 1, 2008, the City issued a work order for Cornwall Park entitled "Safety Hazard." The work to be performed was described as follows: "The 2d speedbump in Cornwall South was only partly painted. A section next to the shoulder area was not painted and a bicyclist did not see that it was part of the speed bump. He hit it and took a nasty fall from his bike. Please paint entire speed bump and make it visible." As a result of the work order, the unpainted section was painted yellow like the rest of the speed bump.

Entrance into Cornwall Park is free, and there were no warning signs posted. Therefore, the only issue under the statute is whether Jewels' injuries were sustained by reason of a known dangerous artificial latent condition. RCW 4.24.210; Davis v. State, 144 Wn.2d 612, 616, 30 P.3d 460 (2001).

Recreational use immunity is an affirmative defense that must be established by the landowner. Camicia v. Howard S. Wright Constr. Co., ___ Wn.2d ___, 317 P.3d 987, 991 (2014). If there are material issues of fact that prevent the landowner's immunity from being decided on summary judgment, the

trial court must submit them to the finder of fact under appropriate instructions. Camicia, 317 P.3d at 991 & n.4. To be granted immunity on summary judgment, the City had to prove beyond reasonable dispute one of the following facts about the unpainted speed bump extension: it was not known, or it was not dangerous, or it was not artificial, or it was not latent. The City agrees the speed bump extension was artificial but contends it was not known, or dangerous, or latent.

The City would have us hold that the speed bump extension was visible and therefore not latent. The majority wisely does not accept this contention. The City relies on a declaration by an employee who states that the extension was visible, but the employee's observations were made after the extension was painted. Photographs in the record similarly fall short of proving that the color of the extension, before it was painted, contrasted sufficiently with the color of the roadway to make it visible. The existence of a material issue of fact as to visibility is shown by Jewels' declaration that before the paint job, there appeared to be "bare, flat pavement" between the speed bump and the curb. Accordingly, it cannot be said as a matter of law that the unpainted extension was "in plain view," Tennyson v. Plum Creek Timber Co., 73 Wn. App. 550, 872 P.2d 524, 555-56, review denied, 124 Wn.2d 1029 (1994), or that it was "obvious," Gaeta v. Seattle City Light, 54 Wn. App. 603, 610, 774 P.2d 1255, review denied, 113 Wn.2d 1020 (1989). For purposes of summary judgment, we must assume that before it was painted, the speed bump extension was a latent condition.

The majority opinion affirms the order of dismissal on the ground that the City lacked "actual knowledge of the injury-causing condition." Majority at 1. The

majority and the City rely on the fact that Jewels was the first person to report a problem with the obstacle. The City "had no knowledge of any other accidents involving the water diverter and the curb cutout." Majority at 6-7. The majority opinion holds, in other words, that a landowner who creates a dangerous latent condition gets to cause one free accident before liability arises.

The flaw in the majority's reasoning is illustrated by the example of a partially covered well on range land. When the statute was being debated on the Senate floor, a senator used the example of the well to explain the meaning of "known" and "latent." Van Dinter v. City of Kennewick, 121 Wn.2d 38, 45 & n.2, 846 P.2d 522 (1993). If a prior owner digs a well but fails to cover it properly and the present landowner does not know about it, the statute immunizes the present owner from liability. Van Dinter, 121 Wn.2d at 45. But what if the present landowner *does* know about the open well? What if it is the present owner who digs the well and fails to cover it properly? The answer is that liability does arise under the statute—and it arises with respect to the first person who falls into the well.

The requirement of actual knowledge protects the landowner from the common law standard of "knows or should know," under which the landowner's duty to an invitee includes the affirmative duty to inspect the premises and discover dangerous conditions. Morgan v. U.S., 709 F.2d 580, 583 (9th Cir. 1983). In Morgan, an irrigation pump shorted and discharged electricity into a recreational lake, and a canoer was electrocuted. There was no liability under the statute because the owner did not have actual knowledge that the irrigation

pump was malfunctioning. Even though a careful inspection would have revealed a code violation that created a potentially dangerous condition, the essence of the plaintiff's argument was that the owner "should have known" and would have known if a reasonable inspection had been made. Morgan, 709 F.2d at 584. Similarly, where an old set of stairs in a public park was rendered dangerous by vandalism, lack of maintenance, accumulated debris, and the effects of weather, there was no liability under the statute to a person who fell down the stairs; the park rangers seldom visited that area of the park, and it was not shown that they had actual knowledge of the dangerous condition. Nauroth v. Spokane County, 121 Wn. App. 389, 393-94, 88 P.3d 996 (2004).

Here, the City did not need to inspect Cornwall Park to know about the condition. The danger created by the invisible barrier did not result from the ravages of time or the activities of third parties. The condition was created by the City itself. See, e.g., Batten v. S. Seattle Water Co., 65 Wn.2d 547, 551, 398 P.2d 719 (1965) (where a municipal corporation creates the dangerous condition, no notice is required).

The majority attributes no significance to the fact that the City created the obstacle in the roadway. "Knowledge in this context would mean that the City knew that the water diverter in proximity to the curb cutout posed a danger to a cyclist choosing to avoid the speed bump to circumvent its speed-reducing effect because riding over the diverter could cause a loss of control resulting in a front wheel becoming trapped in the cutout, producing injury." Majority at 5. This statement of what it means to have actual knowledge is inconsistent with the

cases discussed above. Under the majority's analysis, even if the landowner in Morgan had known there was electricity in the lake, that landowner would have no liability until a previous electrocution had demonstrated that electrified water is dangerous. Even if the park rangers in Nauroth had learned the stairs were slippery by using them, their employer would have no liability until expressly advised that slippery stairs are dangerous. And even if a landowner digs a well and leaves it uncovered, there can no liability unless the landowner has learned from a previous complaint that an uncovered well is dangerous.

Under the majority's analysis, even though the City knew it had placed a fixed and invisible obstacle in the roadway, no liability could arise unless the City had learned from previous complaints that fixed and invisible obstacles in a roadway are dangerous. In short, the majority has taken a sensible immunity statute and transformed it into a rule of no liability until the second accident.

The majority writes that we construe the statute "strictly," citing Matthews v. Elk Pioneer Days, 64 Wn. App. 433, 437, 824 P.2d 541, review denied, 119 Wn.2d 1011 (1992). Majority at 4. It is not clear what significance this statement has, if any, in the majority's analysis. Possibly, the majority believes that strict construction favors landowners. If so, the majority is mistaken. The principle of construction mentioned in Matthews is that a statute is strictly construed where it is "in derogation of the common law" and no intent to change the common law will be found unless the legislature has expressed that intent with clarity. Matthews, 64 Wn. App. at 437. If we actually did construe the recreational use immunity statute strictly because it is in derogation of the common law, we would

regard the statute skeptically and strive to maintain, to the extent possible, the modern common law concepts that treat invitees more favorably than the statute does.

However, I do not believe the principle of strict construction has any application to RCW 4.24.210. The statute was clearly intended to modify the common law. Van Dinter, 121 Wn.2d at 41-42; Davis, 144 Wn.2d at 615-16; Camicia, 317 P.3d at 992. The rule that statutes in derogation of the common law must be strictly construed has been criticized because if viewed as a presumption against changing the common law, it tends to defeat the legislative purpose, which typically is to remedy perceived defects in the common law. Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 102, 829 P.2d 746 (1992), cert. denied, 506 U.S. 1079 (1993). Viewed in this light, the recreational use immunity statute contains no mandate for either liberal or strict construction, in favor of landowners' immunity or against it. It is simply a statute, to be applied to situations encompassed by its terms.

Because this case should be remanded for trial, it is also important to mention that the City is mistaken when it asserts that RCW 4.24.210 is the source of its duty to users of recreational lands. Br. of Respondent at 23, 34. Immunity and duty, though often confused with each other, are distinct concepts. Gilliam v. Dep't of Social & Health Servs., 89 Wn. App. 569, 577-78, 950 P.2d 20, review denied, 135 Wn.2d 1015 (1998). RCW 4.24.210 is a not a source of duty; it is a source of immunity, an affirmative defense that shields the landowner from

liability that might otherwise exist. See RCW 4.24.200 (purpose of statute is to limit liability); Camicia, 317 P.3d at 991.

In a jury trial, the instructions should first permit the jury to decide whether the landowner has proved the facts necessary for immunity. If the jury decides that the landowner has not proved immunity, the instructions should permit the jury to proceed to decide the City's liability under the common law of negligence: duty, breach, causation, and damages. Jewels presents two theories of common law liability. One is that the City as a landowner breached a duty owed to him as an invitee. Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127, 606 P.2d 1214 (1980). The other is that the City breached its duty to build and maintain its roadways in a condition that is reasonably safe for ordinary travel. Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002).[1]

Because there are genuine issues of material fact concerning the City's immunity under RCW 4.24.210, I would reverse the order of summary judgment and remand for trial.

Becker, J.

[1] Jewels submitted two declarations of expert witnesses. One explained that speed bumps (abrupt) as opposed to speed humps (gradual) are considered extrahazardous for bicycles and that the purpose of a gap is "to allow bicyclists to traverse through the speed bump area without encountering it." The trial court denied the City's motion to strike these declarations.