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No. 96263-4

SUPREME COURT
OF THE STATE OF WASHINGTON

CARL W. SCHWARTZ and SHERRY SCHWARTZ, individually
and the marital community composed thereof,

Appellants,

v.

KING COUNTY, a local government entity and
municipal corporation within the State of Washington,

Respondent.

REPLY BRIEF OF APPELLANTS

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A. INTRODUCTION

The record in this case shows that the Green River Trail (“GRT”) is part of the County’s transportation system, predominantly used for transportation, and that the shared-use path is a public-right-of-way, which gives the public a legal right to access the path for transportation. Despite these facts, and the duty King County owes to maintain its transportation system in a condition reasonably safe for ordinary travel, the trial court applied the recreational use immunity statute, RCW 4.24.210, dismissing Carl Schwartz’s lawsuit as a matter of law because some recreational users also use the GRT. That error warrants reversal by this Court.

Faced with a plethora of contested facts and evidence in Schwartz’s favor which should have gone before a jury, the County is forced to resurrect conceded arguments, misstate settled case law, and twist the summary judgment standard, pleading for a favorable reading of the record to which it is not entitled. Rather, Schwartz created a material issue of fact as to whether recreational use immunity applied to the GRT. Alternatively, ample evidence supported Schwartz’s argument that an exception to immunity applied because the bollard which rendered him a quadriplegic was a known, dangerous, artificial, latent condition. Reversal is warranted.

B. REPLY ON STATEMENT OF THE CASE

For the first time on appeal, the County questions the circumstances of Schwartz's accident. The County *admitted* in its motion for summary judgment below that "Schwartz's bike struck the 4-inch wide single white bollard" at the location on the Green River Trail (GRT) in question. CP 932. Yet now the County speculates, with no factual support, that the accident may have occurred in some other way, claiming "the record is silent on the circumstances of his accident." Resp't br. at 6-7. This speculation is inappropriate, where the only evidence in the record supports the (until now) undisputed fact that Schwartz suffered devastating injuries, rendering him a quadriplegic, when he struck the bollard near Cecil Moses Park while riding his bicycle on the GRT.

The County also argues for the first time on appeal that the bollard was not a known, dangerous condition. Resp't br. at 28-29. Again, this is a 180-pivot from its representations below, where the County *conceded* that the bollard was a known, dangerous, and artificial condition for the purposes of summary judgment. RP (8/3/18) at 9.¹ The County was right

¹ The relevant excerpt from the report of proceedings is as follows:

[COUNSEL FOR THE COUNTY]: There are, as I mentioned, exceptions to immunity under the statute; none of those exceptions apply on the record that's before this Court. There is the –

THE COURT: Known, dangerous, artificial, latent.

to concede the issue below, because the record shows that the County had actual knowledge that the inadequately marked bollards, including the bollard at issue in this case, were dangerous hazards to cyclists like Schwartz.²

As discussed in Schwartz's opening brief, the County received *numerous* reports from trail users who complained that inadequately marked bollards were hazardous. Appellants br. at 3-6 (citing, *e.g.*, CP 1943-44). Some reported "catastrophic injuries" after striking the bollards. *Id.* In October 2008, Regional Trails Director Robert Foxworthy sought to fix the known problem, asking County leaders, "Do we have the resources to paint road-like markings on the regional trails - stencils, staff, painting equipment, etc.? We should begin thinking about painting

[COUNSEL FOR THE COUNTY]: Each of those terms modify the word "condition", they do not modify each other; and each of those terms must be present in order for a liability to attach to the landowner. *For purposes of our motion, we are prepared to concede the other elements; latency is the element that King County is not willing to concede.*

RP (8/3/18) at 9 (emphasis added).

² As discussed in detail below, the County misstates the law by arguing that immunity does not apply because it had "[n]o [n]otice" that the bollard required warnings because it had "never been reported as a danger to anyone." Resp't br. at 28-29. It is settled law that a plaintiff need only show that the landowner "knew the injury-causing condition existed...not that the [landowner] knew that the condition was dangerous." *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 46, 846 P.2d 522 (1993); *Jewels v. City of Bellingham*, 183 Wn.2d 388, 397, 353 P.3d 204 (2015). However, even though not required, the evidence in this case shows that the County had actual knowledge that the bollard which injured Schwartz was dangerous. Schwartz offers this evidence to highlight the County's culpability by exposing invitees to known hazards along the GRT.

diamond warning stripes around the bollards on our paved trails.” CP 1950.³ He was told the County had the resources to add warning markings, but it *chose* not to do so. *Id.* In 2009, the County went a step further and officially proposed new guidelines which would have required all bollards to be marked with diamond striping on the pavement according to national AASHTO and WSDOT guidelines. CP 1793-95, 1945-54. Yet eight years later the County had failed to mark the bollard which injured Schwartz.

The record shows that citizens even took it upon themselves to add improvised warnings to dangerous bollards on the County’s trails, including painting markings *around the very bollard which caused Schwartz’s catastrophic injuries.* CP 1100-14. Schwartz presented evidence that County parks staff recognized the danger presented by the bollard which injured Schwartz and informed their supervisors about the improvised markings, but the County still failed to take any action. CP 1115-18.

Other than these new factual disputes raised for the first time on appeal, the County’s brief is littered with veiled credibility arguments and

³ Director Foxworthy continued to voice his frustration with the bollards on the RTS, writing in 2014, “I have a peeve about bollards in general. There must be a better way to keep vehicles off of the regional trails (after all, it didn’t stop the bus). We’ve got to figure out a better solution! Am I right? I spent about half my time pulling and replacing bollards!...[T]he paint is peeling off of most of them.” CP 2171.

disagreements over how to interpret the evidence in the record.⁴ For example, the County asserts in a footnote that it is “undisputed that federal funds were not used for the GRT at Cecil Moses Park.” Resp’t br. at 23 n.13. This is simply not true.⁵ In fact, the record shows that since 1991 federal funds were “a major source of funding for acquisition and development of King County’s regional trails” including the GRT. CP 1290-91, 2788-97. The County received these funds pursuant to two federal programs, the Intermodal Surface Transportation Enhancement Act and the Transportation Enhancement Act for the 21st Century. *Id.* The County includes the GRT in its “federally-designated regional transportation plan” which is “administered by the Puget Sound Regional Council” using federal funds. CP 2341, 2625-34. The County continues to apply for and receive federal funds to improve the GRT. *See, e.g.*, CP 2758-61, 2821-29. The County can only apply for such federal funds for use on projects designed “principally for transportation rather than recreational use.” 23 C.F.R. § 652.7; CP 1583. This fact alone should

⁴ The County would have this Court forget that it must view “the evidence and all reasonable inferences from the facts” in the light most favorable to *Schwartz*. *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 919, 969 P.2d 75 (1998).

⁵ The County cites the deposition testimony of Director Foxworthy for support – resp’t br. at 23 n.13 (citing CP 1752-55) – but Director Foxworthy does not testify that federal funds were *never* used on the GRT near Cecil Moses Park in that passage. Rather, he merely discusses recent instances where the County received federal grant money but chose not to use it. *Id.* The record actually shows that the County used federal funds to acquire the GRT. CP 1290-91, 1506, 2788-97, 2949-50.

estop any argument that the GRT is used primarily for recreation.

The County only highlights the trial court's error in granting summary judgment where these key facts are disputed. These facts should have gone before a jury. For the reasons stated below, reversal is warranted.

C. ARGUMENT

(1) The Trial Court Erred in Granting Summary Judgment Based on the Recreational Use Immunity Statute

The County fails to grapple with *Camicia*'s well-reasoned conclusion that “[w]here land is open to the public for some other public purpose – *for example as part of a public transportation corridor* – the inducement of recreational immunity is unnecessary.” *Camicia v. Howard S. Wright Const. Co.*, 179 Wn.2d 684, 697, 317 P.3d 987 (2014) (emphasis added). This notion squares with the very purpose of the statute, which is to encourage landowners to open their otherwise closed land to others for recreational purposes. Thus, “[i]t would make little sense to provide immunity on the basis of recreational use when the land would be held open to the public even in the absence of that use.” *Id.* Like the I-90 trail at issue in *Camicia*, Schwartz presented evidence to create an issue of fact regarding whether the “major purpose of the trail is transportation” such that the GRT “would be open to public bicycling for transportation

purposes regardless of any recreational use or function.” 179 Wn.2d at 700-01 (quotation omitted).

The myriad of evidence in this case – especially when viewed in the light most favorable to Schwartz – shows that the GRT is part of the County’s “public transportation corridor” and open to the public for transportation purposes regardless of any recreational use. As discussed above, the path is funded through federal grants which mandate that it be used “principally for transportation rather than recreational use.” 23 C.F.R. § 652.7; *see also, Camicia*, 179 Wn.2d at 700 (noting that the source of funding may show the “purpose” of a bike path) (citing RCW 35.75.060). The County classifies the GRT as a “primary trail” meaning that it is one of the County’s “active transportation facilities...expected to meet federal accessibility guidelines.” CP 1901-02, 2099. And, the County designates the GRT as a “public right-of-way” or “land acquired for or dedicated to transportation purposes, or other land *where there is a legally established right for use by the public for transportation purposes.*” CP 1664 (emphasis added).⁶ This is simply not the case of a benevolent landowner opening land for the public’s recreation; the evidence above shows that the public enjoyed a *legal right* to use the GRT

⁶ Several witnesses also testified that the public’s “predominant use” of the section of the GRT where Schwartz was injured is for “transportation and commuting.” CP 1115-18, 1143-46.

as part of the County's transportation network.⁷ *Id.*

As with the deed which conveyed portions of the trail it issues in *Camicia*, the evidence above "suggests [the County] lacks the ability to close the trail to transportation." 179 Wn.2d at 700. Therefore, summary judgment should be overturned where "[a] fact finder could reasonably infer that the [GRT] would be open to public bicycling for transportation purposes regardless of any recreational use or function." *Id.*

The County attempts to counter these arguments by claiming that "it is the bare fact of opening one's property to recreational use...that determines a grant of immunity under the statute." Resp't br. at 19. This argument fails for several reasons. First, it directly conflicts with this Court's opinion in *Camicia*, where this Court held, "It is not enough for the City to show that the I-90 trail was opened for bicycling" or that the trail "can be used for recreational purposes." 179 Wn.2d at 700. Rather,

⁷ The County also actively benefits from the trail's use as a part of its "non-motorized transportation network." CP 2423. According to the County, these benefits include:

[D]ecreased traffic congestion, increased health benefits, improved air quality, and decreased infrastructure costs at the destinations due to decreased parking needs for automobiles...These connections can also help to encourage economic development by bringing additional people into these activity centers and can lead to increased property values as well.

CP 2423. It would be bad policy to relieve the County of its common-law duty to maintain its transportation system "in a condition reasonably safe for ordinary travel" where it benefits from transportation along the trail, despite exposing riders to known hazards like the inadequately marked bollard which injured Schwartz. *Camicia*, 179 Wn.2d at 699.

the question is whether the land “would be held open to the public” for a non-recreational purpose (like transportation) “even in the absence of [the recreational] use.” *Id.* at 697.

Second, the County’s argument leads to a host of absurd results described in *Camicia* and Schwartz’s opening brief. *Id.* at 699-700 (describing the absurdity of recreational use immunity as applied to streets which also serve recreational purposes like Pioneer Square); Appellants br. at 31-33 (explaining that streets and highways are also open to recreational users). The County’s only response is that this analysis is “overwrought” because it is “well established that a municipality has the duty to maintain its roadways in a condition safe for ordinary travel.” Resp’t br. at 20-21 n.11 (quotation omitted). But this is precisely the point. The County does have a well-established duty to maintain its transportation system in a safe condition. Here, Schwartz presented evidence sufficient to show that the GRT – a paved, urban, commuter bike path used predominantly for transportation and designated by the County as a public-right-of-way – is more like a public street than a recreational trail. Just like this Court held in *Camicia* when evaluating the I-90 trail, to the extent there was any doubt, summary judgment was inappropriate, and the issue should have gone to a jury.

Finally, the County’s argument is not supported by *Lockner v.*

Pierce County, 190 Wn.2d 526, 415 P.3d 246 (2018). *Lockner* merely sought to answer whether RCW 4.24.210 requires “sole recreational use” for immunity to apply. 190 Wn.2d at 529. That is not the same question before the Court here. Rather, the question is whether Schwartz created a material issue of fact where the evidence shows that the public has a right to use the GRT as part of the County’s transportation system. Even a strict reading of *Lockner* would not result in immunity as a matter of law in this case where the *Lockner* court opined that an issue of fact may exist where a bike path is used “primarily for transportation,” as Schwartz showed here. 190 Wn.2d at 534.

In short, Schwartz has shown that the GRT is much more like the I-90 trail in *Camicia* than the Foothills Trail, located in rural Pierce County, which was at issue in *Lockner*. This distinction highlights the fact that bike paths are unique and should be considered on a “case by case basis.” *Camicia*, 179 Wn.2d at 700. Here, the evidence shows that the GRT serves vital transportation purposes in the industrial heart of King County. Appellants br. at 16-20. It provides non-motorized transport to important venues and businesses, and the County recognizes that the public has a *legal right* to use the path for these purposes. These material issues of fact, unique to the GRT, should have precluded summary judgment.

(a) Schwartz Presented Evidence That the County Lacked the Authority to Close the Trail

Schwartz presented ample evidence to support his theory, that as a public transportation facility, the County lacked the authority to close the trail, and therefore recreational use immunity did not apply. Again, the GRT was built and is maintained with *transportation*, not recreational, funds. CP 1290-91, 1738-40, 1941. By designating the GRT as a “public right-of-way” the County admits that the public enjoys a “legally established right for use by the public for transportation purposes.” CP 1664. The regional trail director even admitted that the trail “should be available 24 hours as a public transportation facility.” CP 2770. And the County updated its own policies in 2016 to ensure that its trails, including the GRT, are accessible to commuters, 24 hours a day, regardless of a trail’s posted hours. CP 2243, 2739, 2770.⁸

The County does little to refute this evidence, merely arguing, in a footnote, that it is not bound by Director Foxworthy’s admissions, including his admission that trails like the GRT “should be available 24 hours as a public transportation facility.” Resp’t br. at 14-15 n.8; CP 2770. The County claims that Director Foxworthy’s admission is an

⁸ Schwartz also presented evidence that the County does not enforce the posted hours along its trails. CP 1835-36, 2771-72.

“informal belief[.]” of an employee and not an admission of the County. This argument fails. *Id.* At the outset, the County ignores basic principles of agency law. An employee’s admission may bind the employer when the employee is “authorized to make the particular statement at issue, or statements concerning the subject matter, on behalf of the party.” *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 262, 744 P.2d 605 (1987). Additionally, the “overall nature of [an employee’s] authority to act for the party may determine if [he or she] is a speaking agent.” *Id.* For example, in *Lockwood*, this Court held that it was “reasonable to infer” that a company’s “corporate health director” had authority to bind the company when discussing the health risks of asbestos exposure due to his “authority to act” as a health official for the company. *Id.* at 259-62. Here, it is reasonable to infer that the County’s *Regional Trails Director* had authority to bind the County by his admission that trails which receive transportation funds should be made available 24 hours a day.

Moreover, to the extent there was any factual dispute, the trial court was obligated to view the facts in Schwartz’s favor. Director Foxworthy’s admissions are supported by the County’s decision to amend its policies in 2016 to state that its trails should be accessible to commuters and other “utility use[rs]” 24 hours a day. CP 2243, 2739. Summary judgment was inappropriate where the County admitted at

numerous points throughout the record that the trail is a transportation facility and must be open to the public regardless of any recreational use which occurs on the property.

The County's other arguments proffered to show that it has the authority to close the trail also fail. First, the County claims that it "routinely closes regional trails for redevelopment." Resp't br. at 15. But surely the same can be said for the County's streets and roads which the County periodically closes for redevelopment, but that does not relieve the County of its duty to "maintain roadways in a condition reasonably safe for ordinary travel." *Camicia*, 179 Wn.2d at 699.

Next, the County attempts to distract from its designation of the trail as a transportation facility by focusing on a relatively minor point raised by Schwartz regarding the County's legal ownership of the section of the trail where Schwartz was injured, near Cecil Moses Park. Resp't br. at 11-14. This is nothing but a red herring. At the outset, whether the County's has exclusive ownership over the GRT, such that it can unilaterally close the trail, is a fact-intensive question, and the record contains ample evidence doubting the County's ownership and right to exclusively control access to the trail. *E.g.*, CP 1838-39 (Director Foxworthy admitting that the County does not own the entire trail and that there are multiple public and private easements along the GRT); CP 178

(County admitting that it is a mere “steward” of the trail system RTS because the trails are part of the Federal Highway Administration’s transportation plan); CP 2682 (Seattle Public Utilities’ agreement with County showing that SPU had the authority to decide who could use or not use a portion of the GRT near the accident even at night when the County’s posted hours restricted access).⁹

Even more importantly, the County *expressly includes* the portion of the GRT running through Cecil Moses Memorial Park as part of the “public-right-of-way.” CP 1661-64. Thus, the public enjoys a “legally established right” to utilize the trail running through Cecil Moses Park for transportation purposes. CP 1664. This includes accessing the trail 24 hours a day when making such trips, regardless of the trail’s posted hours. CP 2243, 2739, 2770. These facts, especially when viewed in the light most favorable to Schwartz, should have precluded summary judgment where the record shows that the County does not have exclusive

⁹ The County argues, in a footnote yet again, that the mere fact that Schwartz sued the County is evidence of its ownership and right to control the trail, implying that a showing that the County did not own the land “would necessarily require dismissal of their lawsuit.” Resp’t br. at 11 n.5. The County fundamentally misunderstands premises liability law in this state. Ownership is not required for liability to attach. Washington law has long recognized that a *possessor* of premises owes a duty of care to invitees to the premises – including an affirmative duty to discover and protect against dangerous conditions on the premises – regardless of whether the possessor owns the land. *Adamson v. Port of Bellingham*, ___ Wn.2d ___, 438 P.3d 522, 527 (2019). The Court must remember that, as a derogation of common-law, the recreational use immunity statute must be strictly construed. *Carson v. Fine*, 123 Wn.2d 206, 214, 867 P.2d 610 (1994).

ownership and authority to close the GRT.

(b) The Authority to Close Test Should Not Be Abandoned Where the County Fails to Show That It Is Incorrect and Harmful

Recognizing factual hurdles it faces on this issue, the County asks the Court to “abandon” the authority to close test approved by this Court in *Camicia* just five years ago. Resp’t br. at 16-18; *see also, Camicia*, 179 Wn.2d at 696-97 (adopting the authority to close test). According to the County, this Court’s opinion on the topic was “judicial overreach.” *Id.* at 17. This argument fails where “judicial overreach” is not the standard for overturning precedent of this Court. Rather, this Court will “not lightly set aside precedent, and the burden is on the party seeking to overrule a decision to show that it is both incorrect and harmful.” *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008); *see also, State v. Otton*, 185 Wn.2d 673, 688 n.3, 374 P.3d 1108 (2016) (“Incorrectness and harmfulness are separate inquiries.”).

The County fails to show that *Camicia* is incorrect and harmful. As this Court recently said, “[S]tatutes should be interpreted to further, not frustrate, their intended purpose.” *Carranza v. Dovex Fruit Co.*, 190 Wn.2d 612, 625, 416 P.3d 1205 (2018) (quotation omitted). The authority to close test does just that. In *Camicia*, the Court correctly noted that “a landowner must have authority to close the land to the recreating public

because extending recreational immunity to landowners who lack authority to close the land to the public would not further the purpose behind the act.” *Camicia*, 179 Wn.2d at 696. This is sound policy where the intent of the act is to encourage “landowners to open land that would otherwise not be open,” and, therefore, the landowner must be able to close the land in question.

The authority to close test also makes sense given the strict construction required of the statute which derogates a landowner’s common-law duty to keep his or her premises safe for invitees. *Carson*, 123 Wn.2d at 214. Thus, immunity should only apply in the narrow circumstances intended by the Legislature. It should not extend to land designated, acquired, and open for transportation uses, regardless of some minor recreational which also occurs on the land.

This Court was well within its right to interpret the laws of this State when it strictly construed the recreational use immunity statute and adopted the authority to close test. *See Carranza*, 190 Wn.2d at 625 (The Supreme Court “has the ultimate authority to interpret a statute.”) (quotation omitted). Absent a showing, or even discussion, of how that interpretation is incorrect or harmful, this Court should reject the County’s plea to depart from recent precedent.

(c) Schwartz Created an Issue of Fact Regarding Whether the County Charged Some Users a Fee for Using the GRT

Schwartz created a material issue of fact by showing that the County charges a fee of any kind for using the trail by periodically renting out the trail for races and charging a permit fee. Appellants br. at 38-40 (citing RCW 4.24.210(1)). The County is wrong that *Hively v. Port of Skamania County*, 193 Wn. App. 11, 16, 372 P.3d 781, review denied, 186 Wn.2d 1004 (2016), supports its argument on this issue. Resp't br. at 26. In *Hively* a plaintiff fell while walking on a path to a bathroom in a park which the landowner periodically rented out to groups for private events. The County tries to spin *Hively*, arguing that the *Hively* court did not apply recreational use immunity because the fee-generating activities were "occasional[]." *Id.* Not true. Rather, the Division II held that recreational immunity still applied because the path to the bathroom was not a "necessary and integral part of the [landowner's] fee-generating areas," and the bathroom could be reached via "other routes." *Hively*, 193 Wn. App. at 16.

That is nothing like the trail at issue here, where the GRT is not just an "integral part" of the fee generating area; it is the *entire fee generating area* when the County leases it out for races. The record shows that the County leases its trails for races and charges a permit fee,

including at least one occasion on the GRT where Schwartz was injured and in “many” other occasions along the County’s other RTS trails. CP 2840-43. This created a question of fact as to the application of recreational use immunity which should have precluded summary judgment.

The County also claims that Schwartz fails to show that a permit fee charged to a group for using public lands for races “constitutes a rental charge for the use of the trail.” Resp’t br. at 25. The County cites *Jones v. United States*, 693 F.2d 1299 (9th Cir. 1982) for support, but its facts are distinct from the circumstances in this case. In *Jones*, the Ninth Circuit held that a fee paid for a sledding tube did not constitute a charge to use the land. In contrast, *Jones* cited *Thompson v. United States*, 592 F.2d 1104 (9th Cir. 1979), where a government landowner in California charged a motorcycle racing club a total of \$20 (the statutory minimum) in permitting and rental fees to use government land for a motorcycle race. The Ninth Circuit held in *Thompson* that even a nominal permit fee was sufficient to waive California’s version of the recreational use immunity statute. *Id.* at 1108.

Schwartz created a material issue of fact regarding the application of recreational use immunity where the record shows that the County has charged users a “fee of any kind” for using the trail. Summary judgment

should be reversed.

(2) The Trial Court Erred in Granting Summary Judgment Where Schwartz Created a Question of Fact as to Whether the Bollard Was a Known, Dangerous, Artificial, and Latent Condition

Assuming *arguendo* that immunity applies to the GRT, despite its status as a transportation facility, RCW 4.24.210(4)(a) creates an exception to recreational use immunity where a person is injured by “a known dangerous artificial latent condition” on the premises and no sign is “conspicuously posted” to warn of it. Schwartz presented ample evidence to show that this exception applied to the inadequately marked bollard which was functionally *invisible* to bicyclists. *See* Appellants br. at 21-23, 40-46. In response, the County resurrects arguments which it conceded below while highlighting the issues of fact which should have prevented summary judgment.

(a) The County Conceded Below That the Bollard Was a Known, Dangerous, and Artificial Condition

As stated, *supra*, the County *conceded* for purposes of summary judgment that the bollard was a known, dangerous, and artificial condition. ROP (8/3/18) at 9. Yet, now the County seeks to relitigate these conceded points on appeal, arguing, incorrectly, that the bollard was not a known, dangerous condition. Resp’t br. at 28-30. This is improper.

Appellate courts do not permit a party to argue a point on appeal

which the party “conceded” for purposes of summary judgment below. *City of Oak Harbor v. St. Paul Mercury Ins. Co.*, 139 Wn. App. 68, 72, 159 P.3d 422 (2007). As discussed above and in Schwartz’s opening brief, the County was right to concede these points below where the record shows that it knew the bollard existed, state and federal guidelines warn that inadequately marked bollards are dangerous to bicyclists, and the County even had actual knowledge that inadequately marked bollards along its trails presented a danger to regular trail users. Appellants br. at 3-6 (noting reports received by the County of “catastrophic injuries” suffered by bicyclists who hit bollards and numerous requests for additional warnings around the bollards on the County’s trails). The Court should disregard the County’s attempts to revisit these conceded points. Resp’t br. at 28-30. These conceded issues of fact should have gone to the jury.

(b) Schwartz Was Not Required to Show That the County Knew the Bollard Was Dangerous, Even Though He Did

Although the County’s arguments regarding its knowledge of and the dangerousness of the bollard should be disregarded in their entirety because they were conceded below, the County fundamentally misconceives the law where Schwartz was not required to show that the County knew that the bollard in question posed a danger, even though he

did. The words “known, dangerous, artificial, and latent” in the statute modify “condition” not each other. *Van Dinter*, 121 Wn.2d at 46; *Jewels* 183 Wn.2d at 397. Thus, a plaintiff need only show that the landowner “knew the injury-causing condition existed...not that the [landowner] knew that the condition was dangerous.” *Jewels*, 183 Wn.2d at 397. Here, knowledge is plainly met, where the County installed the bollard and has never argued that it did not know the bollard which injured Schwartz existed.

The County ignores this clear rule and argues that the exception to recreational use immunity does not apply because it had “[n]o [n]otice” that the bollard required warnings because it had “never been reported as a danger to anyone.” Resp’t br. at 28-29. Not only is this argument incorrect as a matter of law pursuant to *Van Dinter* and *Jewels*, but it is incorrect as a matter of fact where, as discussed *supra*, Schwartz presented ample evidence to show that the County had actual knowledge that the bollard in question posed a danger. This evidence included improvised markings around the bollard from concerned citizens, warnings from staff regarding the same, state and federal guidelines for marking bollards which the County failed to implement, and repeated complaints from citizens and experts who were injured by bollards on the RTS and warned that they were dangerous. While Schwartz was not required to present this

evidence that the County knew the bollard was dangerous, it only highlights the County's culpability by exposing the public to known dangers along its bike paths. The Court should disregard the County's arguments, which were rightly conceded below.¹⁰

(c) Schwartz Created a Question of Fact as to Whether the Bollard Was a Latent Condition

While the County did not concede latency below, Schwartz presented ample evidence that the bollard was functionally invisible to regular users of the trail who are invited to use non-motorized vehicles on the path. In addition to the Google Earth images, citizens' complaints, and other evidence discussed *supra*, Schwartz presented the unrebutted testimony of two experts who testified that the bollard presented a dangerous latent condition which would not have been visible to a user traveling at a reasonable speed on a bicycle like Schwartz. CP 1062-91. Schwartz also presented evidence that a regular user would not anticipate the bollard, which was placed not at an intersection or crosswalk where

¹⁰ The County also cites a partial survey of other courts where courts have held that bollards do not present an unreasonable risk of harm. Resp't br. at 30. However, the case law is not as one-sided as the County would have this Court believe. *See, e.g., Beckford v. United States*, 950 F. Supp. 4, 8 (D.D.C. 1997) (finding that an inadequately marked bollard "in the middle of a pedestrian and bicycle path" was a negligently installed hazard); *Abolofia v. Bd. of Supervisors of La State Univ. & Agr. & Mech. Coll.*, 2015 WL 782831 (La. App. Jan. 27, 2015) (reversing summary judgment dismissing claims of bicyclist who hit a bollard "in the middle of a bicycle path" due to the "highly factual nature of a determination of whether a condition presents an unreasonable risk of harm" or an "open and obvious danger"). Here, too, "highly factual" questions regarding the dangerousness of the bollard, a point conceded below, should have precluded summary judgment and allowed Schwartz his day in court.

one would expect a bollard, but rather in the middle of the shared-use path at a seemingly random location not easily anticipated by a cyclist using the curving path. *See, e.g.*, CP 1097-98. This type of evidence was enough to survive summary judgment in *Ravenscroft*, 136 Wn.2d at 911, where the Court found that a jury could determine that a stump in a waterway was a latent condition from the perspective of a boater traveling at speed.

The County's attempt to distinguish *Ravenscroft* – a case which has not been overturned by this Court – fails. First, the County argues that *Ravenscroft* should be discredited because it is a “boating case” and not a biking case like *Jewels*, 183 Wn.2d at 400. This distinction is of no consequence, where both cases hold that “[t]he 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.” *Id.* at 398; *Ravenscroft*, 136 Wn.2d at 924. Here, Schwartz presented evidence, including unrebutted testimony of two experts, that the bollard was not “readily apparent” to bicyclists like Schwartz, i.e. the general class of users on the GRT. State and federal guidelines expressly acknowledge the latent danger inadequately marked bollards pose to regular users of bicycle trails; that is why they require precautions like diamond-striped markings on the ground around bollards like the one which injured Schwartz. CP 1793-95, 1945-54.

Second, the County highlights the issues of fact which predominate questions of latency, by claiming that *Ravenscroft* and *Jewels* are consistent because the stumps in *Ravenscroft* were submerged and therefore no person could “‘stand’ next to it and observe the condition.” Resp’t br. at 35. But this is nothing more than factual speculation, improper when deciding latency as a matter of law. Notably, this speculation conflicts with four members of this Court who observed that it is possible the stumps would have been readily apparent to “someone swimming near them.” *Jewels*, 183 Wn.2d at 403 (Gordon-McCloud, J., dissenting). Where reasonable minds can differ, as they could here, factual disputes should go before the jury.

Ultimately, the Court must reconcile *Ravenscroft* and *Jewels*. Either *Ravenscroft* is good law, where it was not overturned or even cited by the majority in *Jewels*, and the latency of a hazard like a functionally invisible stump or bollard can be a question of fact for the jury. Or the incorrect and harmful standard espoused in *Jewels*, which plunks a hypothetical observer next to an object to determine latency as a matter of law and ignores whether the hazard is actually visible in real world conditions, prevails. Not only *Jewels*’ liberal expansion of recreational use immunity at odds with the Court’s duty to strictly construe the statute as discussed *supra*, but such a standard will inevitably lead to more

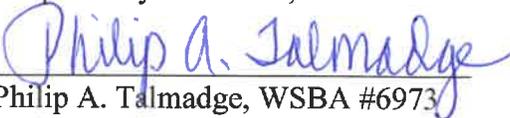
catastrophic injuries to regular users of our State's non-motorized transportation routes, despite known hazards to their safety. *See* appellant's br. at 43-45. Such users will be incentivized to eschew paved bike paths in favor of potentially more dangerous roadways and streets or give up their bikes altogether. These harmful outcomes were not intended by the Legislature and should not be tolerated by this Court.

F. CONCLUSION

Significant issues of fact should have precluded summary judgment as to whether RCW 4.24.210's recreational use immunity applies in this case. Schwartz asks that the Court reverse the trial court's order granting summary judgment to the County, and award costs on appeal to Schwartz.

DATED this 13th day of May, 2019.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the *Reply Brief of Appellants* in Supreme Court Cause No. 96263-4 to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: May 13, 2019, at Seattle, Washington.


Patrick J. Aguilar, Legal Assistant
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