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Supreme Court No. 90319-1

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**SUPREME COURT OF THE  
STATE OF WASHINGTON**

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STEVEN JEWELS,

Petitioner,

v.

CITY OF BELLINGHAM, a municipal corporation,

Respondent.

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**CITY OF BELLINGHAM'S ANSWER TO BRIEF OF AMICUS CURIAE,  
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION**

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## I. INTRODUCTION

Defendant, the City of Bellingham ("the City"), respectfully submits this answer to the amicus curiae brief filed by the Washington State Association for Justice Foundation ("WSAJ").

## II. ARGUMENT

Respectfully, WSAJ's arguments are flawed because they misunderstand the reasoning, case law, history, language and legislative intent behind RCW 4.24.210, the recreational use act. As articulated below, WSAJ's arguments fail and should be rejected.

### A. WSAJ ignores legislative intent and precedent.

The primary argument advanced by WSAJ is that this Court should "disapprove" of cases that, in their view, conflict with *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 846 P.2d 522(1993). WSAJ Br. at 4. Despite this contention, WSAJ failed to cite any of these cases or explain why the reasoning in these cases is allegedly flawed. A mere summary of and citation to *Van Dinter* was the only argument offered in support of this sweeping contention. What WSAJ failed to address is the Achilles heel of their argument: that the vitality of RCW 4.24.210 depends upon the reasoning articulated in *Gaeta v. Seattle City Light*, 54 Wn.App. 603, 774 P.2d 1255 (1989), and

that the legislature intended to include the actual knowledge requirement.

The *Gaeta* Court reasoned that the statute requires a plaintiff to prove actual knowledge of a dangerous condition to overcome the protections of RCW 4.24.210 or else the recreational landowner would be relegated to common law landowner status.<sup>1</sup> *Gaeta* at 609. *Gaeta* and every court of appeals case that followed understood that without the actual knowledge requirement, landowner's would be subjected to the "known or should have known" status that applies to invitees and licensees. See e.g. *Nauroth v. Spokane County*, 121 Wn.App. 389, 88 P.3d 996 (2004); *Davis v. State*, 102 Wn.App. 177, 189, 6 P.3d 1191 (2000), *aff'd on different grounds*, 144 Wn.2d 612, 30 P.3d 460 (2001); *Cultee v. City of Tacoma*, 95 Wn.App. 505, 977 P.2d 15 (1999); *Ertl v. State 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 *Partridge v. City of Seattle*, 49 Wn.App. 211, 741 P.2d 1039 (1987).

WSAJ asserts that the court of appeals has "uncritically" relied on *Gaeta* in establishing over 30 years of precedent. But, the cases

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<sup>1</sup> *Van Dinter* relied on and treated *Gaeta* favorably but did not directly rule on the "known" element of the statute.

that followed *Gaeta* and *Morgan v. United States*, 709 F.2d 580 (1983), all examined and articulated their understanding of the importance of the "known" element in premises cases. To say these subsequent cases ruled "uncritically" is a mischaracterization. To the extent the cases subsequent to *Gaeta* didn't discuss *Van Dinter*, this is to be expected. After all, *Van Dinter* had nothing to do with the "known" element of RCW 4.24.210(4)(a). Moreover, *Van Dinter*, *Gaeta*, and *Morgan* can all be read together harmoniously. See City's Supp. Br.

As the cases articulate, the requirement of actual knowledge of a dangerous condition under RCW 4.24.210 is well reasoned and has been accepted since the statute was enacted. "When no admission charge has been paid, an entrant will be required to prove that the owner either acted intentionally or **had prior knowledge of a dangerous condition** which could have been warned against at reasonable expense." Barrett, *Good Sports and Bad Lands: The Application of Washington's Recreational Use Statute Limiting Landowner Liability*, 53 Wash.L.Rev. 1, 9 (1977).<sup>2</sup> Commentators,

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<sup>2</sup> This Court has cited John Barrett's 1977 Law Review article with approval multiple times. See e.g. *Camicia v. Howard S. Wright Construction Co.*, 170 Wn.2d 684, 695, 317 P.3d 987 (2014); *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 920, 934 (1999) (Madsen, J. Dissenting); *Van Dinter* at 42; and *McCarver v. Manson Park and Recreation Dist.*, 92 Wn.2d 370, 374 (1979).

therefore, acknowledged early on that subjective knowledge or evidence of the landowner's "state of mind" is required to prove knowledge of a dangerous condition. *Id.* at 20, n. 124.

The senate also recognized the importance of actual knowledge during the debate preceding the statute's enactment. It is well chronicled that the senate amended the statute prior to passage to specifically include the word "known" before "dangerous artificial latent condition." *Morgan* at 584. Senator Donahue's explanation of the inclusion of "known" is that a landowner should not be responsible for latent conditions he doesn't know about. *Id.* Likewise, a landowner should not be responsible for dangerous conditions he or she doesn't know about. Senator Donahue affirms this later in the debate when asked a question by Senator Canfield about posting a sign on river lands:

The way the amendment reads, if my amendment [to include "known"] is not adopted, you would be charged with knowledge. Take for example your river bottom lands. **You would be charged with knowledge of any dangerous thing that was down in that ground even though you weren't aware of it.**

H.R. 258, Wash.S.Jour., 42<sup>nd</sup> Legis. 875, 876 (1967).  
[emphasis added].

WSAJ summarily concludes that *Van Dinter* should be construed to overrule 30 years of case law without addressing the

important legal reasoning behind these cases. WSAJ also ignores that the legislature specifically called for the actual knowledge requirement. Finally, as the City has previously argued, the courts' interpretation of "known" is in harmony with *Van Dinter*. WSAJ's argument is therefore unpersuasive and should be rejected.

**B. Recreational land use case law does not need to be clarified.**

WSAJ also argues that this Court should "clarify" the proper interpretation of RCW 4.24.210. But, there has been no confusion over how RCW 4.24.210 applies when it comes to determining what a "known condition" is. As articulated in previous briefs and above, the court of appeals' reasoning and decision in this case is in accord with all those before it. There has been no confusion or conflict. The reasoned analysis by the court in *Morgan*, and adopted by and relied upon by *Gaeta*, *Partridge*, *Ertl*, *Tabak*, *Cultee*, *Nauroth*, and the court of appeals in this case shows there has been no confusion and no wavering over the actual knowledge requirement.

The well-settled requirement that actual knowledge is necessary is evidenced by this case alone. Plaintiff did not dispute to the trial court or court of appeals that actual knowledge under RCW 4.24.210 was required. See CP 55-68; and Br. of Appellant.

Rather, Plaintiff merely argued that there were facts that showed actual knowledge and that standards for street construction applied to this case. *Id.* These arguments were rejected by both the trial court and court of appeals.

The argument that *Van Dinter* should be interpreted to require something less than actual knowledge first appeared in Plaintiff's petition for review. See Pet. for Rev. There was no dispute about this aspect of the law below. Thus, the precise issue of law raised in the petition for review was not even disputed by Plaintiff himself. WSAJ's assertion that confusion exists amongst practitioners and the courts is unsupported.

**C. RCW 4.24.210 establishes an affirmative defense as to its application and created a new duty of care.**

WSAJ asserts that this Court needs to address whether RCW 4.24.210 establishes an affirmative defense for landowners or establishes the duty owed to users of recreational lands. WSAJ Br. at 11.

First, this issue was not raised by Plaintiff in the trial court, in the court of appeals, or in any meaningful way to this Court. See CP 55-58, Appellant. Br., Pet. for Review, and Pl. Supp. Br. Issues raised

for the first time by amicus should not be considered by the Court. *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962).

Second, to the extent this issue is relevant to the petition for review, WSAJ misconstrues the law. As explained below, RCW 4.24.210 establishes both an affirmative defense and a legal duty. The landowner must assert the defense as to the statute's applicability. Once the landowner proves the statute applies, that an unintentional injury happened on open recreational land for which no fee was charged, the plaintiff must prove the landowner failed to comply with the statute's duty to post a conspicuous warning sign for the alleged injury causing condition.

RCW 4.24.210(1) states that recreational landowners "shall not be liable for unintentional injuries." It goes on to state:

Nothing in this section shall prevent the liability of a landowner or others in lawful possession and control for injuries sustained to users by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted.

RCW 4.24.210(4)(a). Recently, this Court acknowledged that RCW 4.24.210 provides an affirmative defense requiring the landowner to show the statute applies. *Camicia v. Howard S. Wright Construction Co.*, 170 Wn.2d 684, 317 P.3d 987 (2014); *Cregan v. Fourth Memorial Church*, 175 Wn.2d 279, 285 P.3d 860 (2012). To

fall within the statute, a landowner must prove that the land in question was open to members of the public for recreational purposes and no fee was charged. *Cregan* at 284. The applicability of the statute is an affirmative defense that the landowner must prove. See *Camicia* at 694; *Cregan* at 283.

However, *Camicia* also stated that RCW 4.24.210 created a legal duty owed to park users. *Camicia* at 702. The Court said:

**Washington's recreational use immunity statute modifies the legal duty owed to public invitees by permitting landowners to invite the public onto the land...Rather than owing these invitees a duty of ordinary care, a landowner owes them a duty to warn of "known dangerous artificial latent conditions".**

*Id.* Thus, once it is established by the landowner that RCW 4.24.210 applies, the duty owed is defined by the statute and the plaintiff must prove he was injured by known dangerous artificial latent condition for which no warning signs were posted.

In finding the statute creates a duty, *Camicia* is in accord with established precedent. This Court has previously recognized that the statute modified the common law duty owed to public invitees and that the recreational landowner's duty under RCW 4.24.210 is to post a conspicuous warning sign. *Davis v. State* 144 Wn.2d 612, 615-16, 30 P.3d 460 (2001); *Ravenscroft* at 920. The court of appeals has

said that "[t]he statute changed the common law by altering an entrant's status from that of a trespasser, licensee, or invitee to a new statutory classification of recreational user." *Van Dinter v. City of Kennewick*, 64 Wn.App. 930, 934-35 (1992) *aff'd* 121 Wn.2d 38 (1993) (*Van Dinter I*). Similarly, the Ninth Circuit held that "[a] defendant's duty to recreational users is defined by statute and consists of avoiding intentional injuries and posted conspicuous signs warning of any known dangerous artificial latent condition." *Morgan* at 583.<sup>3</sup>

The principle that RCW 4.24.210 creates a duty is further supported by the intent of the statute. The intent of the statute is to limit liability by creating a separate premises class - recreational users - and a corresponding duty. See e.g. *Morgan and Ravenscroft supra*.<sup>4</sup> By enacting RCW 4.24.210, the legislature significantly

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<sup>3</sup> The mechanics of RCW 4.24.210 are comparable to paramedic "immunity" under RCW 18.71.210, which sets a gross negligence standard for paramedics acting in good faith. If a paramedic defendant asserts and proves the applicability of the statutory defense, a plaintiff must then prove gross negligence. See *Marthaller v. King County Hosp. Dist. No. 2*, 94 Wn.App. 911, 973 P.2d 1098 (1999). It's also comparable to industrial insurance immunity under Title 51 RCW, where an employer asserts immunity for an injury occurring in the scope of employment which then requires the employee/plaintiff to prove the injury was caused by an intentional act. See e.g. *Foster v. Allsop Automatic Inc.*, 86 Wn.2d 579, 547 P.2d 856 (1978).

<sup>4</sup> "In a more immediate sense, however, RCW 4.24.210 merely adds another entrant category - the recreational user - to the jerry-built common law classification scheme." Barrett, *supra*, at 28.

modified the duty owed to what were formally public invitees and created a "residual duty" owed to recreational users. Barrett, *supra*, at 9. The legislature created a residual duty to post conspicuous warning signs for known dangerous artificial latent conditions. *Id.* at 16. In other words, the legislature eliminated the duty owed to public invitees, and left only a residual duty to warn park users of known dangerous artificial latent conditions.

In this case, it is undisputed that the recreational land use act applied. To wit, Plaintiff has not disputed that he suffered an unintentional injury in an open City park for which no fee was paid. With this concession, the courts below appropriately acknowledged that the duty owed was to post a conspicuous warning sign for a known dangerous artificial latent condition. The trial court and court of appeals both appropriately held that RCW 4.24.210 defined the duty owed in this case.

Accordingly, WSAJ's contention that the court of appeals "misapprehended the nature of" RCW 4.24.210 by "viewing it as a liability statute supplanting the common law" is without merit. See WSAJ Br. at 11. In fact, the opposite is true: the legislature intended to create a new premises class for park users and a corresponding duty owed. The court of appeals correctly applied the law.

**D. Plaintiff cannot be both a recreational user and a common law invitee or licensee.**

WSAJ contends that the City must prove that the injury causing condition was not a known dangerous artificial latent condition and that if it fails, the Plaintiff must prove his case under ordinary negligence. WSAJ Br. at 12. In effect, WSAJ is arguing that Plaintiff was a park user and a common law entrant.

But, RCW 4.24.210 reclassified public invitees using recreational lands as park users. *Van Dinter I* at 934-35; and section C *supra*. This was done purposefully to protect recreational land owners from what was perceived to be a liberal definition of "public invitee" under the law. *Van Dinter* at 42. As such, an entrant to a park is a park user and not an invitee or licensee. RCW 4.24.210 "plainly prohibits application of the public invitee standard to recreational entrants." Barrett, *supra.*, at 9.

The flaw in WSAJ's argument is illustrated by *Bilbao v. Pacific Power & Light Company*, 257 Or. 360, 479 P.2d 226 (1971). There, the plaintiff was in Washington when she was injured at a public recreation area at Lake Merwin. *Bilbao*, 257 Or. at 361, 479 P.2d at 227. It was undisputed the injury happened in a park and that RCW 4.24.210 applied. *Id.* The Oregon Supreme Court held that the

plaintiff's "status and the defendant's duty to plaintiff are clearly defined by the statute, RCW 4.24.210." *Bilbao*, 257 Or. at 363, 479 P.2d at 227. The court further held that it was error to instruct the jury regarding common law invitee status because the applicable status and duty owed were contained in RCW 4.24.210. *Id.* at 364, 479 P.2d at 228.

Because the legislature modified public invitees in parks to park users and defined the duty owed, Plaintiff cannot be both a park user and a common law entrant. A trial court cannot, therefore, instruct a jury that both RCW 4.24.210 and common law duties apply in a case where the injury undisputedly happened in a park for which no fee was paid and the injury was unintentional.<sup>5</sup>

**E. The court of appeals did not inappropriately place the burden on Plaintiff.**

WSAJ argues that the court of appeals inappropriately placed the burden on Plaintiff to prove the elements under RCW 4.24.210. WSAJ Br. at 11. WSAJ's argument fails because RCW 4.24.210

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<sup>5</sup> To the extent WSAJ relies on Judge Becker's dissent below, it is unpersuasive. Judge Becker's dissent relied on a common law premises case involving the Crystal Mountain ski area and is therefore not relevant or helpful in interpreting RCW 4.24.210. *Jewels v. City of Bellingham*, 180 Wn. App. 605, 618-619, 324 P.3d 700 (2014) (Becker, J., dissenting).

does establish a duty of care (see section C and D, *supra*) which requires Plaintiff to prove that the duty owed was breached.

Further, WSAJ's argument would lead to an absurd result. In requiring a landowner defendant to prove a condition was *not* known dangerous artificial or latent, the condition would necessarily be *presumed* known dangerous artificial and latent. In limiting landowner liability by enacting RCW 4.24.210, the legislature surely did not intend to create a presumption that the statute had been violated.

Importantly, WSAJ also fails to appreciate that the City prevailed at summary judgment. CP 119-121. Pursuant to CR 56, the City submitted evidence showing that the condition was not known, dangerous or latent. CP 26-54. The trial court granted the motion because Plaintiff failed to submit evidence that contradicted the City's evidence, notably regarding knowledge and latency. CP 142-144.

In the context of the CR 56 summary judgment motion, Plaintiff had the burden under the rule to contradict the City's evidence and he failed to do so. Therefore, regardless of who has the burden at trial to prove or disprove the elements of RCW 4.24.210, at the summary judgment hearing there was no factual

dispute about the known element and the latency element. Plaintiff's claims therefore failed at summary judgment. WSAJ's contention that the trial court and court of appeals erred in finding it was incumbent upon Plaintiff to produce evidence to overcome summary judgment is counter to the very letter of CR 56 and is meritless.

**F. Remaining assertions and arguments should be rejected.**

WSAJ makes additional, ancillary arguments that warrant clarification.

First, WSAJ argues that *stare decisis* does not guide this court in regards to the *Gaeta* decision. WSAJ heedlessly asserts that because *Gaeta* is only a court of appeals decision, this court is not bound by it. WSAJ Br. at 9, n. 5.

WSAJ's argument only looks at half of the picture. This Court has approved of *Gaeta*, albeit not solely based on review of the knowledge issue. See *Van Dinter*. *Gaeta*, however, is also not the only case that supports the City's position. *Gaeta* has been relied upon multiple times by all three divisions of the court of appeals. *Gaeta* itself relied on legislative history, *Morgan*, *Bilbao*, and John Barrett's well-respected law review article.

So, WSAJ isn't just asking this court to overturn *Gaeta*. WSAJ and Plaintiff are asking this Court to overturn 35 years of established, consistent precedent. Because the court has approved of *Gaeta* and because of the uniform agreement amongst the courts, legislature, and commentators, this Court should be bound by the "incorrect and harmful" standard and reject WSAJ's overtures to simply overturn portions of *Gaeta*.

Second, WSAJ asserts that the City does not "take issue with the definition of 'known'" as used in RCW 4.24.210. WSAJ Br. at 7, n. 4. The City's position is consistent with the case law and reasoning underpinning the case law. "Known" under RCW 4.24.210 means that the landowner must have actual knowledge that the condition was dangerous.

Finally, WSAJ asserts, without citation, that Plaintiff was injured by an "extension of a speed bump." WSAJ Br. at 2. In fact, the undisputed evidence shows that Plaintiff rode over the water-diverter that abutted the speed bump. CP 16 ¶ 14; CP 92 ¶ 9. The water-diverter was not an extension of the speed bump; its purpose was not to calm traffic. CP 16 ¶ 14. While WSAJ may loosely refer to the water-diverter as an extension of the speed bump, this is factually incorrect.

The only person with knowledge about the water-diverter's purpose and construction in the record is City of Bellingham Parks supervisor Tom Slack. See CP 14-18. Plaintiff cannot and did not contradict Slack's declaration about the water-diverter. In fact, the court of appeals correctly determined, based on the record, that the water-diverter was not a traffic calming measure and not part of the speed bump. *Jewels* at 611.

### III. CONCLUSION

Precedent and legislative intent show that this Court must uphold the court of appeals in this case. WSAJ failed to refute the case law and legislative intent compelling the court of appeals' decision. WSAJ also misconstrued the duty owed, the requirements of CR 56, the well-ingrained precedent underpinning RCW 4.24.210, and facts surrounding the injury causing condition. For these reasons, WSAJ's arguments fail and should be rejected.

Respectfully submitted this 8<sup>th</sup> day of January, 2015.



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THE STATE OF WASHINGTON**

STEVEN JEWELS,

Petitioner,

and

CITY OF BELLINGHAM, a  
municipal corporation,

Respondent.

NO. 90319-1

**DECLARATION OF  
SERVICE**

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I declare under the penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. I am an employee of the City of Bellingham. My employment address is 210 Lottie Street, Bellingham, Washington 98225.

On January 8, 2015, I served a true and correct copy of the following documents on the parties listed below in the manner indicated:

1. **City of Bellingham's Answer to Brief of Amicus Curiae, Washington State Association for Justice Foundation**
2. **Declaration of Service**

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DATED this 8<sup>th</sup> day of January, 2015.

**CITY OF BELLINGHAM**

  
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Paralegal

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Supreme Court Clerk's Office:

Please find the following documents attached for filing:

1. City of Bellingham's Answer to Brief of Amicus Curiae, Washington State Association for Justice Foundation
2. Declaration of Service

The case and contact information is set forth below as follows:

**Case Name:** Steven Jewels v. City of Bellingham  
**Case Number:** 90319-1

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We look forward to receiving your confirmation e-mail. Thank you in advance for your attention to this matter.

Sincerely,

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