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

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STEVEN JEWELS,

Petitioner,

v.

CITY OF BELLINGHAM, a municipal corporation,

Respondent.

CITY OF BELLINGHAM'S SUPPLEMENTAL BRIEF

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 ORIGINAL

Table of Contents

I. INTRODUCTION..... 1

II. STATEMENT OF THE CASE2

III. ARGUMENT.....5

A. The court of appeals and the trial court correctly granted summary judgment because Plaintiff failed to prove the City had actual knowledge of a dangerous condition..... 5

1. RCW 4.24.210 and actual knowledge. 5

2. Plaintiff's arguments.....9

3. Judge Becker's dissent. 16

B. The Court should affirm because Plaintiff failed to raise an issue of material fact regarding latency or dangerousness of the condition..... 17

IV. CONCLUSION20

Table of Authorities

Cases

<i>Chamberlain v. State Dept. of Transportation</i> , 79 Wn.App. 212, 901 P.2d 344 (1993).....	12
<i>City of Federal Way v. Koenig</i> , 167 Wn.2d 341, 217 P.3d 1172 (2009)	14
<i>Cultee v. City of Tacoma</i> , 95 Wn.App. 505, 977 P.2d 15 (1999)....	8, 16, 18, 19
<i>Davis v. State</i> , 102 Wn.App. 177, 6 P.3d 1191 (2000).....	17
<i>Davis v. State</i> , 144 Wn.2d 612, 30 P.3d 460 (2001)	5, 13
<i>Ertl v. State Parks & Recreation Commission</i> , 76 Wn.App. 110, 882 P.2d 1185 (1994).....	6, 8, 9, 11
<i>Gaeta v. Seattle City Light</i> , 54 Wn.App. 603, 774 P.2d 1255 (1989)	passim
<i>In Re Rights of Waters Stranger Creek</i> , 77 Wn.2d 649, 466 P.3d 508 (1970)	14, 15
<i>Jewels v. City of Bellingham</i> , 180 Wn.App. 605, 324 P.3d 700 (2014)	5, 16
<i>Morgan v. United States</i> , 709 F.2d 580 (1983)	8, 9, 11, 15
<i>Nauroth v. Spokane County</i> , 121 Wn.App. 389, 88 P.3d 996 (2004)	8
<i>Partridge v. City of Seattle</i> , 49 Wn.App. 211, 741 P.2d 1039 (1987)	6, 11
<i>Ravenscroft v. Washington Water Power Co.</i> , 136 Wash.2d 911, 969 P.2d 75 (1998).....	13, 18, 19
<i>Riksem v. City of Seattle</i> , 47 Wn.App. 506, 736 P.3d 275 (1987)...	8
<i>Scott v. Harris</i> , 550 U.S. 372, 127 S.Ct. 1769 (2007).....	18
<i>Singleton v. Jackson</i> , 85 Wn.App. 835, 935 P.2d 644 (1996)	10
<i>Smith v. Stockdale</i> , 166 Wn.App. 557, 271 P.3d 917 (2012)	17
<i>State v. J.P.</i> , 149 Wn.2d 444, 69 P.3d 318 (2003)	12
<i>Swinehart v. City of Spokane</i> , 145 Wn.App. 836, 187 P.3d 345 (2008)	13, 17, 18
<i>Tabak v. State</i> , 73 Wn.App. 691, 870 P.2d 1014 (1994).....	passim
<i>Tennyson v. Plum Creek Timber</i> , 73 Wn.App. 550, 556, 872 P.2d 524 (1994)	passim
<i>Tincani v. Inland Empire Zoological Society</i> , 124 Wn.2d 121, 875 P.2d 621 (1994).....	10
<i>Van Dinter v. City of Kennewick</i> , 121 Wn.2d 38, 846 P.3d 522 (1993)	passim

Young Soo Kim, v. Choong-Hyun Lee, 174 Wn.App. 319, 300 P.3d
431 (2013) 20

Statutes

RCW 4.24.200..... 8, 11
RCW 4.24.210..... 5

Other Authorities

CR 56 7
ER 702 20
Restatement of Torts §§ 342, 343 10

I. INTRODUCTION

Steven Jewels, the Plaintiff, was injured when he attempted to avoid a speed bump on his bicycle in a City of Bellingham park ("City"). Although the speed bump was installed and designed to slow traffic, Plaintiff rode around the speed bump and encountered a 1-2 inch asphalt berm (known as a water-diverter) that was abutting the speed bump and was injured. The court of appeals followed established precedent in affirming summary judgment for the City based on recreational land use immunity under RCW 4.24.210, because there was no evidence that the City had actual knowledge of the condition's dangerousness.

The court of appeals' decision is consistent with more than 30 years of precedent, which has required a Plaintiff to show that a recreational landowner had actual knowledge of a dangerous condition, and not mere knowledge that a condition existed. The court of appeals and precedent recognize that the legislature's well-known and unambiguous intent is to provide greater protection to recreational landowners as compared to common law landowners, and that the requirement of actual knowledge is vital to maintain the legislature's intent.

Plaintiff is asking this Court to reverse decades of well-settled precedent and to blatantly contradict the legislature's express intent to place recreational landowners above other common law landowners. His arguments have no merit and fail.

For the sake of argument, even if Plaintiff is correct about the knowledge issue in this case, this Court should still affirm based on the latency and dangerousness elements in RCW 4.24.210. The latency issue in this case is dispositive for the City because the condition that injured Plaintiff was patent - it was visible, out in the open and not obscured. Additionally, Plaintiff failed to prove the condition that injured him was unreasonably dangerous. The record is scant, if not bare, on admissible evidence showing that condition at issue was unreasonably dangerous.

The Court should affirm.

II. STATEMENT OF THE CASE¹

It is undisputed that Cornwall Park is a City of Bellingham park open to the public for use without a fee. CP 9, CP 15. It is also undisputed that Plaintiff was unintentionally injured in Cornwall Park

¹ A full statement of the facts is contained in the City's Answer to the Petition for Review and its Response Brief below.

while riding his bicycle on the park's southern access road on June 30, 2008. CP 91.

The southern access road has four speed bumps and is lined with curbs on each side. CP 15, 16. The speed bumps do not extend from curb to curb and therefore leave a small gap in between the curbs and the speed bumps (with the exception of one side of the second speed bump as explained below). CP 15-16. The gaps between the speed bumps and the curbs exist to facilitate drainage. CP. 16. The gaps are not designed to allow cyclists to bypass the speed bumps. CP 16. In fact, the speed bumps were installed to slow vehicles and bicycles down. CP 16.

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

Plaintiff rode over the first speed bump fast enough to find it "jarring" and knocked his water bottle loose from its position on his

bike. CP 91. Instead of slowing down, as Plaintiff approached the second speed bump, he attempted to ride around the speed bump while readjusting his water bottle. CP 91-92. As he rode around the speed bump, he encountered the water-diverter and crashed his bike into the curb and curb cut-out. CP 92.

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

Moreover, the water-diverter, curb, and curb cut-out are not hidden or obscured in any way. CP 17. Prior to Mr. Jewels' accident, the City had no knowledge of any prior accidents at this particular location, nor had it received any complaints. CP 18.

Plaintiff filed this lawsuit alleging the City was negligent. CP 6. The trial court granted the City's motion for summary judgment based on recreational land use immunity because the injury causing condition was not latent and the City did not have actual knowledge of any danger. RP 17. The court of appeals affirmed the trial court based on the City's lack of knowledge. *Jewels v. City of Bellingham*,

180 Wn.App. 605, 324 P.3d 700 (2014). This Court should affirm the court of appeals and the trial court.

III. ARGUMENT

A. The court of appeals and the trial court correctly granted summary judgment because Plaintiff failed to prove the City had actual knowledge of a dangerous condition.

1. RCW 4.24.210 and actual knowledge.

The court of appeals and the trial court correctly held that Plaintiff was required to prove that the City had actual knowledge that the water diverter and curb cut-out was dangerous in order to overcome recreational immunity. Pursuant to RCW 4.24.210(4)(a), the City is entitled to immunity unless Plaintiff can prove the injury causing condition was known, artificial, latent and dangerous for which there were no conspicuous warning signs posted. *Davis v. State*, 144 Wn.2d 612, 616, 30 P.3d 460 (2001). Plaintiff must demonstrate that each of the four elements is present in the injury-causing condition. *Id.* If any of the four elements is lacking, his claim cannot survive summary judgment. *Id.*

In construing what it means to prove that an injury causing condition was "known," Washington courts have held that a plaintiff must prove that the landowner had actual knowledge that the

condition was dangerous. *Gaeta v. Seattle City Light*, 54 Wn.App. 603, 609, 774 P.2d 1255 (1989), see also *Partridge v. City of Seattle*, 49 Wn.App. 211, 741 P.2d 1039 (1987). "In order to constitute a 'known' dangerous condition for purposes of the recreational use act, the landowner must have actual as opposed to constructive knowledge that the condition is dangerous." *Id.* Actual knowledge distinguishes the recreational land use act from common law liability for dangerous conditions about which the landowner knows or should know. *Ertl v. State Parks & Recreation Commission*, 76 Wn.App. 110, 114-15, 882 P.2d 1185 (1994). A landowner must know of the condition and must know it is dangerous in order to lose immunity. *Ertl* at 114-115.

Here, the court of appeals and trial court appropriately held that the City was entitled to recreational immunity because Plaintiff failed to provide any evidence that the City knew the condition at issue, the water-diverter and the curb cut-out, posed a danger. In fact, prior to Plaintiff's accident, the City had never received a complaint about the condition. CP 18. Not from a bicyclists, runner, walker, or any park user. See CP 18. Nor had there been any reported or known accidents. CP 18. Because Plaintiff failed to

contradict the lack of knowledge on City's part, his claims failed under RCW 4.24.210 and CR 56.

Moreover, it is undisputed that Plaintiff attempted to avoid a speed bump in the park and that is when he encountered the water-diverter and curb cut-out. The City is not expected to anticipate all the ways a park user could misuse property in a park. *Tennyson v. Plum Creek Timber*, 73 Wn.App. 550, 556, 872 P.2d 524 (1994). While Plaintiff argues that bicyclists commonly avoid speed bumps, there is nothing in the record showing that the City had knowledge of this. Quite the opposite, the record shows the City left gaps at the ends of the speed bumps and installed the water-diverter and curb cut-out for only drainage purposes. CP 16. In other words, the City intended for cyclists to ride over the speed bumps to slow their speed, and did not intend or expect cyclists to circumvent them.

As the court of appeals said, Plaintiff was required to show that:

[T]he City knew that water-diverter in proximity to the curb cut-out posed a danger to a cyclist choosing to avoid the speed bump 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 become trapped in the cut out, producing injury.

Jewels at 610. Plaintiff failed to make such a showing and his claims were, therefore, properly dismissed.

The court of appeals' decision and reasoning below is in accord with every case before it. The history and purpose of the recreational land use immunity act is well chronicled and embedded in Washington law. The express purpose of the recreational land use statute is to encourage landowners and others in lawful possession and control of land to make them available to the public for recreational purposes by limiting their liability towards persons entering thereon. RCW 4.24.200; *See also Riksem v. City of Seattle*, 47 Wn.App. 506, 509, 736 P.3d 275 (1987).

The issue surrounding what a "known" condition is under the recreational land use immunity act is likewise well-settled in Washington. The Washington Court of Appeals (all three divisions) and the Ninth Circuit have not only ruled on this issue, but have uniformly construed and interpreted the statute. *See e.g. Gaeta; Ertl; Cultee v. City of Tacoma*, 95 Wn.App. 505, 977 P.2d 15 (1999); *Neuroth v. Spokane County*, 121 Wn.App. 389, 88 P.3d 996 (2004); *Tabak v. State*, 73 Wn.App. 691, 870 P.2d 1014 (1994); and *Morgan v. United States*, 709 F.2d 580 (1983).

The cases that have addressed the term "known" condition have uniformly articulated the importance of actual knowledge of dangerousness in determining summary judgment in recreational land use cases. See *e.g. Gaeta and Ertl*. Actual knowledge is what distinguishes the recreational land owner from the common law land owner; if a court were to require the common law "known or should have known" standard to a recreational land use owner, the court would in effect "emasculate the statute." *Morgan* at 583. If actual knowledge is not required, the recreational landowner would in effect revert back to a common law landowner and the corresponding duty to public invitees. Such an interpretation is without question contrary to legislative intent.

Thus, the court of appeals and trial court appropriately relied on well-grounded precedent and granted summary judgment.

2. Plaintiff's arguments.

Plaintiff argues that the Court should interpret *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 846 P.3d 522 (1993) to mean that "known" means a recreational landowner is required to know of a condition without regards to its dangerousness. See Pet. for Rev. But, Plaintiff's argument, if accepted, would fatally contradict legislative intent and overturn *Gaeta* and decades of precedent.

Specifically, Plaintiff's argument fails because: (1) construing *Van Dinter* to require that a landowner merely have actual knowledge of a condition defies legislative intent and public policy by placing recreational land owners below common law land owners; and (2) it disregards stare decisis.

First, in asserting that *Van Dinter* should be interpreted to only require that a recreational landowner know of a condition without regard to danger under RCW 4.24.210, Plaintiff is advocating for recreational land owners to have less protection than common law landowners.² Those who invite or license persons on property are at least required to have constructive knowledge about a condition's danger. *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 138, 875 P.2d 621 (1994) quoting of the Restatement of Torts §§ 342, 343. For example, in *Singleton v. Jackson*, 85 Wn.App. 835, 935 P.2d 644 (1996), the court affirmed summary judgment when a plaintiff, who was a licensee under the common law, failed to prove the landowner knew that a slippery, algae laden portion of a deck, which was off of the intended path to the door, was dangerous. Under

² *Van Dinter* did not address the issue of actual knowledge under RCW 4.24.210. The Court in *Van Dinter* concerned itself only with the term "latent" and did not engage in any further analysis of the statutory terms. *Van Dinter* at 46. ("*In particular*, "latent" modifies "condition", not "danger.") [emphasis added].² Thus, *Van Dinter* is distinguishable.

Plaintiff's argument though, users of the land would be wholly absolved of proving the same element needed if the land was not recreational, and would only be required to prove knowledge of a condition and nothing more. Per Plaintiff's argument, recreational land owners would only be required to know of a condition and nothing more. Not even constructive knowledge would be required. Thus, common law landowners would have greater protections from liability than a recreational landowner, a paradigm that stands in direct contradiction to the legislature's intent. See RCW 4.24.200. Plaintiff's argument is, therefore, untenable.

Furthermore, *Van Dinter's* interpretation of the terms "known dangerous artificial latent condition" in RCW 4.24.210 is not inconsistent with the courts' interpretation of what it means to show a known condition. The courts have recognized the holding in *Van Dinter*, that "condition" modifies the terms that precede it, but at the same time, acknowledged it is necessary to interpret the terms further to honor legislative intent. This is especially true in the courts' interpretation of "known" where the construction requiring actual knowledge of a dangerous condition is necessary to uphold the legislature's intent to give recreational landowners greater protection. See e.g. *Gaeta, Ertl, Partridge, Morgan*. Further, despite Plaintiff's

suggestion, there is no lower court confusion over the *Van Dinter* ruling and interpreting a "known" condition under RCW 4.24.210.³ The lower courts have harmonized *Gæta*, *Van Dinter* and the interpretation of "known" to create a sensible rule that upholds the purpose of the statute.

Plaintiff is asking the Court to read the terms "known artificial latent dangerous condition" as bare words on a page. According to Plaintiff, the Court need only read the terms and apply select principles of grammar to arrive at a conclusion. This approach, however, is not how courts interpret statutes. It would be absurd to diminish recreational immunity below the common law, and this Court refuses to interpret statutes in a way that leads to absurdity. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Further, the courts have consistently interpreted RCW 4.24.210 to give effect to the legislature's purpose. See *Chamberlain v. State Dept. of Transportation*, 79 Wn.App. 212, 217, 901 P.2d 344 (1993) ("fundamental objective to statutory construction is to carry out the

³ Every case in Washington that has construed the term "known" has held actual knowledge of a dangerous condition is necessary. *Cultee* and *Tabak* both found there were questions of fact about actual knowledge but followed the rule requiring actual knowledge of a dangerous condition.

intent of the legislature" and a "statute is to be construed as a whole...to best advance the legislative purpose.").

To that end, Washington courts have interpreted and construed each operative term in RCW 4.24.210(4)(a). There is a body of case law interpreting what it means to be artificial. See *Ravenscroft v. Washington Water Power Co.*, 136 Wash.2d 911, 969 P.2d 75 (1998) and *Davis*. There is a body of case law interpreting what it means to be latent. See *Tennyson*, *Van Dinter*, *Swinehart v. City of Spokane*, 145 Wn.App. 836, 187 P.3d 345 (2008), and *Gaeta*. There is even case law on what it means to be a danger. See *Cutlee*, *Gaeta*, and *Tabak*. Thus, Washington courts' longstanding interpretation of "known" is consistent with the courts' interpretation of the statute as a whole.

Finally, Plaintiff's argument would subject recreational landowners to limitless liability for conditions that have no history of posing a danger. This includes innocuous "conditions" that are misused by a park user, as was the case here. For example, a recreational landowner would be liable for injuries caused by someone misusing commonplace "conditions" like a picnic table, a bollard in a trail, a curb, a bench, or playground equipment. No matter what the condition, if a landowner built it, liability would attach. This

position is contrary to *Tennyson* (a recreational land owner "is not required to anticipate the various ways that people might use its property") and the common law. *Tennyson* at 556. If accepted as the standard, park users who disregard safety and use innocuous property for which it was not intended, could subject recreational landowners to limitless liability.

Accordingly, the current interpretation of what it means to be a "known" condition under RCW 4.24.210, is consistent with *Van Dinter, Gaeta*, statutory construction, and legislative intent. Plaintiff's argument contradicts precedent, undermines the legislative intent and violates accepted statutory construction principles and therefore fails.

Second, Plaintiff's argument disregards stare decisis. In order for a court to overturn established precedent, "stare decisis requires a showing that a previous rule is both 'incorrect and harmful before it is abandoned.'" *City of Federal Way v. Koenig*, 167 Wn.2d 341, 352, 217 P.3d 1172 (2009). Stare decisis ensures stability, otherwise the "law could become subject to incautious action or the whims of current holders of judicial office." *In Re Rights of Waters Stranger Creek*, 77 Wn.2d 649, 653, 466 P.3d 508 (1970). Furthermore, the legislature is presumed to be aware of judicial interpretation of its

enactments and where a statute remains unchanged after a court decision, the court will not overrule clear precedent interpreting the same language. *Id.*

Gaeta held that "condition" is modified by the preceding terms but also held that "known" meant actual knowledge of a dangerous condition. *Gaeta* at 609-611. *Van Dinter* relied on and followed *Gaeta*. *Van Dinter* at 46. The *Van Dinter* court's analysis focused on the term "latent" and did not disturb *Gaeta*'s analysis regarding "known." *Id.* By deduction, *Van Dinter* accepted the rule from *Gaeta* that actual knowledge of dangerous condition is required to overcome recreational immunity. Going back to *Morgan*, this interpretation has stood for more than 30 years without legislative enactment. In fact, the legislature has amended the statute several times since 1967 (when the statute was enacted) and has only expanded the provisions of RCW 4.24.210.⁴

Additionally, Plaintiff cannot show that the interpretation is both incorrect and harmful. In fact, the courts' interpretation of this

⁴ See Laws of 2012, ch. 15, § 1; Laws of 2011, ch. 320 § 11; Laws of 2011, ch. 171 § 2; Laws of 2011, ch. 53, § 1; Laws of 2006, ch. 212, § 6; Laws of 2003, ch. 39 § 2; Laws of 2003, ch. 16 § 2; Laws of 1997, ch. 26 § 1; Laws of 1992, ch. 52 § 1; Laws of 1991, ch. 69 § 1; Laws of 1991, ch. 50 § 1; Laws of 1980, ch. 111 § 1; Laws of 1979, ch. 53 § 1; Laws of 1972, Ex. Sess. Ch. 153 § 17; Laws of 1969, Ex. Sess. ch. 24 § 2.

issue has aided and given life to the legislature's intent to provide an incentive to open up lands for recreational purposes. Far from "incorrect and harmful" the courts' interpretation has been spot-on. Thus, Plaintiff's argument cannot overcome the firm principles of stare decisis and fails.

3. Judge Becker's dissent.

Judge Becker's dissent argues that recreational landowners need only have notice of a condition without regards to its dangerousness. at 612-619 (Becker, J. dissenting). But, Washington courts have uniformly interpreted RCW 4.24.210 to require actual knowledge of a dangerous condition to overcome recreational immunity. *See supra*. Respectfully, her argument is inconsistent with the law and the legislature's intent.

Judge Becker also argues that the current state of the law gives recreational landowners "one free accident" unless there is a prior complaint. But, the current body of law in Washington, including *Cultee* and *Tabak*, demonstrates that it is possible, and not uncommon, to show a landowner had actual knowledge of a dangerous condition before an accident or a complaint. In *Cultee*, it was acknowledged internally by the City of Tacoma that the tidal waters were a hazard. In *Tabak*, it was shown the landowner had

previously repaired the dock. Thus, it is possible and not unlikely, that a plaintiff can show actual knowledge of a danger without a prior accident or complaint.

B. The Court should affirm because Plaintiff failed to raise an issue of material fact regarding latency or dangerousness of the condition.

For the sake of argument, even if the Court agrees with Plaintiff on the interpretation of "known condition" under RCW 4.24.210, the trial court and court of appeals should still be affirmed because there is no disputed evidence that the injury causing condition was patent, not latent. When reviewing an order of summary judgment, the Court sits in the same position as the trial court and can affirm summary judgment on alternative grounds if supported by the record. *Davis v. State*, 102 Wn.App. 177, 184, 6 P.3d 1191 (2000), *see also Smith v. Stockdale*, 166 Wn.App. 557, 271 P.3d 917 (2012).

"Latent" under the statute means "not readily apparent to the recreational user." *Swinehart* at 848. The "dispositive question is whether the condition is readily apparent to the general class of recreational users, not whether one user might fail to discover it." *Id.* If a park user can take "visual reference" of the condition, it is not

latent. *Swinehart* at 853. Injuries that result from latent dangers presented by a patent condition are not actionable under RCW 4.24.210." *Id.*, quoting *Van Dinter*.

The only cases in Washington that have found that a condition was latent involved conditions that were submerged under water or completely hidden from sight. See *Ravenscroft* (stump under water), *Cultee* (edge of rode covered by water), and *Tabak* (loose bolts underneath a dock). Further, courts have rejected the argument Plaintiff is making here that the condition was deceptive and that he didn't see it. See e.g. *Tennyson* at 555-556; see also *Swinehart*.

Here, the water diverter and curb-cut out were visible and in plain sight. The water diverter and curb cut-out were not covered or hidden. Moreover, Plaintiff failed to raise an issue as to latency other than his bare statement that he didn't see the water diverter. But, a party cannot raise an issue of fact by making an allegation that is plainly contradicted by physical evidence. *Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, 1776 (2007). The pictures depict the condition, demonstrate it was visible, and contradict Plaintiff's contention. CP 19-25.

As a matter of law, the condition was not latent. No reasonable juror could reach a differing conclusion because anyone can take

"visual reference" of it. A simple review of the record shows that the condition was visible, and, consistent with *Ravenscroft*, *Van Dinter*, *Tennyson*, *Cultee*, and *Tabak*, not latent. Therefore, the Court should affirm the trial court based on the latency issue.

The Court should also affirm the trial court because Plaintiff failed to present any evidence that the water diverter and curb cut-out was dangerous. Under RCW 4.24.210, a condition that poses an unreasonable risk of harm is dangerous. *Cultee* at 518. Plaintiff failed to show how a 1 to 2 inch asphalt berm (shorter than the speed bump) next to a curb cut-out that he wasn't supposed to be riding over was unreasonably dangerous. Merely having an accident himself is not enough to prove dangerousness. Much like the plaintiff in *Gaeta*, Plaintiff failed to see a condition and put himself in a situation that led to injury. That alone is insufficient to prove the water diverter and curb cut-out was unreasonably dangerous under the case law.

Furthermore, as argued to the court of appeals, declarations from Plaintiff's alleged experts about the condition filed in response to the City's summary judgment motion are inadmissible. The report from expert Edward Stevens is unsworn and therefore inadmissible, CP 70, 77-89; *Young Soo Kim, v. Choong-Hyun Lee*, 174 Wn.App.

319, 325-327, 300 P.3d 431 (2013). Further, expert Jim Couch's declaration is inadmissible because it offers testimony on areas outside his expertise (park construction) and speculates on why Plaintiff made certain decisions. CP 107-109; and ER 702.

Because Plaintiff failed to raise an issue of material fact showing the water diverter and curb cut-out was unreasonably dangerous, this Court should affirm summary judgment for the City.

IV. CONCLUSION

The court of appeals and the trial court followed established precedent in granting summary judgment. RCW 4.24.210 has always been interpreted to require a plaintiff to show that the landowner had actual knowledge of a dangerous condition. In fact, the vitality of RCW 4.24.210 depends on such an interpretation. Plaintiff has failed to articulate a basis for the Court to deviate from this well-settled law. Further, the facts in this case also show the condition at issue was not latent or dangerous. For the foregoing reasons, this Court should affirm summary judgment.

Respectfully submitted this 14th day of November, 2014.



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Rec'd 11/14/2014

From: Steele, Julie A. [mailto:jasteele@cob.org]
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Supreme Court Clerk's Office:

Please find the following documents attached for filing:

1. City of Bellingham's Supplemental Brief
2. Declaration of Service

The case and contact information is set forth as follows:

Case Name: Steven Jewels v. City of Bellingham
Case Number: 90319-1
Hearing Date: Thursday, January 22, 2015

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I look forward to your confirmation e-mail. Could you please send the confirmation to both of the above addresses as Mr. Brady is absent this afternoon? Thank you in advance for your attention to this matter.

Sincerely,

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My incoming and outgoing e-mail messages are subject to public disclosure requirements, pursuant to RCW 42.56.

Sincerely,

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