

NO. 90319-1

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STEVEN JEWELS,

Petitioner,

vs.

CITY OF BELLINGHAM;

Respondent.

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BRIEF OF *AMICI CURIAE*  
WASHINGTON STATE ASSOCIATION OF MUNICIPAL  
ATTORNEYS & ASSOCIATION OF WASHINGTON CITIES

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## I. INTRODUCTION

Respondent City of Bellingham correctly articulates that the position advanced by Petitioner Steven Jewels, if accepted, would contravene the legislature's stated intent and increase liability exposure of property owners, public or private, who open their property to recreational users. That inherently poses a great concern to all cities and towns across the state as it would likely reduce the availability of lands for public recreation. *Amici curiae* fully agree with Bellingham's arguments that actual knowledge of a condition's dangerousness is a requisite to establishing a landowner's liability for an injury on recreational land, and that this condition was not dangerous. *See* Suppl. Br. of Resp't at 5-20. Thus, multiple grounds compel affirming summary judgment for the City.

*Amici curiae* provide an additional reason for affirmance. By definition, "latent" means "hidden." The present case affords this Court with the opportunity to clarify its precedent defining a recreational landowner's responsibility to the public, particularly in regards to a condition that is visible to the naked eye, but has the potential to be made *more* obvious with additional work. Nothing in RCW 4.24.210 requires a landowner to highlight an already visible condition on recreational land. Consistent with how this Court construes statutes, *amici curiae* submit that the legislature's intent is best advanced by applying a plain meaning

definition to “latent,” which should be derived from the dictionary. If the Court does that, which it has done so many times before with other undefined statutory terms (including terms from RCW 4.24.210), resolution of this case becomes rather simple. Summary judgment in favor of the City of Bellingham should be affirmed.

## **II. IDENTITY AND INTEREST OF *AMICI CURIAE***

WSAMA is a non-profit organization of municipal attorneys who represent Washington’s 281 cities and towns. WSAMA members represent municipalities throughout the state. AWC is a private, non-profit corporation that represents Washington’s cities and towns before the State Legislature, the State Executive branch and regulatory agencies. Membership in the AWC is voluntary, however the association includes 100% participation from Washington’s 281 cities and towns. AWC’s mission is to serve its members through advocacy, education and services. As discussed above, the scope of recreational immunity is one of great importance to Washington’s cities and towns.

## **III. STATEMENT OF THE CASE**

The material facts<sup>1</sup> of this case are straightforward. Jewels was unintentionally injured in Cornwall Park, recreational land that is owned and operated by the Respondent City of Bellingham. The condition that

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<sup>1</sup> Material facts are those on which the outcome of the litigation depends. *Seattle Police Officers’ Guild v. City of Seattle*, 152 Wn.2d 823, 830, 92 P.3d 243 (2004).

caused his injury was a “1-2 inch high asphalt berm” that connects a curb to a speed bump. CP at 16. The berm serves as “water diverter” which “divert[s] water coming down the road ... [to] facilitate[] drainage.” *Id.* On the date of the accident, the water diverter was unpainted, but was still unobstructed, visible from at least 15 feet away, colored differently from the surrounding concrete, and easily seen in photographs. CP at 17, 22-25.

In opposition to the City’s summary judgment motion, Jewels presented only the following on the issue of latency:

- Jewels’ declaration, attesting that he did not see the diverter as he approached the speed bump on his bicycle, CP at 91-93;
- A declaration from an experienced cyclist, opining that it is common for cyclists to travel around speed bumps through gaps, CP at 107-09;
- A work order from the City dated the day after Jewels’ accident to paint the water diverter, and processed directly in response to Jewels’ accident, CP at 76; and
- An unsworn letter by an engineer that was “attached” to the declaration of Jewels’ attorney, CP at 77-89;

Removing any suggestion that there was a factual dispute over the visibility of the condition, Jewels offered photographs into the record to supplement *his* version of how the diverter appeared when he fell. CP at

99-103. And although the yellow paint on top of the diverter certainly made the condition *more* visible after his fall, there can be no mistake that the rest of the diverter that was *unpainted* was the same color as the rest of the diverter on the day of the fall, but was *still* very visible, even from the extended distance shown in one of Jewels' photographs. CP at 99.

#### IV. ISSUE PRESENTED

Because this Court can affirm on any basis adequately supported by the record, *amici curiae* submit that an additional, dispositive issue is whether an unobstructed condition that is plainly visible in photographs and from distances of up to 15 feet is, as a matter of law, not "latent," thereby preserving a landowner's recreational immunity.

#### V. ARGUMENT

At common law, owners of land open to the public owed all individuals a duty to of ordinary care to keep the premises in a reasonably safe condition. *Davis v. State*, 144 Wn.2d 612, 615-16, 30 P.3d 460 (2001) (*Davis II*). Discontent with this rule, the legislature passed Engrossed House Bill No. 258 in 1967 "to encourage owners or others in lawful possession and control of land and water areas or channels to make them available to the public for recreational purposes by limiting their liability." LAWS OF 1967, ch. 216, § 1, *codified as amended at* RCW 4.24.200. The vehicle used to further this legislative policy was

Washington’s recreational immunity statute, which protects public and private landowners equally. RCW 4.24.210.

That statute provides that “any public or private landowners or others in lawful possession and control of any lands ... who allow members of the public to use them for the purposes of outdoor recreation ... shall not be liable for unintentional injuries to such users.” RCW 4.24.210(1). Therefore, in contrast to common law, the general rule representing the public policy of this state is that if a person is unintentionally injured on recreational land, there is no liability. *Davis II*, 144 Wn.2d at 616. The only exception to this rule of nonliability that has any possible applicability here is whether Jewels was injured “by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted.” RCW 4.24.210(4)(a).<sup>2</sup> The absence of any one of the four elements from RCW 4.24.210(4)(a)—“known,” “dangerous,” “artificial,” or “latent”—means, as a matter of law, “a claim cannot survive summary judgment.” *Davis II*, 144 Wn.2d at 616.

Although the primary thrust of Jewels’ petition focused on whether a plaintiff must prove that the landowner knew not only of the condition’s existence, but also its dangerousness and latency, it is well settled that

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<sup>2</sup> *Amici curiae* follow Jewels’ lead and cite the current version of the statute as the operative language has remained substantively unchanged. Pet. for Review at 2 n.1. .

“[t]his court may affirm a lower court’s ruling on any grounds adequately supported in the record.” *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). The trial court here granted summary judgment on the grounds that not only did Jewels fail to prove that the injury-causing condition was known, but also that it was latent and dangerous. VRP (July 27, 2012) at 17-18. Thus, even if this Court disagrees with the Court of Appeals’ holding on the “known” element with which Jewels takes issue, summary judgment should still be affirmed if the condition that caused Jewels’ injuries was not latent.

**A. As a matter of law, an unobstructed condition that can be easily photographed is by definition not latent, regardless of what a particular user may or may not see while recreating in a certain way.**

As with any statute, this Court’s goal is to ascertain and give effect to the legislature’s intent. *HomeStreet, Inc. v. Dep’t of Rev.*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009). The primary means of accomplishing this task is to examine the statute’s text. *Id.* If the text is plain, the inquiry ends, *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009), because the Court “presume[s] the legislature says what it means and means what it says,” *Costich*, 152 Wn.2d at 470 (citations omitted).

1. **The definition of latent, as supplied by the dictionary, focuses on whether a condition is visible or hidden, which negates the relevance of what a particular user might fail to notice.**

Prior to any Washington court attempting to elucidate on the meaning of “latent” in RCW 4.24.210, the United States Court of Appeals for the Ninth Circuit expressed that latent meant “not readily apparent to the recreational user.” *Morgan v. United States*, 709 F.2d 580, 583 (9th Cir. 1983). But it did so in *dicta* and without citation to authority. *Id.* In *Morgan* the court affirmed summary judgment dismissing a claim because the evidence there did not show that the United States had actual knowledge that the Grand Coulee Dam had malfunctioned to create a deadly electrical current through recreational waters. *Id.* at 584. As such, latency was irrelevant to the disposition of that case.

Nevertheless, this Court cited both *Morgan* and a single senator’s statement to define “latency” in its first opportunity to consider what the term meant. *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 44-45 & n.2, 846 P.2d 522 (1993) (citing *Morgan*, 709 F.2d at 583, and SENATE JOURNAL, 40TH LEG. (1967), at 875 (statement of Senator Perry Woodall responding to question from Senator Fred Dore)). In so doing, *Van Dinter* did not conduct a plain meaning analysis, but instead summarily adopted *Morgan*’s *dicta* and pronounced that “latent” meant “not readily apparent to the recreational user.” *Id.* at 45. Its decision to do so is perplexing,

given that this Court has consistently looked to the dictionary to determine the plain and ordinary meaning of undefined statutory terms.<sup>3</sup> In fact, this Court has twice utilized the dictionary when interpreting RCW 4.24.210. *Cregan v. Fourth Memorial Church*, 175 Wn.2d 279, 285, ¶ 10, 285 P.3d 860 (2012) (C. Johnson, J.) (“public”); *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 922, 969 P.2d 75 (1998) (“artificial”); *accord Partridge v. City of Seattle*, 49 Wn. App. 211, 215, 741 P.2d 1039 (1987) (employing dictionary to define “known” in RCW 4.24.210 to require actual knowledge). And this Court has long rejected any reliance on legislative history when a statute’s language is plain. *Shelton Hotel Co. v. Bates*, 4 Wn.2d 498, 508, 104 P.2d 478 (1940); *see also State v. Velasquez*, 176 Wn.2d 333, 336, ¶ 6, 292 P.3d 92 (2013). Thus, if the definition of “latent” can be gleaned from a dictionary, it is inappropriate to consult the legislative history of RCW 4.24.210 as a basis to express an alternative meaning.

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<sup>3</sup> In fact, just about every member of this Court has done so when writing for the majority. *E.g., LaCoursiere v. Camwest Dev., Inc.*, No. 88298-3, slip op. at 6-7, ¶¶ 14-15 (Wash. Oct. 23, 2014) (Wiggins, J.) (using dictionary to define “wage” in the wage rebate act, ch. 49.52 RCW); *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 395-96, ¶¶ 10-11, 325 P.3d 904 (2014) (Fairhurst, J.) (using dictionary to define “recovers nothing” in RCW 4.84.250 and 4.84.270); *Jametsky v. Olsen*, 179 Wn.2d 756, 766-67, ¶ 19, 317 P.3d 1003 (2014) (González, J.) (using dictionary to define “at risk” in RCW 61.34.020(2)(a)); *Armantrout v. Carlson*, 166 Wn.2d 931, 937, ¶ 13, 214 P.3d 914 (2009) (Madsen, J.) (using dictionary to define “dependent” and “support” in RCW 4.20.020); *State v. Alvarado*, 164 Wn.2d 556, 562, ¶¶ 9-11, 192 P.3d 345 (2008) (Stephens, J.) (using dictionary to define “punishment” in RCW 9.94A.530(1)); *Troxell v. Rainier Pub. Sch. Dist. No. 307*, 154 Wn.2d 345, 352, ¶ 12, 111 P.3d 1173 (2005) (Owens, J.) (using dictionary to define “day” and “elapsed” in Former RCW 4.96.020(4) (2001)).

The version of Webster's dictionary that existed at the time of the legislature's initial passage of RCW 4.24.210 defined "latent" as "existing in *hidden*, dormant, or repressed form...; that which *is submerged and not clearly apparent to any but a most searching examination* but may emerge and develop with effect and significance." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1275 (1966) (emphasis added). A more recent definition reads: "present and capable of becoming though *not now visible, obvious, or active.*" MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 657 (10th ed. 1998) (emphasis added). Applying these definitions to "latent" best advances the legislature's intent to "limit[] the[] liability" of recreational landowners. RCW 4.24.200. If a condition is *either "visible" or "obvious,"* MERRIAM-WEBSTER'S, *supra* at 657, it is not "hidden," WEBSTER'S, *supra* at 1275, meaning it is not "latent."

This is not to say that *Van Dinter* was wrongly decided, and an examination of that case reveals why. There, a piece of playground equipment in a city park was shaped like a caterpillar with rods protruding from the front end as if they were the insect's antenna. *Van Dinter*, 121 Wn.2d at 40. The "caterpillar" was positioned in a gravel area encapsulated by wooden beams, and was plainly visible to the naked eye. *Id.* A man, distracted by the water fight in which he was engaged, did not realize that he could collide with the antenna if he was on a grassy area outside of

the gravel where the “caterpillar” rested. *Id.* He turned and collided with one of the antenna, injuring his eye. *Id.* The man sued, arguing (not dissimilar to what Jewels asserts here)<sup>4</sup> that the City should have anticipated that people playing around the structure would become distracted and would fail to discover that the rod protruded beyond the manufacturer’s recommendation. *Id.* at 40, 41, 46; *see also Van Dinter v. City of Kennewick*, 64 Wn. App. 930, 936, 827 P.2d 329 (1992), *aff’d*, 121 Wn.2d 38. Both the Court of Appeals and this Court rightly rejected that argument, reasoning:

Admittedly, it may not have occurred to Van Dinter that he could injure himself in the way he did, but this does not show the injury-causing condition – the caterpillar’s placement – was latent. At most, it shows that the present situation is one in which a patent condition posed a latent, or unobvious, danger.

*Van Dinter*, 121 Wn.2d at 46. The Court concluded that “RCW 4.24.210 does not hold landowners potentially liable for patent conditions with latent dangers,” but rather the plaintiff must show “[t]he condition itself [to] be latent.” *Id.*

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<sup>4</sup> To be sure, reversing summary judgment here would necessarily compel *Van Dinter* to be overruled. Jewels’ claim hinges on Bellingham shouldering liability for a plainly visible condition because, according to Jewels’ evidence, it is reasonable for a bicyclist to assume that a gap would exist between a speed bump and a curb. *See infra* at 18. This is the exact opposite of what *Van Dinter* held. *Stare decisis* commands that this Court adhere to a previous holding absent “a clear showing that an established rule is incorrect and harmful.” *Walmart, Inc. v. Progressive Campaigns, Inc.*, 139 Wn.2d 623, 634, 989 P.2d 524 (1999) (citation and internal quotation marks omitted). This is a “substantial burden” that no party has made, meaning that *Van Dinter*’s ultimate holding should not be abandoned. *Id.*

Despite failing to employ Webster's, *Van Dinter's* application of "latent" to its facts is faithful to the dictionary definition and a proper statutory analysis. The phrase "not readily apparent to a recreational user" is consistent with the dictionary definition of "latent" so long as the Court does not permit the introduction of a psychological analysis as to whether a particular recreational user might not notice the condition while engaged in a certain type of activity. For example, one could easily expect an adult (or child) to be focused more on playing a game of tag rather than the schematics of a playground apparatus. *Van Dinter*, 121 Wn.2d at 46. Similarly, one might expect a bicyclist to disregard a speed bump normally designed for an automobile and instead attempt to circumnavigate it, assuming that the bump is designed like others he has experienced in the past. CP at 107-09. Both *Van Dinter* and the dictionary rightly reject the materiality of these arguments. Rather, the analysis focuses on whether a condition is "hidden" or "submerged" to the point that one would need to expend an effort far more strenuous than simply opening one's eyes and observing. WEBSTER'S, *supra* at 1257 ("not clearly apparent to any but a most searching examination"). Conversely, if a condition is unobscured—or in terms employed by the dictionary, "visible, obvious, or active," MERRIAM-WEBSTER, *supra* at 657—it is by definition not "latent."

Decisions of the Court of Appeals are in accord. In *Tennyson v. Plum Creek Timber Co.*, 73 Wn. App. 550, 872 P.2d 524 (1994), a plaintiff was injured “after driving his motorcycle up a large gravel mound that had been substantially excavated on the other side.” *Id.* at 552. The plaintiff claimed the condition that caused his injury was latent because he had ridden his motorcycle up the same mound a year earlier when the excavated hole was not there. *Id.* According to the plaintiff, the condition was latent because he could not see it from his perspective approaching the mound from the opposite side. *Id.* at 552-53. The Court of Appeals affirmed summary judgment, reasoning that “the excavation was in plain view and readily apparent to anyone who examined the gravel mound as a whole,” concluding that simply because “some recreational users ... might fail to discover the excavation” did not “render it latent within the meaning of the statute.” *Id.* at 555-56.

Likewise, in *Widman v. Johnson*, 81 Wn. App. 110, 912 P.2d 1095 (1996), a plaintiff was injured in an automobile accident on a logging road located on recreational land. *Id.* at 112-13. The accident occurred when the driver sped too fast on the logging road and failed to timely observe an upcoming intersection with a state highway, resulting in a collision with a crossing pickup truck. *Id.* at 113. Although *Widman*’s analysis of latency was rather cursory, the court rejected the contention that the intersection

was latent because the plaintiff reasonably did not expect the logging road to intersect with a highway. *Id.* at 114-15. The court reasoned, “What a particular user sees or does not see is immaterial.” *Id.* at 114.

The court reached the same result in *Swinehart v. City of Spokane*, 145 Wn. App. 836, 187 P.3d 345 (2008), rejecting a plaintiff’s contention that a condition was latent because “children, parents, and the disabled, [we]re not concerned or even capable of appreciating” the injury-causing condition. *Id.* at 847. The plaintiff there was injured sliding into a pit of wood chips that was alleged to have insufficient depth. *Id.* at 841 ¶¶ 8-9. The Court of Appeals affirmed summary judgment, holding that photographs taken by the plaintiffs the following day “seemingly acknowledge that the condition of the wood chips was visible and obvious at the time of the accident *or such a condition could not have been captured by a photograph.*” *Id.* at 852, ¶ 42 (emphasis added). The court concluded that regardless of whether that specific plaintiff appreciated the risk posed, the condition itself was visible and obvious which gave rise to recreational immunity. *Id.* at 853, ¶¶ 44-45.

The common denominator in these cases is that, as a matter of law, a condition is not latent if it is either obvious or visible to the naked eye, regardless of how well a plaintiff attempts to explain why the condition went unnoticed. This is fully consistent with adopting a dictionary

definition of “latent,” which this court has already done in regards to other undefined terms in RCW 4.24.210. *Cregan*, 175 Wn.2d at 285, ¶ 10; *Ravenscroft*, 136 Wn.2d at 922. In sum, the touchstone of latency is obscurity, meaning that the condition is hidden from the naked eye by something *other* than air. *Cf.* Part V.A.2, *infra*. It is this definition that best gives effect to the legislature’s intent. This Court should clarify *Van Dinter*’s definition of “latent” to ensure its consistency with the dictionary, which means that a plaintiff cannot create a genuine issue of material fact on that element by offering an explanation, no matter how reasonable, why a plainly visible condition was not appreciated at the time of injury.

**2. The only cases that have found a genuine factual dispute as to latency have involved hidden conditions.**

Only three decisions of precedential value<sup>5</sup> have found genuine issues of fact on latency and each one involved a condition that was

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<sup>5</sup> A fourth decision, *Davis v. State*, 102 Wn. App. 177, 6 P.3d 1191 (2000) (*Davis I*), *aff’d* by *Davis II*, 144 Wn.2d 612, is non-precedential because the latency analysis there is pure dicta. *In re Marriage of Rideout*, 150 Wn.2d 337, 354, 77 P.3d 1174 (2003) (defining dicta as “ha[ving] no bearing on the decision that was rendered.”). In *Davis I* the plaintiff injured himself by driving his motorcycle over a sand dune with a drop-off on the far side. *Davis I*, 102 Wn. App. at 180. The plaintiff produced substantial evidence of motorcycle tracks leading up to the drop-off, which he argued was enough to create a jury question on latency. *Id.* at 181. Nevertheless, the court affirmed summary judgment because the condition was not artificial. *Id.* at 189-91. The court even noted that because “[the plaintiff] has failed to establish artificiality, an essential element of the exception to the recreational use immunity statute ... *all other facts are immaterial.*” *Id.* (emphasis added). Nevertheless, even after finding two essential elements (artificiality and knowledge) to be lacking, the court opined that reasonable minds could differ on latency. *Id.* at 191-93. The categorization of the latency analysis as dicta is confirmed by this Court’s subsequent review, in which the Court affirmed dismissal based solely on artificiality and refused to analyze any other element. *Davis II*, 144 Wn.2d at 619. *Davis I*’s latency analysis should be “disregarded” as dicta because it has no precedential value. *Ruse v. Dep’t of Labor & Indus.*, 138 Wn.2d 1, 9, 977 P.2d 570 (1999).

covered, obscured, or masked. In this Court's only other case analyzing the term "latent," the condition that injured a boater was a "stump[] [that] w[as] submerged." *Ravenscroft*, 136 Wn.2d at 916. The record demonstrated that "the river appeared very wide and calm, although somewhat murky," and that there was "no floating debris or stumps of any kind in the water near the dock nor in the water downstream toward the main body of Long Lake," and that there was "nothing that would indicate the presence of any *submerged* objects or hazards in the direction he was traveling." *Id.* (emphasis added). The Court concluded that a jury should determine latency in that case because "[t]he record d[id] not support a conclusion that the *submerged* stumps near the middle of the channel were *obvious or visible* as a matter of law." *Id.* at 926 (emphasis added). Stated another way, the record in *Ravenscroft* demonstrated that the tree stump was "submerged," as opposed to being "obvious or visible." *Id.* Thus, it was latent. *Cf.* WEBSTER'S, *supra* at 1275 ("that which is submerged").

Similarly, in *Tabak v. State*, 73 Wn. App. 691, 870 P.2d 1014 (1994), the injury-causing condition was created by two adjacent narrow "floats" that were normally bolted together to form an even walking surface. *Id.* at 693-94. Unlike the water diverter here, the bolts holding the floats together in *Tabak* were "not visible to users." *Id.* at 694. After the bolts broke, the plaintiff stepped on one float causing it to sink several

inches, creating a tripping hazard that injured him. *Id.* The Court of Appeals held the condition was latent because the record was devoid of any evidence showing that the plaintiff knew the bolts were broken and that the floor beneath him would suddenly drop. *Id.* at 698. More fundamentally however, the condition in *Tabak* causing the fall (i.e., the broken bolts) was “not visible.” *Id.* at 694.

Four years after *Tabak*, the Court of Appeals decided *Cultee v. City of Tacoma*, 95 Wn. App. 505, 977 P.2d 15 (1999). There, a young girl was passing through a ranch owned by the City of Tacoma on a road, the edge of which was covered with muddy water. *Id.* at 510. While attempting to mount her bike near the masked edge of the roadway, the girl fell in and drowned in tidal waters. *Id.* at 510-11. The court concluded a genuine issue of fact as to the latency of the condition existed because “the edge of the road ... was eroded *and covered with a two to four inch layer of muddy water.*” *Id.* at 523 (emphasis added).

In sum, Washington courts have tendered the latency question to the jury when the condition is “hidden” by something other than air. *Ravenscroft*, 136 Wn.2d at 926; *Cultee*, 95 Wn. App. at 523; *Tabak*, 73 Wn. App. at 694. Conversely, when a condition is plainly visible to the naked eye, it is not latent and the landowner retains immunity. *Van Dinter*, 121 Wn.2d at 46; *Swinehart*, 145 Wn. App. at 852, ¶ 42.

**B. Jewels' evidence confirms the condition that caused his injury was visible and unobscured, meaning the essential element of latency was lacking and thus entitling the City to summary judgment.**

Judge Becker's dissent below suggested a genuine issue of fact existed as to the latency element because of "Jewels' declaration," which states "that before the paint job, there appeared to be 'bare, flat pavement' between the speed bump and the curb." *Jewels v. City of Bellingham*, 180 Wn. App. 605, 614, ¶ 24, 324 P.3d 700 (Becker, J., dissenting), *review granted*, 181 Wn.2d 1001 (2014). But what Jewels saw or did not see is legally irrelevant. *Widman*, 81 Wn. App. at 114. Regardless of how characterized, there is no dispute as to how the condition appeared—photographs which Jewels offered himself document the color contrast between the asphalt diverter and the surrounding concrete. CP at 20, 22-25, 99-103. Although the berm is painted in the photograph, all parties agree that on the date of Jewels' fall, it was the same black color that appears immediately next to the diverter. Certainly one could argue that a diverter painted yellow is *more* visible than an unpainted diverter. But if the Court is to remain faithful to the legislature's intent as expressed in the plain meaning of "latent," the test is not whether the berm was "more visible at a later date," but rather whether it was "hidden" at the time of Jewels' injury. This diverter most certainly was not, and the photographs readily demonstrate this beyond any genuine dispute.

The primary thrust behind Jewels's evidence,<sup>6</sup> as documented by his declaration and that of a bicycle expert, is that it is reasonable for a bicyclist to assume the presence of a gap between the speed bump and curb. *See* CP at 108-09. But if the Court were to accept that the condition was latent for bicyclists, it would have to accept it as latent for every other activity as well, such as walking, skipping, or skateboarding, even though a recreational user engaged in these activities would have no problem seeing the visible diverter. This analysis is not only untenable, it contradicts this Court's most recent holding that a landowner's entitlement to immunity does not depend on what the plaintiff was doing at the time of injury. *Camicia v. Howard S. Wright Constr. Co.*, 179 Wn.2d 684, 701-02, ¶¶ 40-41, 317 P.3d 987 (2014). Consequently, the only material evidence is the photographs, and even those that Jewels himself offered into evidence demonstrate that the injury-causing condition was visible and unobscured, and therefore not latent. Whether a bicyclist reasonably believed this condition was a "typical speed bump," CP at 109, is not material to prove latency, and thus insufficient to deny immunity.

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<sup>6</sup> Mr. Jewels also offered an unsworn report of an engineer that was "attached" to his attorney's declaration. CP at 70, 77-89. He relies on that same report here. Suppl. Br. of Pet'r at 2-3, 14, 16. Such unsworn out of court statements are classic hearsay and ought to always be disregarded on summary judgment, as this Court recently reaffirmed. *SentinelC3, Inc v. Hunt*, 331 P.3d 40, 46-47, ¶ 28 (Wash. 2014). This Court takes a de novo review of a trial court's evidentiary rulings in the summary judgment context. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). There is no hearsay exception for "expert reports." ER 803, 804. The City properly objected to the report, CP at 117-18, so this Court should fully disregard it. *SentinelC3*, 331 P.3d at 47, ¶ 28.

**C. Because RCW 4.24.210 supplants the common law for recreational land, “latency” is an essential element of a negligence claim, meaning subsequent actions to make a condition more visible cannot be used to prove that fact.**

There can be no question that City’s work order dated after Jewels’ injury “is not admissible to prove negligence or culpable conduct.” ER 407. But Jewels contends that the evidence is admissible to prove the condition’s invisibility. Suppl. Br. of Pet’r at 15 n.4. This contention is grounded in the premise that the common law governs a landowner’s duty on recreational land. *Accord Jewels*, 180 Wn. App. at 618-19 (Becker, J., dissenting). On the contrary, once a landowner proves that the injury occurred on recreational land, RCW 4.24.210 then “modifies the legal duty.” *Camicia*, 179 Wn.2d at 702. Rather than owing a duty of ordinary care to identify and correct unreasonably dangerous conditions, *e.g.*, *Iwai v. State*, 129 Wn.2d 84, 93-94, 915 P.2d 1089 (1996), the landowner’s only duty is to warn of “known dangerous artificial latent condition[s].” *Camicia*, 179 Wn.2d at 702 (quoting RCW 4.24.210(4)(a)).

For this reason, a landowner bears the burden to prove the injury occurred on recreational land. *Id.* at 693. But once it does, the burden then shifts to plaintiff to prove the revised elements of his/her negligence claim: that the condition was “known dangerous artificial [and] latent,” RCW 4.24.210(4)(a). *Tabak*, 73 Wn. App. at 696. In other words, latency becomes an essential element to prove negligence. Thus, if a plaintiff

offers evidence that a landowner made a condition *more* visible after the fact to prove that it was latent before, the proffered evidence is being used “to prove negligence or culpable conduct,” which ER 407 plainly forbids. *Bartlett v. Hantover*, 84 Wn.2d 426, 430-31, 526 P.2d 1217 (1974).

It is for this reason that any reliance on *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983), and *Peterson v. King County*, 41 Wn.2d 907, 252 P.2d 797 (1953), is misplaced. *Petersen* addressed the admissibility of a psychiatric patient’s criminal conduct after an auto collision that injured the plaintiff. *Petersen*, 100 Wn.2d at 438-39. Conversely, *Peterson* held that King County’s action of unplugging a drain was admissible to show nothing more than the drain was in fact plugged. *Peterson*, 41 Wn.2d at 910. In neither case was the evidence offered to prove an essential element of the plaintiff’s negligence claim, meaning that neither case justifies admitting Bellingham’s work order to prove latency—an essential element of Jewels’ negligence claim.

## VI. CONCLUSION

If a condition is not hidden, then it is not latent. Stated another way, if the only thing hiding a condition is the air we breathe, RCW 4.24.210 absolves the landowner of liability. This Court should clarify the law and hold that visible conditions such as the one present here are not latent, and thus this Court should affirm the Court of Appeals’ judgment.

RESPECTFULLY SUBMITTED this 5th day of December, 2014.

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Dear Mr. Carpenter:

Attached to this email please find a Motion for Leave to File Brief as *Amici Curiae* as well as a Proposed Brief of *Amici Curiae* on behalf of the Washington State Association of Municipal Attorneys and Association of Washington Cities. I am copying counsel for the parties, but a hard copy of each filing is also being mailed today to them as well.

Respectfully submitted,

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On Behalf of WSAMA/AWC

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