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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STEVEN JEWELS,

Petitioner,

v.

CITY OF BELLINGHAM,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

Crystal G. Rutherford, WSBA #27202
2217 NW Market Street, Suite 26
Seattle, Washington 98107-4062
Telephone: (206) 715-9137

Ian S. Birk, WSBA #31431
Benjamin Gould, WSBA #44093
KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101
Telephone: (206) 623-1900

Attorneys for Petitioner

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INTRODUCTION AND SUMMARY

Steven Jewels was injured while bicycling through Cornwall Park in Bellingham. As he attempted to ride through an apparent gap between a yellow-painted speed bump and a curb, his front wheel struck an unpainted asphalt berm, causing him to be thrown from his bicycle and injured. Jewels sued Bellingham for negligence. CP 4–6. As an affirmative defense, the city asserted immunity under RCW 4.24.210, the recreational use statute. CP 12.

The statute does not extend immunity, however, “for injuries sustained to users by reason of a *known dangerous artificial latent condition* for which warning signs have not been conspicuously posted.” RCW 4.24.210(4)(a) (emphasis added). Jewels contends that the berm was a “known dangerous artificial latent condition,” so that the city’s immunity defense fails. The City agrees that the berm was an “artificial” condition, and that there was no warning sign, but disputes that the berm was “known,” “dangerous,” or “latent.” Br. of Resp’t at 9, 24, 29.

The Court of Appeals held that the condition was not known, and did not reach whether it was latent or dangerous. *Jewels v. City of Bellingham*, 180 Wn. App. 605, 612, 324 P.3d 700 (2014). Jewels contends that the City knew of the berm because the City installed it—a fact that is undisputed. According to the Court of Appeals, this was insufficient to

establish that the condition was “known” because Jewels had to establish that the city “knew of the condition” and “*also knew that it was dangerous and latent.*” *Id.* at 611 (emphasis added). The City “maintains that it had no knowledge of any other accidents,” and therefore, the Court of Appeals reasoned, it did not know that the berm was dangerous. *Id.*

The Court of Appeals erred in two respects. First, it used an incorrect standard to determine when a condition is “known.” Under the plain language of the statute, and under this Court’s controlling analysis in *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 846 P.2d 522 (1993), a condition is “known” if a landowner knows of it—i.e., knows it exists. A claimant need not also show, to overcome immunity, that the landowner subjectively appreciates that the condition is dangerous or latent. Otherwise a landowner would arbitrarily enjoy “one free accident before liability arises.” *Jewels*, 180 Wn. App. at 615 (Becker, J., dissenting).

The Court of Appeals further erred in failing to credit evidence proffered by Jewels that the City *did* know that the berm was dangerous and latent. The berm that injured Jewels did not comply with national design standards. Those standards are circumstantial evidence that the city knew that fixed devices placed in the roadway and unmarked with warnings—like the berm—are dangerous and latent. Similarly, Jewels presented the opinion of a traffic engineer that speed bumps were “*known*

to cause loss of control for bicycles.” CP 81 (emphasis added). This is further circumstantial evidence that the City knew the dangers associated with fixed “bumps” in the roadway. In rejecting this evidence, the Court of Appeals doubly erred by prohibiting Jewels and future claimants from establishing a defendant landowner’s subjective knowledge through circumstantial evidence.

ISSUES PRESENTED FOR REVIEW

The chief issue presented is whether, under the recreational use statute, a condition is “known” when a landowner knows of its existence, even if the landowner claims not to have appreciated that it was dangerous and latent. A subsidiary issue is presented if the Court requires subjective knowledge of dangerousness and latency. That issue is whether Jewels’ evidence would permit a jury to conclude that Bellingham subjectively knew that the unpainted berm it installed was dangerous and latent.

STATEMENT OF THE CASE

On bicycle, Jewels entered Cornwall Park via a paved roadway. CP 91, ¶¶ 4, 7. The Park is owned and maintained by the City of Bellingham. CP 9, ¶ 4. In 2007, the City installed speed bumps in the Park. CP 16, ¶ 9.

After entering the Park, Jewels encountered two speed bumps. He encountered the first one at five to ten miles per hour. CP 91, ¶ 7. It jarred

him badly. CP 91, ¶ 7. Jewels saw a second speed bump, with what looked like a gap between the curb and bump. CP 91, ¶¶ 7–8. There had been a gap between the first speed bump and the curb. CP 91, ¶ 8.

Such gaps are common. As Jewels’ expert on roadway design later testified, because speed bumps are “extra hazardous for bicycle traffic,” gaps have been inserted in speed bumps to allow bicycles to pass through safely. CP 81. And, as Jewels’ cycling expert testified, most speed bumps do not take up the entire roadway but have gaps allowing bicycles (and motorcycles) to pass. CP 107–08.

As Jewels approached the second speed bump, he saw what appeared to him like a gap—a “bare, flat pavement between the curb and speed bump.” CP 92, ¶ 9. Instead of a gap, he encountered and struck an unpainted extension of the speed bump that had been installed to divert water. CP 92, ¶ 9. The bump deflected his front tire into a v-shaped notch in the curb, which trapped his wheel and broke it, and threw him off the bike onto the cement. CP 92, ¶ 10. Jewels suffered a serious laceration on his leg and other injuries. CP 92, ¶ 11. A nearby pedestrian found Jewels, used her shirt to staunch his bleeding leg, and called 911. An ambulance then took him to an emergency room for treatment. CP 92, ¶¶ 11–13.

After learning of Jewels’ injury, the City prepared a work order to correct what it identified as a “Safety Hazard” in the “[s]peed bump.”

CP 76. Noting that the “speed bump” was “only partly painted,” the city ordered that the bump be painted yellow like the rest of the speed bump to “make it visible.” CP 76.

ARGUMENT

I. Under the Court’s settled interpretation of the recreational use statute, it is the “condition” that must be “known”—not the condition’s dangerousness or latency.

This Court’s precedents answer the chief question in this case: for a condition to be “known” under the recreational use statute, only the condition’s existence, and not its dangerousness, must be known.

A. “Known” modifies “condition,” not the other terms of the statute.

The key precedent is *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 846 P.2d 522 (1993). Van Dinter was injured by playground equipment at a Kennewick park. Kennewick argued that it was immune under the recreational use statute because the equipment was not a “latent” condition. Van Dinter maintained that Kennewick was not immune, because while the equipment itself was not latent, its dangerousness was. *Id.* at 45. The Court rejected Van Dinter’s argument. The statute, it said, does not hold landowners potentially liable for “latent dangers.” *Id.* at 46. Rather, the “condition itself must be latent.” *Id.* That conclusion “follow[ed] from the language of the statute,” because “the four terms—‘known,’ ‘dangerous,’ ‘artificial,’ and ‘latent’—modify ‘condition,’ not one another.” *Id.* Because

“‘latent’ modifies ‘condition,’ not ‘danger,’” it followed that “injuries that result from latent dangers presented by a patent condition” do not defeat immunity under the statute. *Id.*

The same analysis controls this case. If—as the City argues—“known” requires that a landowner know both that the condition exists and that it is dangerous, then “known” would have to modify both “condition” and “dangerous.” The Court already rejected this argument in *Van Dinter*. It held that the four adjectives in the statute—“known,” “dangerous,” “artificial,” and “latent”—“modify ‘condition,’ not one another.” *Id.* Under *Van Dinter*, it is the “condition” itself that must be known, rather than its dangerousness. *Tabak v. State*, 73 Wn. App. 691, 696–97, 870 P.2d 1014 (1994), relying on *Van Dinter*, correctly applied the statute, requiring proof that the landowner actually knew the condition *existed*, rather than requiring proof that the landowner subjectively knew its dangerousness.¹

The City argues that *Van Dinter* is irrelevant, noting that it addressed the terms “latent” and “dangerous,” not “known.” Answer to Pet. at 11–12. *Van Dinter*’s reasoning cannot be confined in that way. Its

¹ Several other Court of Appeals decisions have stated in dicta or holdings that for a condition to be “known,” the landowner must know both the condition’s existence and its dangerousness. Pet. for Review at 11–13. Those decisions, however, do not acknowledge the conflict with this Court’s precedent, and rely on dicta from *Morgan v. United States*, 709 F.2d 580 (9th Cir. 1983), which preceded *Van Dinter*. See Pet. for Review at 11–12.

interpretation of “latent” and “dangerous” followed directly from its statement that “known,” “dangerous,” “artificial,” and “latent” all “modify ‘condition,’ not one another.” *Van Dinter*, 121 Wn.2d at 46. The Court’s statement was not dicta, but instead has been repeated in *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 920, 969 P.2d 75 (1998), and *Davis v. State*, 144 Wn.2d 612, 616, 30 P.3d 460 (2001).

B. *Van Dinter*’s holding gives effect to the plain meaning of the statutory text.

Van Dinter holds that the adjectives “known,” “dangerous,” “artificial,” and “latent” modify the noun “condition,” not one another. This is the only interpretation that “employ[s] traditional rules of grammar.” *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010). Adjectives like “known” cannot modify other adjectives like “dangerous”; only adverbs modify adjectives. See Jane Straus, *The Blue Book of Grammar and Punctuation* (10th ed. 2008). Adjectives can only modify nouns like “condition.” See *id.*

This, moreover, is how the pattern instruction committee has interpreted both *Van Dinter* and the statute, explaining in the comment to WPI 120.07 (liability to a public invitee) that there is no immunity for “conditions that are known, dangerous, artificial, and latent.” 6A Wash.

Prac. Wash. Pattern Jury Instructions, Civil at 29 (6th ed. 2012) (emphasis added) (citing *Van Dinter*).

Reading the statute to require only that the “condition” be “known” is also the only reading that comports with the rule that immunities are construed narrowly. *Tennyson v. Plumb Creek Timber Co.*, 73 Wn. App. 550, 557–58, 872 P.2d 524 (1994) (construing RCW 4.24.210 narrowly); *Matthews v. Elk Pioneer Days*, 64 Wn. App. 433, 439, 824 P.2d 541 (1992) (same). When there is a reasonable and grammatically supportable reading of the statute, a court should not stretch the grammar when doing so would only run counter to established rules of construction. If the Legislature meant to make landowners immune unless they “knew” that a condition “was dangerous,” it could have said so in a variety of ways—but the text of RCW 4.24.210 is not one of them.

C. Legislative history supports *Van Dinter*’s interpretation of the statute.

The word “known” was added to RCW 4.24.210 by an amendment in the Senate. The floor debate makes it clear that “known” refers to knowledge that the condition exists, not subjective appreciation of its dangerousness. The reason for adding “known” was to make sure that landowners would face liability only for conditions that they knew about. If they faced liability for conditions that were “dangerous,” “artificial,” and

“latent” even if they did not know about them, then they would have to inspect land that they were opening to the public in order to benefit from the statute. As the Senator moving to amend the bill explained:

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

Senate Journal, 42d Legis. 875 (1967) (emphasis added).

As this explanation reveals, “known” means that the landowner has actual knowledge that the condition exists. Nothing in the Senator’s explanation even hints that “known” was intended to require proof that the landowner had subjectively appreciated the condition’s dangerousness. The Senator’s hypothetical about the open well does not discuss whether the landowner knows that the well is dangerous. The focus is on whether the landowner knows that the well exists. The intent of adding “known” is to relieve Senator Donohue from liability if he did not know about the well. Nothing suggests an intent to relieve him from liability if he knew about the well but claims he did not know that open wells are dangerous.

As the floor statement shows, the addition of “known” was intended to relieve landowners from the duty to inspect the land—or, as the Senator put it, the duty to “personally explore[]” their land “foot by foot.” *Id.* The term “known” accomplishes this purpose by immunizing recreational landowners for liability for a condition on the land as long as they lack actual knowledge that the condition exists. A recreational landowner who does not inspect the land—and thus remains ignorant of the condition’s existence—will be immune from liability. This is true even *without* the further requirement that the landowner subjectively appreciate that a condition is dangerous or latent. Thus, adopting the rule proposed by Bellingham is not necessary to further the Legislature’s purpose. A duty to inspect does not arise under either Jewels’ or Bellingham’s rule.

The legislative history also illustrates how Bellingham’s rule would lead to arbitrary results. If, in the example from the floor debate, Senator Donohue did know of the open well, then the rule advanced by Bellingham would make immunity turn on his subjective appreciation of whether he thought it was dangerous and latent. So, if Senator Donohue decided that the open well was “latent” because it was obscured by vegetation, then he would be liable according to Bellingham because he “knew” it was “latent.” But if he believed the vegetation was not thick enough that the well could be called “latent,” then according to Bellingham he would not

be liable, because he did not “know” it was “latent.” It is implausible that the Legislature intended for the courts to delve into this subjective and unpredictable inquiry when applying the recreational use statute. Nor would the Legislature have intended recreational landowners to get “one free accident before liability arises”—to enjoy immunity merely because no prior accident had led the landowner to subjectively appreciate the danger. *Jewels*, 180 Wn. App. at 615 (Becker, J., dissenting). Immunity would then be an arbitrary matter that depended on the fortuity of a prior accident.

D. The parties agree that RCW 4.24.210 establishes an actual knowledge standard.

Bellingham has argued that RCW 4.24.210 establishes an actual knowledge standard, not a constructive knowledge standard. This argument misses the point. *Jewels* agrees that RCW 4.24.210 makes the landowner immune unless the landowner has actual knowledge. But the parties disagree on the question of actual knowledge *of what*. Bellingham contends that the landowner will still be immune unless the landowner also has actual knowledge that the condition is dangerous and latent. *Jewels* contends that a landowner having actual knowledge of a condition that is otherwise artificial, dangerous, and latent will not be immune.

E. What Bellingham *should* have known goes to negligence, not immunity.

If Bellingham is not immune, Jewels still has the burden of establishing his negligence claims at trial. *See Camicia v. Howard S. Wright Constr. Co.*, 179 Wn.2d 684, 694, 317 P.3d 987 (2014) (recreational use statute “creates an exception to Washington’s premise liability law”); *see also Potter v. Wash. State Patrol*, 165 Wn.2d 67, 76, 196 P.3d 691 (2008) (common law governs absent a contrary constitutional, federal, or state law).² Jewels does not seek to get around the common law. Answer to Pet. at 16. Quite the opposite is true. Under Jewels’ rule, not only must the known condition be artificial, latent, and dangerous before immunity is overcome, but the trier of fact must *also* conclude that a recreational landowner was negligent according to the applicable common law standards before liability attaches. This merely effectuates legislative intent: when a landowner *does* know of a condition that is artificial, latent, and dangerous, the landowner must either post a warning, *see* RCW 4.24.210(4)(a), or is subject to common-law standards of due care.

² Jewels asserts both that Bellingham was negligent under *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002), and that it “should [have] realize[d]” that the berm posed an unreasonable danger under premises liability law, *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 49, 914 P.2d 728 (1996) (quoting *Restatement (Second) of Torts* § 343 (1965)).

But the city is not entitled to argue that *immunity* turns on its subjective appreciation of dangerousness and latency. RCW 4.24.210 alters the common law by ensuring that recreational landowners not need to inspect the land for defects. As in the example from the legislative history, however, once the landowner actually learns of an artificial, dangerous, latent condition, the rules of common law negligence apply.

II. Jewels’ evidence establishes that the berm was a known dangerous artificial latent condition, precluding immunity.

It is undisputed that the berm was “artificial,” and Jewels’ evidence establishes that it was “known,” “latent,” and dangerous.”

RCW 4.24.210(4)(a). Each element is a question of fact. *Ravenscroft*, 136 Wn.2d at 926 (latency a question of fact); *Cultee v. City of Tacoma*, 95 Wn. App. 505, 519–20, 977 P.2d 15 (1999) (dangerousness and artificiality questions of fact); *Tabak*, 73 Wn. App. at 697 (dangerousness a question of fact).³ The Court should therefore conclude that Bellingham is not immune and remand for trial.

A. The berm was known.

It is undisputed that the City created the berm. The City therefore knew of the berm under well-settled law. *Jewels*, 180 Wn. App. at 616

³ The Court should clarify that knowledge under RCW 4.24.210(4)(a) is, like the other elements, a question of fact. In other contexts, this Court has held that knowledge is a question of fact. *E.g.*, *Hillhaven Props. Ltd. v. Sellen Constr. Co.*, 133 Wn.2d 751, 768, 948 P.2d 796 (1997).

(Becker, J., dissenting) (citing *Batten v. S. Seattle Water Co.*, 65 Wn.2d 547, 551, 398 P.2d 719 (1965) (where a municipal corporation creates the dangerous condition, no notice is required)); cf. *Falconer v. Safeway Stores, Inc.*, 49 Wn.2d 478, 480, 303 P.2d 294 (1957) (“One is presumed to know what one does.”).

B. The berm was latent.

Under the recreational use statute, a condition is “latent” if it is “not readily apparent to the recreational user.” *Van Dinter*, 121 Wn.2d at 45. Here, Jewels relies on several independently sufficient pieces of evidence to establish that the unpainted berm was latent.

Jewels himself testified that while he “did look at the gap,” it simply “looked like bare, flat pavement,” since it was unpainted. CP 92, ¶ 9. This testimony was corroborated by Jewels’ two expert witnesses, both of whom had examined photographs of the scene. Jewels’ first expert witness, engineer Edward Stevens, opined that the condition was “latent and deceptive at the time of” Jewels’ accident because “[t]here was no warning including paint striping . . . to focus the attention of street users on the hazard while there was still time to react.” CP 82. Jewels’ second expert witness, bicycling expert Jim Couch, said that because speed bumps “are usually marked by warnings on the roadway such as yellow paint and/or through signage to give people notice.” CP 107. Thus, Couch

concluded, the unpainted bump “created a deceptive and latent dangerous condition for bicyclists.” CP 108. These declarations are enough by themselves to create a triable issue. *See Ravenscroft*, 136 Wn.2d at 925 (concluding that there was a triable issue on latency because “the driver of the boat testified . . . that the submerged stumps were not apparent to him. Other witnesses filed affidavits stating that other boats had hit the stumps, indicating they were not readily apparent.”).

The City’s post-accident painting of the berm also demonstrates that it was latent. The City’s work order for the paint job stated: “Please paint entire speed bump *and make it visible*.” CP 76 (emphasis added). This statement, of course, necessarily means that the bump was *not* visible before it was painted.⁴

⁴ The Court of Appeals majority rejected the evidence of the paint job, saying it was a subsequent remedial measure that was inadmissible under ER 407. But ER 407 merely provides that evidence of subsequent remedial measures is “not admissible to prove negligence or culpable conduct in connection with the event.” Evidence of subsequent remedial measures is not excluded “when offered for another purpose.” ER 407. Here, Jewels offered evidence of the paint job not to prove negligence or culpable conduct, but “for another purpose.” The evidence was offered for two other purposes. First, Jewels offered the evidence to show that the condition is latent—to show the nature of the condition rather than the City’s lack of care. *See Petersen v. State*, 100 Wn.2d 421, 439, 671 P.2d 230 (1983) (“Evidence of subsequent conduct is admissible in a negligence action for the purpose of showing the conditions at the time of the injury.” (citing *Peterson v. King Cnty.*, 41 Wn.2d 907, 910, 252 P.2d 797 (1953))). Second, he offered evidence of the paint job not to prove the City’s *negligence*, but to prove that the City is *not immune*. Lack of immunity and negligence are two different things. *See Jewels*, 180 Wn. App. at 618 (Becker, J., dissenting) (“Immunity and duty, though often confused with each other, are distinct concepts.”).

To counter Jewels' evidence of latency, Bellingham has relied on photographs in the record and a declaration by an employee stating that the bump was visible. As Judge Becker pointed out below, however, the employee's observations and the photographs in the record were made *after* the bump had been painted. *Id.* at 614. A jury is needed to decide whether the bump was latent.

C. The berm was dangerous.

A condition is "dangerous" if it "poses an unreasonable risk of harm." *Cultee*, 95 Wn. App. at 518; *Gaeta v. Seattle City Light*, 54 Wn. App. 603, 609, 774 P.2d 1255 (1989). Jewels created a genuine issue of fact as to whether the unpainted berm posed an unreasonable risk of harm.

Jewels' expert Edward Stevens, a highway and traffic engineer, CP 83–89, opined that the berm was extremely hazardous.⁵ In his expert report, Stevens said that "[w]hen bicycles are allowed and expected to use" a roadway, "[a]brupt deviations in roadway profile," such as a speed bump,

⁵ Bellingham moved to strike Stevens' declaration. The trial court denied the motion, a decision reviewed deferentially. *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 247, 178 P.3d 981 (2008). Bellingham now argues on appeal that the trial court abused its discretion because Stevens' declaration was unsworn. Because the City "fail[ed] to raise" the issue before the trial court, CP 148–51, it has "waive[d] the right to raise that issue on appeal." *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008). Even if the argument is considered, however, the trial court did not abuse its discretion. A party opposing summary judgment is given "some leniency" in the presentation of its evidence. *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 879, 431 P.2d 216 (1967).

“are not only not allowed but are considered to be extra hazardous.” CP 79. Stevens also noted a 1975 San Jose study that found short speed bumps⁶ to be unacceptably hazardous on public roadways. CP 80. The study specifically noted that speed bumps “present[ed] an immediate and specific hazard” to bicycles. CP 80.

The fact that gaps are often left in speed bumps also provides evidence that the bump posed an unreasonable risk of harm. Jewels and both of his experts testified that gaps are generally left on the edges of speed bumps allow cyclists pass through safely. CP 81; CP 91, ¶ 8; CP 107–08. In fact, there were two gaps on the side of the first speed bump that Jewels encountered in Cornwall Park, CP 91, ¶ 8, and a gap on the other side of the speed bump that caused Jewels’ accident, CP 92, ¶ 15. Given the frequency of these gaps, cyclists are supposed to go around speed bumps, as Jewels did here. Ordinarily a bicyclist must stay as near to the right side of the roadway as practicable. Bellingham Mun. Code § 11.48.070(A); RCW 46.61.770(1).⁷ Jewels did not “deviate from the traveled roadway to avoid” the speed bump. *Jewels*, 180 Wn. App. at 611.

⁶ Following the technical literature, Stevens distinguished between speed bumps and speed humps; the former are narrow and abrupt, while the latter are wider and more gradual. CP 80.

⁷ Bellingham has claimed that these rules of the road did not apply in the Park because it did not contain a “roadway.” That is incorrect. *See* Pet. for Review at 17 n.4.

He was simply following the law by traveling as far to the right as practicable, through what appeared to be the *safer* path. By installing an unpainted berm precisely where bicyclists are supposed to go, Bellingham created an unreasonable risk of harm.

III. Even if a landowner must subjectively appreciate that a condition is dangerous and latent, Jewels' evidence would allow a jury to find that Bellingham knew both.

Even if the Court requires evidence that a landowner subjectively knows that a condition is dangerous and latent, Jewels' evidence is sufficient.⁸ A person's knowledge may be shown by evidence of what a person in the person's circumstances *would* have known. *See Tabak*, 73 Wn. App. at 696 (where actual knowledge is denied, plaintiff must offer evidence from which trier of fact could "infer" actual knowledge). Even in criminal cases, a jury is permitted "to find that the defendant had knowledge if it finds that the ordinary person would have had knowledge under the circumstances." *State v. Shipp*, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980). It is all the more permissible here for a jury to infer that

⁸ In its Answer to the Petition, Bellingham put at issue the type of evidence that is required to show actual knowledge of dangerousness. *See* Answer to Pet. at 13–14. It argued that a plaintiff may show actual knowledge of dangerousness in a number of different ways, but that Jewels had failed to do so here. *Id.* at 14. What kind of evidence can show actual knowledge of dangerousness at the summary-judgment stage is thus before the Court. *See* RAP 13.7(b); *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 210 n.3, 87 P.3d 757 (2004). The issue was also raised below. *See* Br. of Resp't at 24–26; Reply Br. of Appellant at 9–13.

Bellingham had knowledge of a danger because an ordinary municipality in its circumstances *would* have had knowledge of the danger.

The evidence that shows that the berm was dangerous is taken from traffic engineering principles that a municipality in Bellingham's circumstances would know. It is based on principles from the Manual on Uniform Traffic Control Devices (MUTCD),⁹ which Bellingham must use. The MUTCD design criteria applicable at the time of Jewels' injury required "traffic control devices" to, among other things, "[c]ommand attention." Br. of Appellant, App. A at 1A-1. They should be "designed so that features such as ... color ... and contrast are combined to draw attention." *Id.* They must give the road user "adequate time to make the proper response." *Id.* at 1A-1, 1A-2. The MUTCD standards are circumstantial evidence that the city knew that fixed, unmarked obstructions placed in the roadway are dangerous. Edward Stevens, a highway design engineer, also testified that speed bumps were "known" to be dangerous to bicycles, based on literature dating from years before Jewels' injury. CP 78-79, 81. A jury may reasonably infer that Bellingham knew of principles known to traffic engineers and presented in traffic engineering literature.

⁹ See 23 C.F.R. § 655.603(b)(1); RCW 47.36.030(1), (2); WAC 468-95-010 (requiring use of the MUTCD).

The Court of Appeals rejected this evidence. It said that because the purpose of the berm was for drainage, it “was not a traffic control device” and “the MUTCD standards do not apply.” *Jewels*, 180 Wn. App. at 611. But whether or not the MUTCD governed the installation of the berm, it nevertheless was evidence of the City’s knowledge of safety standards for roadways. And the Court of Appeals’ reasoning cannot extend to Jewels’ expert evidence, which was directed generally at the “proper design and maintenance of a safe street.” CP 79.

If the Court were to adopt Bellingham’s rule that actual knowledge of dangerousness is required to overcome immunity under RCW 4.24.210(4)(a), and yet find that a plaintiff’s evidence of what a landowner would be expected to know does not raise a question of fact as to immunity, the Court would be granting absolute immunity whenever a landowner asserts simply, “I did not know that was dangerous.” No reading of legislative intent can justify so broad and facile a rule.

CONCLUSION

The Court should hold that Bellingham is not immune and remand for trial on Jewels’ negligence claims.

Respectfully submitted this November 14, 2014.

KELLER ROHRBACK L.L.P.

LAW OFFICE OF CRYSTAL
GRACE RUTHERFORD



Ian S. Birk, WSBA #31431

Benjamin Gould, WSBA #44093

Attorneys for Petitioner



for Crystal G. Rutherford; WSBA #11437 } by authorization

Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on November 14, 2014, I caused a true and correct copy of the foregoing SUPPLEMENTAL BRIEF OF PETITIONER to be served on the following via email, pursuant to RAP 18.5(a) and CR 5(b)(7):

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


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Dear Clerk:

Attached for filing, please find *Supplemental Brief of Petitioner*.

The case information is:

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Case number: 90319-1

Names, phone number, bar numbers and email addresses of persons filing the above document are:

Ian S. Birk, WSBA #31431
Benjamin Gould, WSBA #44093
Keller Rohrback L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101
(206) 623-1900
ibirk@kellerrohrback.com
bgould@kellerrohrback.com

Thank you.

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**Cathy A. Hopkins**  
**Complex Litigation Legal Assistant/Paralegal**  
**KELLER♦ROHRBACK L.L.P.**  
Phone: (206) 623-1900  
Direct Line: (206) 224-7433  
Fax: (206) 623-3384  
E-mail: [chopkins@kellerrohrback.com](mailto:chopkins@kellerrohrback.com)

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