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No. 90319-1

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STEVEN JEWELS,

Plaintiff/Petitioner,

vs.

CITY OF BELLINGHAM,

Defendant/Respondent.

Filed
Washington State Supreme Court

DEC 15 2014

Ronald R. Carpenter
Clerk

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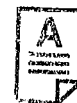
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BRIEF OF AMICUS CURIAE
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ORIGINAL

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of persons seeking legal redress under the civil justice system, including an interest in the proper interpretation and application of RCW 4.24.210, Washington's recreational use immunity statute.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case presents the Court with the opportunity to clarify the proper interpretation and application of Washington's recreational use immunity statute, RCW 4.24.210, and the limitation on such immunity in subsection (4)(a).¹ Steven Jewels (Jewels) sued the City of Bellingham (City) in negligence for injuries sustained while biking in a City park. The underlying facts are drawn from the Court of Appeals opinion and the briefing of the parties. See Jewels v. City of Bellingham, 180 Wn.App. 605, 324 P.3d 700, *review granted*, 181Wn.2d 1001 (2014); Jewels Br. at

¹ The full texts of the current versions of RCW 4.24.210 and its companion statute, RCW 4.24.200, are reproduced in the Appendix to this brief.

2-3; City Br. at 1-5; Jewels Pet. for Rev. at 4-7; City Ans. to Pet. for Rev. at 3-6, 10; Jewels Supp. Br. at 3-5; City Supp. Br. at 2-5.

For purposes of this amicus curiae brief, the following facts are relevant: Jewels was injured when he was thrown from his bicycle as he encountered an unpainted extension of a speed bump on a road located inside the City's Cornwall Park. The City refers to this unpainted extension as a "water diverter." Jewels sued the City for common law negligence, based upon premises liability law governing public invitees and failure to properly maintain its roadways. The City invoked immunity under RCW 4.24.210 (or §210). Jewels countered that §210 immunity is unavailable because under subsection (4)(a) a landowner remains liable "for injuries sustained to users by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted." In turn, the City contended subsection (4)(a) does not apply.

The superior court dismissed Jewels' claim on summary judgment based upon recreational use immunity and the Court of Appeals affirmed, with Judge Becker dissenting. See Jewels, 180 Wn. App. at 607; id. at 612-19 (Becker, J., dissenting). The majority opinion held:

Jewels also argues that the City had actual notice that the water diverter was dangerous because the City created this condition. *But to establish that the water diverter with an adjacent curb cutout was a known condition, Jewels must show that the City knew of the condition and also knew that it was dangerous and latent.* The City maintains that it had no knowledge of any other accidents involving the water diverter and the curb cutout. Jewels presents no evidence to refute the City's assertion that it had no actual knowledge of a dangerous, latent condition. The mere fact

that an unfortunate event occurs, without more, does not demonstrate knowledge of latent danger.

180 Wn. App. at 611 (footnote omitted; emphasis added); see also id. at 612 (concluding “[b]ecause Jewels cannot establish actual knowledge, his claim fails, and we need not reach the issue of whether the condition was latent or dangerous;” footnote omitted).²

In dissent, Judge Becker concluded that the City had knowledge of the water diverter because it created it, and that, otherwise, summary judgment should not have been granted because genuine issues of material fact exist regarding whether the condition was dangerous and latent. See id. at 613-17 (Becker, J., dissenting).

Jewels filed a petition for review urging that the Court of Appeals erred in reading subsection (4)(a) as requiring actual knowledge by the landowner that the condition was dangerous and latent. See Jewels Pet. for Rev. at 4, 9-11. In response, the City argued that the Court of Appeals below “followed straightforward precedent in affirming summary judgment based on recreational immunity,” and that its decision was also correct because Jewels failed to show the injury-causing condition was dangerous and latent. See City Ans. to Pet. for Rev. at 1. This Court granted review.

² The Court of Appeals appears to have considered the “condition” at issue in this case to be the water diverter extending from the painted speed bump to include the adjacent curb cutout. See Jewels at 608, 611. The parties do not appear to take issue with this characterization. See Jewels Supp. Br. at 1-2, 4; City Supp Br. at 1,3. It appears beyond question that the City installed the speed bump, water diverter and curb cutout. For purposes of this brief, the “condition” at issue in this case will simply be referred to as the “water diverter.”

III. ISSUE PRESENTED

Under RCW 4.24.210, the recreational use immunity statute, what is the proper interpretation of subsection (4)(a), which preserves landowner liability “for injuries sustained to users by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted?” Specifically, in addition to having actual knowledge of the condition, must a landowner also have actual knowledge that the condition is dangerous and latent for this provision to apply?

IV. SUMMARY OF ARGUMENT

Under RCW 4.24.210(4)(a), “known,” “dangerous,” “artificial,” and “latent” are independent elements that must be present in order for a landowner to be potentially liable in negligence for an injury-causing condition on the land. A landowner who knows about the injury-causing condition does not need to have actual knowledge that the condition is “dangerous,” “artificial” and “latent” to be potentially subject to liability. The existence of each of these elements is determined objectively, applying their well-established meaning, and factual disputes regarding any of the elements must be resolved at trial. Court of Appeals holdings to the contrary should be disapproved.

Because RCW 4.24.210 confers immunity on a landowner and constitutes an affirmative defense to a common law negligence claim, the landowner has the burden of proving entitlement to the immunity. This burden should include the burden of proving that the exception to immunity in subsection (4)(a) does not apply.

V. ARGUMENT

A.) Overview Of Washington Premises Liability Law And RCW 4.24.210, The Recreational Use Immunity Statute.

Under modern premises liability law, persons invited on the land of another for recreation are public invitees, and the landowner owes a common law duty to keep the premises in a reasonably safe condition. See Davis v. State, 144 Wn.2d 612, 615-16, 30 P.3d 460 (2001). This duty includes the obligation to inspect the premises to discover and remedy dangerous conditions. See id. at 616.

The recreational use immunity statute limits liability for breach of this duty under prescribed conditions when landowners open their property to the public for recreational purposes.³ RCW 4.24.210(1) provides in pertinent part:

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, which term includes ... bicycling ..., shall not be liable for unintentional injuries to such users.

This Court has noted that, “[b]ecause recreational use immunity is an affirmative defense, the landowner has the burden of proving it applies.”

Cregan v. Fourth Mem’l Church, 175 Wn.2d 279, 283, 285 P.3d 860

³ The purpose for limiting liability is to encourage landowners to make their property available to the public for recreational purposes. See RCW 4.24.200. Similar laws have been enacted around the country, many traceable to a model act developed by the Council on State Governments. See John C. Barrett, Good Sports & Bad Lands: The Application of Washington’s Recreational Use Statute Limiting Landowner Liability, 53 Wash. L. Rev. 1, 2-8 (1977). While RCW 4.24.210 resembles the model act, certain aspects of this statute are unique, including subsection (4)(a). See Barrett at 9; Tabak v. State, 73 Wn.App. 691, 694-95 & n. 3, 870 P.2d 1014 (1994).

(2012); accord Camicia v. Wright Constr. Co., 179 Wn.2d 684, 693, 317 P.3d 987 (2014).

The immunity conferred by the recreational use immunity statute is subject to three generally recognized exceptions:

(1) When the entrant is charged a “fee of any kind”, (2) when the entrant is injured by an intentional act, or (3) when the entrant sustains injuries “by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted.” Former RCW 4.24.210.

Van Dinter v. Kennewick, 121 Wn.2d 38, 42-43, 846 P.2d 522 (1993) (footnote omitted). The third exception identified in Van Dinter is referred to in this brief as the “known condition exception.”

B.) The Known Condition Exception Of RCW 4.24.210(4)(a) Does Not Require A Landowner To Have Actual Knowledge That An Injury-causing Condition Is Dangerous, Artificial And Latent; Whether Each Of These Elements Exists Is Determined Objectively, And Questions Of Fact Regarding Each Element Are For The Jury.

The known condition exception in RCW 4.24.210(4)(a) provides:

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

The four adjectives—“known,” “dangerous,” “artificial,” and “latent”—modify the noun “condition”, not each another. See Van Dinter at 46; Ravenscroft v. Water Power Co., 136 Wn.2d 911, 920, 969 P.2d 75 (1998).

The noun “condition” and two of the adjectives—“latent” and “artificial”—have been defined by this Court. A “condition” is the injury-causing instrumentality viewed in light of the surroundings in which it

operates. See Van Dinter, 121 Wn.2d at 43-44; Ravenscroft, 136 Wn.2d at 921. The exact “condition” at issue may be a question of fact for the jury, unless reasonable minds cannot differ on the question. See Van Dinter at 44.

“Latent” is defined as not readily apparent to the general class of recreational users. See Van Dinter at 45; Ravenscroft at 924-25. The condition itself must be latent; it is not enough that its potential for harm may be hidden. See Van Dinter at 46. Latency also may be a question of fact to be resolved at trial. See id. at 47.

“Artificial” means “contrived through human effort, not by natural causes detached from human effort.” Ravenscroft at 923-24; see also Davis, 144 Wn.2d at 617 n.2 (indicating “proper inquiry is whether the injury-causing condition was the product of human efforts in contrast to a naturally occurring condition”). It is conceivable that artificiality may present a question of fact to be resolved at trial, but, in light of the definition, it will often be capable of determination as a matter of law.

The Court of Appeals has defined the remaining two adjectives—“known” and “dangerous.” “Known” refers to actual knowledge of the condition in question. See Gaeta v. Seattle City Light, 54 Wn. App. 603, 609, 774 P.2d 1255, *review denied*, 113 Wn. 2d 1020 (1989). “Dangerous” means an “unreasonable risk of harm.” Id., 54 Wn. App. at 609. These definitions have not met with serious controversy in subsequent cases.⁴

⁴ The City does not take issue with the definitions of “known” and “dangerous.” While it does not appear to deny it had actual knowledge of the water diverter as the condition, it

In addition to defining “known” and “dangerous,” the Court of Appeals has held that “known” modifies the other adjectives “dangerous” and “latent,” so that a landowner must have actual knowledge of the danger and latency of the condition in addition to knowledge of the condition itself. This line of cases begins with Gaeta, 54 Wn. App. at 609, where the court stated: “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 a condition is dangerous,” citing the Ninth Circuit’s decision in Morgan v. United States, 709 F.2d 580, 583-84 (9th Cir. 1983). The plaintiff in Morgan appears to have assumed the burden to prove that the danger was known. See id. at 584 (stating “plaintiff theorizes the government may have known the pumping system was dangerous when installed” and “[t]he testimony of plaintiff’s witness is essentially that the government should have known of the dangerous condition”). The Ninth Circuit did not meaningfully address the necessity of showing that the landowner knew of the danger.

While Gaeta predated this Court’s holding in Van Dinter (repeated in Ravenscroft) that the four adjectives modify the noun “condition” and not each other, subsequent Court of Appeals case law, including the decision below, has uncritically relied on Gaeta without addressing the effect of Van Dinter. See Jewels, 180 Wn.App. at 610 & n.9 (requiring actual knowledge that the condition is dangerous, relying on Gaeta, 54

does challenge whether the condition was dangerous. See City Ans. to Pet. for Rev. at 10 (regarding known condition); City Supp. Br. at 19-20 (disputing whether condition is dangerous). The City also disputes latency. See id. at 17-19.

Wn.App. at 609); Tabak, 73 Wn.App. at 696 (requiring actual knowledge of dangerousness and latency, relying on Gaeta at 609); Ertl v. Parks & Recreation Comm'n, 76 Wn. App. 110, 115, 882 P.2d 1185 (1994) (requiring actual knowledge that the condition is both dangerous and latent, relying on Gaeta at 609), *review denied*, 126 Wn.2d 1009 (1995); Cultee v. City of Tacoma, 95 Wn.App. 505, 517-19, 977 P.2d 15 (requiring actual knowledge that the condition is dangerous, citing Gaeta at 609), *review denied*, 139 Wn.2d 1005 (1999).

This Court should disapprove of this aspect of Gaeta, and the cases following Gaeta that require proof of a landowner's actual knowledge that a known condition is "dangerous" and "latent" in order for the known condition exception to apply.⁵ As Jewels points out, interpreting the adjective "known" to modify the adjectives "dangerous" and "latent," violates the clear teachings of this Court that all of the adjectives modify the noun "condition", and not each other. See Van Dinter at 46; Ravenscroft at 920; Jewels Supp. Br. at 7-8.

Moreover, requiring an analysis of a landowner's subjective understanding of terms that this Court has otherwise defined objectively is

⁵ Gaeta has been cited with approval by this Court regarding other aspects of §210. See Van Dinter, 121 Wn. 2d at 46-47 (regarding "latent"); Ravenscroft, 136 Wn.2d at 923 (regarding "artificial"). Gaeta need only be disapproved regarding extending the actual knowledge requirement to the "dangerous" and "latent" elements.

The City is incorrect in suggesting that the Court may only disapprove of the Court of Appeals actual knowledge requirement for dangerousness and latency if it determines this analysis is "incorrect and harmful" under the doctrine of stare decisis. See City Supp. Br. at 14-15. While the Court may well give deference to the analysis undertaken by the intermediate appellate court, it writes with a clean slate regarding issues it has not previously addressed. See Bunch v. Dep't of Youth Servs., 166 Wn. 2d 165, 181, 116 P.3d 381 (2005) (indicating Court of Appeals decisions not binding on Supreme Court).

counterintuitive. Cf. Cregan, 175 Wn.2d at 285-86 (concluding that the undefined term “public” in §210(1) means “for all to use or enjoy,” and that “the facts surrounding access are viewed objectively”). The elements of “dangerous” and “latent” should also be viewed objectively. The landowner’s subjective understanding should not be relevant.

To the extent it is unclear whether “dangerous” or “latent” is a subjective or objective inquiry, requiring proof of the landowner’s subjective understanding seems at odds with the rule of strict construction of immunity statutes. See Matthews v. Elk Pioneer Days, 64 Wn.App. 433, 439, 824 P.2d 541 (strictly construing “outdoor recreation” to deny recreational use immunity to sponsor of outdoor festival), *review denied*, 119 Wn.2d 1011 (1992).⁶

Determining “dangerous” and “latent” under an objective standard is consistent with this Court’s description of subsection (4)(a) in Ravenscroft:

While we agree the primary intent of the recreational use statute is to encourage landowners to make lands and waterways available for recreational users, the statute evidences a legislative intent to withhold immunity from landowners who know of a condition *which is* dangerous, hidden, and artificial.

136 Wn.2d at 924 (emphasis added).

⁶ Imposing a subjective knowledge requirement on the elements of dangerous and latent is also at odds with the rule that statutes in derogation of the common law are strictly construed. See Matthews, 64 Wn.App. at 437; Nielsen v. Port of Bellingham, 107 Wn.App., 662, 666-67, 27 P.3d 1242 (2001) *review denied*, 145 Wn.2d 1027 (2002). Although this rule construction has been criticized, see Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 102, 829 P.2d 746 (1992), it continues to serve as a helpful analytical tool in appropriate cases. See Potter v. Wash. State Patrol, 165 Wn.2d 67, 76-80, 196 P.3d 691 (2008); Michaels v. CH2M Hill, Inc., 171 Wn.2d 587, 600, 257 P.3d 532 (2011).

For the foregoing reasons, the Court should hold that the “dangerous” and “latent” elements are determined objectively, irrespective of the subjective knowledge of the landowner. Court of Appeals decisions holding to the contrary should be disapproved.

C.) A Landowner Has The Burden of Proving The Affirmative Defense of Recreational Use Immunity, And This Burden Should Include Proving That The Known Condition Exception Does Not Apply.

On two recent occasions this Court has confirmed that the recreational use immunity statute is an affirmative defense and the landowner has the burden of proving §210 applies. See Cregan, 175 Wn.2d at 283 (involving whether the recreational land was open to the “public”); Camicia, 179 Wn.2d at 693 (involving whether the land in question was open to the public for recreational purposes). Yet, it appears the Court of Appeals placed the burden on Jewels to establish the City’s “liability under this statute.” Jewels at 609; see also id. (stating “a plaintiff must show that each of the four elements—known, dangerous, artificial, and latent — was present in the injury causing condition”); id. at 611 (requiring that Jewels “must show that the City knew of the condition and also knew that it was dangerous and latent”; footnote omitted). In placing the burden of proving the known condition exception on the plaintiff, the Court of Appeals misapprehended the nature of §210, viewing it as a liability statute supplanting the common law instead of a limited immunity statute. See Jewels at 610 (concluding “RCW 4.24.210, not the common law, controls here”); see also id. at 618 (Becker, J.,

dissenting, noting City mistakenly views §210 as a source of duty instead of a source of immunity).

The landowner's proof of entitlement to immunity should include demonstrating that subsection (4)(a) does not apply. Although this Court has referred to subsection (4)(a) as an "exception" to the grant of immunity, Ravenscroft, 136 Wn.2d at 921, this provision serves as a limitation on the scope of immunity and, properly construed, the landowner should be obligated to rule out the exception. See Matthews, 64 Wn.App. at 439. Under subsection (4)(a), a landowner may avoid liability by establishing the injury was not the result of a "known dangerous artificial latent condition."

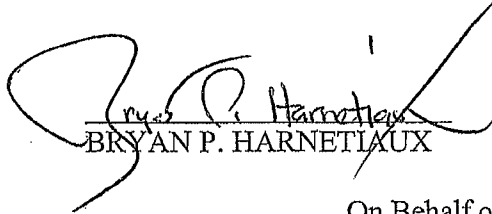
To hold otherwise would place an additional burden on the plaintiff, who must already prove the landowner is liable for common law negligence. There is no indication that §210 was intended to increase a plaintiff's burden of proof in establishing liability under the common law. See RCW 4.24.200 (expressly indicating that RCW 4.24.200-.210 serve as a limitation on landowners' liability).⁷

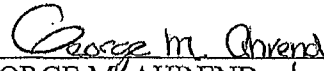
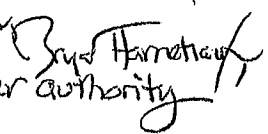
⁷ RCW 4.24.210 should not be read as altering the customary order of proof in premises liability cases. The plaintiff must show a prima facie case of common law negligence, and the defendant landowner must overcome plaintiff's evidence or prove entitlement to immunity under §210. The dissent's suggestion that in a jury trial involving a premises liability claim and a §210 defense the jury should first decide whether the landowner is entitled to immunity should be rejected. See Jewels, 180 Wn.App. at 618 (Becker, J., dissenting). Absent instances where recreational use immunity can be resolved on summary judgment as a matter of law, entitlement to this immunity should be determined in the normal course of trial, as an affirmative defense.

VI. CONCLUSION

The Court should adopt the arguments advanced in this brief and resolve this case accordingly.

DATED this 4th day of December, 2014.


BRYAN P. HARNETIAUX


GEORGE M. AHREND by 
per authority

On Behalf of WSAJ Foundation

Appendix

4.24.200. Liability of owners or others in possession of land and water areas for injuries to recreation users--Purpose

Currentness

The purpose of RCW 4.24.200 and 4.24.210 is 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 toward persons entering thereon and toward persons who may be injured or otherwise damaged by the acts or omissions of persons entering thereon.

Credits

[1969 ex.s. c 24 § 1; 1967 c 216 § 1.]

4.24.210. Liability of owners or others in possession of land and water areas for injuries to recreation users--Known dangerous artificial latent conditions--Other limitations

Currentness

(1) Except as otherwise provided in subsection (3) or (4) of this section, any public or private landowners, hydroelectric project owners, or others in lawful possession and control of any lands whether designated resource, rural, or urban, or water areas or channels and lands adjacent to such areas or channels, who allow members of the public to use them for the purposes of outdoor recreation, which term includes, but is not limited to, the cutting, gathering, and removing of firewood by private persons for their personal use without purchasing the firewood from the landowner, hunting, fishing, camping, picnicking, swimming, hiking, bicycling, skateboarding or other nonmotorized wheel-based activities, aviation activities including, but not limited to, the operation of airplanes, ultra-light airplanes, hanggliders, parachutes, and paragliders, rock climbing, the riding of horses or other animals, clam digging, pleasure driving of off-road vehicles, snowmobiles, and other vehicles, boating, kayaking, canoeing, rafting, nature study, winter or water sports, viewing or enjoying historical, archaeological, scenic, or scientific sites, without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users.

(2) Except as otherwise provided in subsection (3) or (4) of this section, any public or private landowner or others in lawful possession and control of any lands whether rural or urban, or water areas or channels and lands adjacent to such areas or channels, who offer or allow such land to be used for purposes of a fish or wildlife cooperative project, or allow access to such land for cleanup of litter or other solid waste, shall not be liable for unintentional injuries to any volunteer group or to any other users.

(3) Any public or private landowner, or others in lawful possession and control of the land, may charge an administrative fee of up to twenty-five dollars for the cutting, gathering, and removing of firewood from the land.

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

(i) A fixed anchor used in rock climbing and put in place by someone other than a landowner is not a known dangerous artificial latent condition and a landowner under subsection (1) of this section shall not be liable for unintentional injuries resulting from the condition or use of such an anchor.

(ii) Releasing water or flows and making waterways or channels available for kayaking, canoeing, or rafting purposes pursuant to and in substantial compliance with a hydroelectric license issued by the federal energy regulatory commission, and making adjacent lands available for purposes of allowing viewing of such activities, does not create a known dangerous artificial latent condition and hydroelectric project owners under subsection (1) of this section shall not be liable for unintentional injuries to the recreational users and observers resulting from such releases and activities.

(b) Nothing in RCW 4.24.200 and this section limits or expands in any way the doctrine of attractive nuisance.

(c) Usage by members of the public, volunteer groups, or other users is permissive and does not support any claim of adverse possession.

(5) For purposes of this section, the following are not fees:

(a) A license or permit issued for statewide use under authority of chapter 79A.05 RCW or Title 77 RCW;

(b) A pass or permit issued under RCW 79A.80.020, 79A.80.030, or 79A.80.040; and

(c) A daily charge not to exceed twenty dollars per person, per day, for access to a publicly owned ORV sports park, as defined in RCW 46.09.310, or other public facility accessed by a highway, street, or nonhighway road for the purposes of off-road vehicle use.

Credits

[2012 c 15 § 1, eff. June 7, 2012. Prior: 2011 c 320 § 11, eff. July 1, 2011; 2011 c 171 § 2, eff. July 1, 2011; 2011 c 53 § 1, eff. July 22, 2011; 2006 c 212 § 6, eff. June 7, 2006; prior: 2003 c 39 § 2, eff. July 27, 2003; 2003 c 16 § 2, eff. July 27, 2003; 1997 c 26 § 1; 1992 c 52 § 1; prior: 1991 c 69 § 1; 1991 c 50 § 1; 1980 c 111 § 1; 1979 c 53 § 1; 1972 ex.s. c 153 § 17; 1969 ex.s. c 24 § 2; 1967 c 216 § 2.]

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Cc: gahrend@trialappeallaw.com; ibirk@kellerrohrback.com; sbrady@cob.org; jastele@cob.org; sestest@kbmlawyers.com
Subject: Jewels v. City of Bellingham (S.C. No. 90319-1)-WSAJ Foundation letter request and proposed amicus brief

Dear Mr. Carpenter:

Attached is the letter request and proposed amicus curiae brief of the Washington State Association for Justice Foundation. Counsel are being served by email on this date per prior arrangement, as set forth in the letter request.

Respectfully submitted,

Bryan Harnetiaux, WSBA No. 5169
On Behalf of WSAJ Foundation

Via special clerical assistant – Sandra Babcock