

75659-1

75659-1

NO. 75659-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

GREGORY CORWIN,

APPELLANT,

v.

CITY OF KENT,

RESPONDENT.

APPEAL FROM KING COUNTY SUPERIOR COURT

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

The Superior Court erred in determining that plaintiff's premises liability claim failed as a matter of law because there was insufficient evidence to support that the defendant knew or should have known of the dangerous condition of the lakebed. The documents produced by the City show that it was engaged in various improvement and maintenance projects where the condition of the lakebed was at issue. It is uncontested that the City took efforts to stop erosion by placing two-man boulders within the 200-foot shoreline area. It is irrefutable that the City hired contractors to backfill holes in the beach area with sand. And, it is unchallenged that an old boat ramp that was demolished in the area at issue had foundational characteristics similar in description to that experienced by Mr. Corwin and his family. Because there is sufficient evidence to support a premises liability theory, this Court should reverse the decision below and remand this matter for trial.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred by granting summary judgment to the City of Kent on the basis that Mr. Corwin had not presented sufficient evidence to create a genuine issue of fact on his premises liability claim.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did Mr. Corwin present sufficient evidence for a jury to find that the City of Kent knew or should have known that the uneven surface of the lakebed created an unreasonable risk of harm to waders?
2. Did Mr. Corwin present sufficient evidence for a jury to find that the City of Kent should have expected that invitees would either not discover the danger inherent in the lakebed, or otherwise fail to protect themselves from it?

IV. STATEMENT OF THE CASE

I. Boating on Lake Meridian.

On August 4, 2012, Greg Corwin took his boat to Lake Meridian for a fun day on the water with family and friends. CP 97. He was accompanied by his girlfriend, Stacey Johnson, and her two minor sons that live with them, Conner and Zander. CP 97. Mr. Corwin was joined at the lake by Stacey's family—Marianne Johnson, Alana King, Rodney King, and their three minor children—and Brandon and Paula Swanson. CP 97-98. Everyone arrived at the lake at approximately 11:00 a.m. CP 102. Upon his arrival, Mr. Corwin paid a \$5.00 fee charged by the City of Kent to use the boat launch. CP 25, 100, 114.

After parking his vehicle, Mr. Corwin, Stacey, and the boys got into the boat at the boat launch ramp. CP 101. Mr. Corwin's boat has a

maximum capacity to transport nine people, but usually only takes five to six people at a time. CP 102. As such, Mr. Corwin's friends had to take turns riding the boat. CP 102-03. Pursuant to Lake Meridian's boating rules, Mr. Corwin was forced to anchor the boat near Lake Meridian Park Beach whenever people wanted to switch out. CP 111-12.

The party started out wakeboarding first. CP 104. After that, Mr. Corwin brought the boat in to anchor near the beach because they were going to start tubing with the children. CP 104. Mr. Corwin anchored the boat approximately 50 feet from the shore of the beach. CP 84. At his deposition, Mr. Corwin identified the location of the anchored boat (via large rectangle) and the location of the party on the beach (via small rectangle) on a Google Maps aerial photo provided by defense counsel. CP 105, 140.



On his way back to the boat from shore, Mr. Corwin sustained the injury that is the subject of this appeal. Mr. Corwin described how he was injured, in his deposition:

I was walking and I was – you know, I was about chest deep and I kind of hit a rock, some sort of piece of cement something on the ground and – and it was kind of at an angle and I stepped on it. And – and I'm thinking wow, that's kind of weird, thinking it was a rock or something, you know.

And the next thing I know there's another one and now I'm stepping up out of the water . . . so I'd gone out of the water maybe this far and then I came down and I came down on the other side hard because there just wasn't anything there. As I'm stepping forward, my left foot went into the hole, I got scared and yanked my foot out. And that was it. It was a sprain.

I tried to go to the beach and I couldn't – I knew I was hurt so I hobbled back....

CP 106.

With boats and swimmers constantly kicking up sediment, no one was able to see underwater in the murky lake. CP 108, 155. However, the members of the party could still feel the objects beneath their feet. Mr. Corwin believed that the objects were a little rougher than a smooth rock, like “[s]ome sort of big piece of material, like cement, rock, stone. . . .” CP 107-08. In describing the angle and drop-off, Mr. Corwin testified, “It felt like somebody had stacked up some sort of boulders or rocks or construction or something, cement, ecology blocks, something felt like it had been – like a pile, and I was in the middle of it all of a sudden out of nowhere.” CP 109.

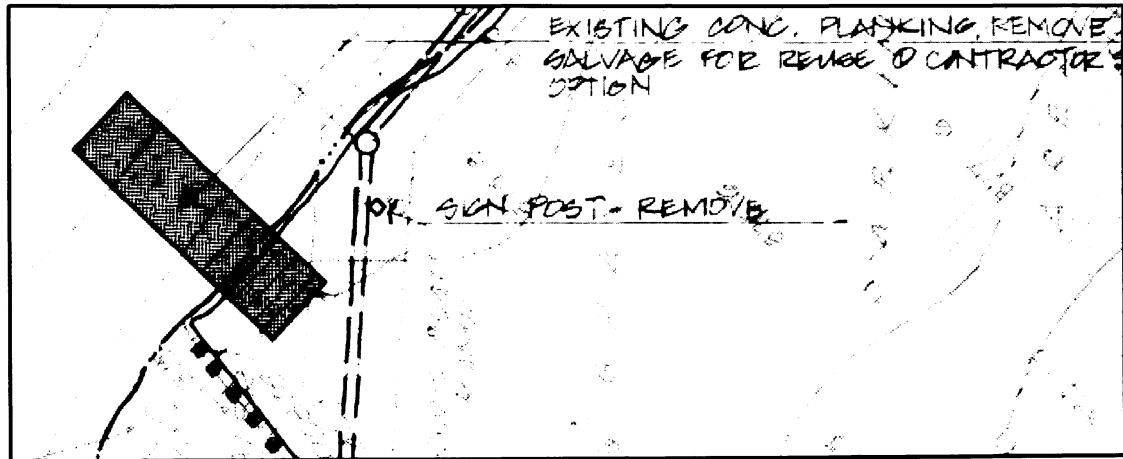
Other members of the party also experienced what Mr. Corwin described. For example, Alana stated, “While traveling from the boat to the shore and back I remember that I had to step very carefully as the bottom of the lake was full of what felt like large slippery rocks. Walking was difficult because of the uneven ground, which almost caused me to fall so I stepped very slowly and carefully.” CP 155. Marianne, too, stated, “I remember when I waded out to the boat that the bottom of the lake was really uneven and there were pot holes around the rock and debri[s]. It was difficult to maintain balance.” CP 84.

Underwater video footage taken on August 18, 2015, shows a pile of rocks near the area where Mr. Corwin was injured. CP 142. According to plaintiff’s expert Steve Brannon, the rocks in the video clip are not naturally occurring. CP 91. Naturally occurring lakebed rocks are usually smooth, due to erosion from the water; however, the rocks shown in the video have jagged, cracked, and angular edges. CP 91, 142. These jagged edges are likely the result of the rocks having been crushed or processed and placed in the lake. CP 91.

B. Construction and Improvements at the Location where Greg Corwin was Injured.

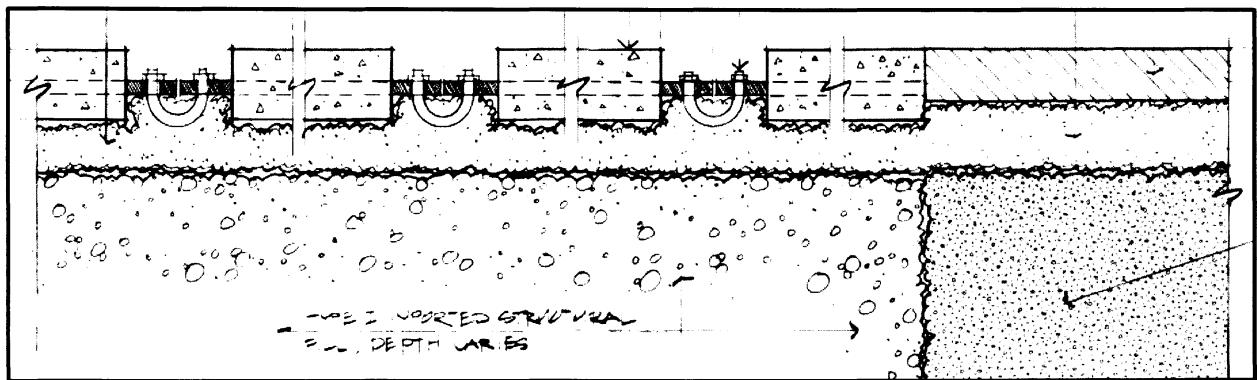
Lake Meridian Park Construction. On file with the City are various documents showing construction that occurred in the area where Mr. Corwin

was injured. One such project was Phase II of the Lake Meridian Park construction, which occurred sometime between 1992 and 1995. CP 144. Part of this project was the replacement of the boat launch then present in the park, which, notably, is not in the same location as the current boat launch. CP 144. In a record drawing depicting "Existing Conditions/Demolition," there is a darkly shaded rectangular object that jettisons from the beach area into the lake. CP 144. It is described as a "Conc[rete] Boat Ramp" with a note that states, "Existing Conc[rete] Planking, Remove Salvage for Reuse @ Contractor's Option." CP 144. This pre-existing concrete boat ramp is in the exact area where Mr. Corwin was injured as he traveled from the beach to the anchored boat. CP 144-46.



Other drawings from this same project depict the temporary shoring measures used during the construction of the boat ramp subgrade. CP 148. According to the technical notes, "The purpose of the temporary shoring is to

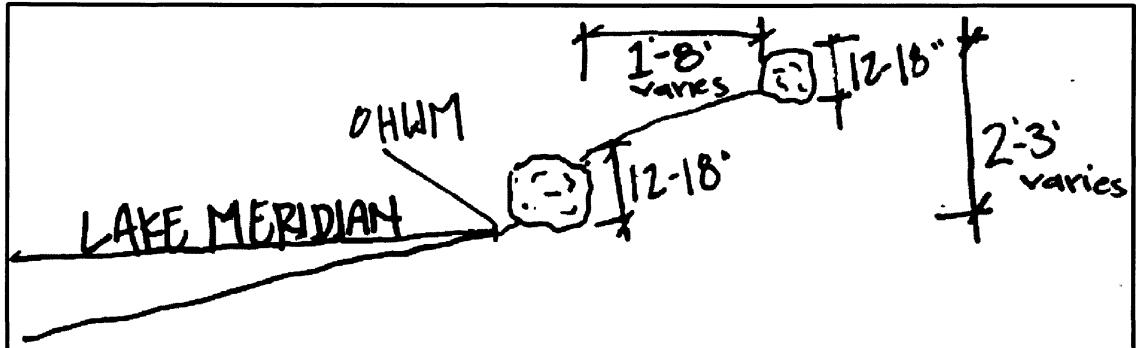
prevent the migration of soft, organic soils into area where the boat ramp subgrade preparation is to occur and reduce turbidity in the lake.” CP 148. Per Steven Brannon, a civil marine engineering expert, this type of construction is typical of boat ramps, and may be similar in construction to the pre-existing boat ramp. CP 91. The detailed cross-section drawing, shown below, depicts imported structural fill material to support concrete planks with steel bars and galvanized U-bolts. CP 148.



CP 148. No documents on file with the City suggest that these materials were ever completely removed.

Lake Meridian Bulkhead Improvements. The shore of the Lake Meridian beach underwent construction again in 2005. CP 150. According to the public notice, the project description states, “The project proposal includes the replacement of existing rockery to prevent further erosion of the lake shore. The project will take place within the 200-foot shoreline area of Lake Meridian.” CP 150. The location description states, “The project is

located within the developed 1-acre portion of Lake Meridian Park. Lake Meridian Park is generally located north of Kent-Kangley Road, east of 144th Ave SE and is zoned SR-1, Single-Family Residential.” CP 150.



A drawing of the proposed rockery replacement depicts the rocks that the City intended to place within the shoreline area. CP 151. The rocks to be used for the project were large, between 12 and 18 inches in diameter. CP 151. According to notes on the drawing: (1) All rocks will be two man rocks in size; (2) Fill material in-between tiers will be existing material; and (3) All rocks will be placed by hand or the use of a small backhoe on shore. CP 151. There are no other documents to suggest that these rocks and fill material were subsequently removed prior to Mr. Corwin’s injury.

Lake Meridian Park Beach. Much newer documents on file with the City demonstrate that the City had not smoothed out or returned the lakebed to its natural condition. On August 8, 2014, Planning Services responded to Justin Oliver of City of Kent Parks Department regarding his application for

a Shoreline Exemption Request. CP 153. The letter states in relevant part, the following:

I have reviewed your application received on July 25, 2014, wherein you request an exemption from the Kent Shoreline Master Program (SMP) to replenish the sand at the Lake Meridian Park beach once a year for 4 years, **in order to fill in any holes and smooth out the grade to its previous condition.** In your application, you indicate that no more than 50 cubic yards of sand will be added per year to the beach and placement of the sand will be limited to the existing beach footprint, above the ordinary high water mark. A small tractor will be used to dump the piles of sand on the beach and the sand will be spread using a chain drag and handheld rakes. The work will be done once a year in early summer, during the morning to lessen impacts to the public who utilize the beach.

CP 153.

C. Procedural history.

Mr. Corwin filed suit against the City of Kent for negligence, under the theory of premises liability. On June 17, 2016, the City of Kent filed a motion for summary judgment, contending that it was immune from suit under RCW 4.24.210, that Mr. Corwin assumed the risk of any injury, and that there was insufficient evidence to support a claim of premises liability. CP 9-23. The trial court rejected the first two arguments, but accepted the third and granted the City's motion for summary judgment. CP 166-67. The trial court explained its reasoning as follows:

So we'll start initially with the recreational land use immunity statute. In this case this Court believes that *Hively* and the idea of what is necessary and integral to the

use of a place, when viewing all the evidence in the light most favorable to the nonmoving party, is not necessarily applicable here.

In this case this is on the beach, in the water, and in terms of location, close enough to the boat ramp that the Court finds that the City has not met its burden.

With regards to the assumption of risk, again, viewing all of the evidence in the light most favorable to the nonmoving party, summary judgment must also be denied, leaving us with the other issue as to whether or not the plaintiff can establish premises liability under the circumstances and given the evidence that we have.

Even when viewing all the evidence in the light most favorable to the plaintiff, the plaintiff cannot establish a basis for premises liability for the City -- that the City knew or should have known of this condition. Under those circumstances, this Court is going to grant summary judgment.

RP 24.

Mr. Corwin timely appealed. CP 168-70.

V. ARGUMENT

A. Standard of Review.

This Court reviews decisions on summary judgment de novo. *Coronado v. Orona*, 137 Wn. App. 308, 313, 153 P.3d 217 (2007). Summary judgment is appropriate only when there is no genuine issue of material fact. *Id.*; CR 56. A genuine issue of material fact exists when reasonable minds could differ on the facts controlling the outcome of the litigation. *Ranger Ins. Co. v. Pierce Cnty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). The party moving for summary judgment has the burden of

proving that summary judgment is appropriate. *Mason v. Kenyon Zero Storage*, 71 Wn. App. 5, 9, 586 P.2d 410 (1993). In reviewing a motion for summary judgment, all facts and reasonable inferences are viewed in the light most favorable to the nonmoving party. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

A motion to summary judgment is not meant to be a practice run of the trial. As the Supreme Court has stated,

[I]t is well established that the function of the trial court in ruling upon a motion for summary judgment is not to resolve the basic factual issues, with the ultimate finality which is expected and is appropriate at the final or ‘full-blown’ trial stage of a lawsuit. Rather, the trial court’s function is to determine whether a genuine issue as to any material fact exists.

Chase v. Daily Record, Inc., 83 Wn.2d 37, 43, 515 P.2d 154 (1973).

Here, when viewing the facts in the light most favorable to Mr. Corwin, there are genuine issues of material fact about whether the City failed to exercise reasonable care in protecting invitees like Mr. Corwin from the dangers presented by the rocks and holes in the floor of Lake Meridian. Accordingly, the trial court erred in granting summary judgment to the City on Mr. Corwin’s premises liability claim.

B. Mr. Corwin presented sufficient evidence to show a genuine issue of material fact on his premises liability claim.

In premises liability actions, the scope of the landowner's duty is determined by the plaintiff's status as an invitee, licensee, or trespasser. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 128, 875 P.2d 621 (1994). Here, the parties agree that Mr. Corwin was an invitee at the time of his injury. CP 18. "The possessor's duty to an invitee is based on the expectation of the invitee that the premises have been made safe for him." *Jarr v. Seeco Constr. Inc.*, 35 Wn. App. 324, 326, 666 P.2d 392 (1983); *accord* RESTATEMENT (SECOND) OF TORTS § 343, comment b (1965). The landowner's duty to invitees is one of reasonable care, applicable when the landowner knows or should know of the existence of a condition that involves an unreasonable risk of harm, and should expect that the invitees will not discover the danger or will fail to protect themselves from it. *Tavai v. Walmart Stores, Inc.*, 176 Wn. App. 122, 128, 307 P.3d 811 (2013) (quoting RESTATEMENT (SECOND) OF TORTS § 343 (1965)).

1. A jury could find that the City knew or should have known about the dangerous condition of the lakebed.

Mr. Corwin presented ample evidence demonstrating that the City knew, or at least should have known, about the condition of the lake bottom where he was injured. Multiple documents on file with the City

show that the area of the lakebed where Mr. Corwin was injured had been the subject of multiple construction projects designed and implemented by the City.

First, construction maps from 1992 show that the area where Mr. Corwin was injured was once the site of boat ramp and concrete planking. Documents from that project called for the installation of concrete blocks with gaps in between to be placed on the floor of the lake at the site of the then-existing boat ramp. Second, documents for the Lake Meridian Bulkhead Improvement Project demonstrate that around 2005, the City was installing 12-18 inch rocks within the 200-foot shoreline of Lake Meridian. Rocks are not uniform in size or shape unless man-made and do not fit perfectly together. Given that the rocks called for are of such a large size, a pile of them is likely to have large gaps between rocks. Third, evidence showed that the City knew that the beach was subject to erosion resulting in “holes” within the 200-foot beach area of Lake Meridian Park. In fact, it took affirmative steps to fill in those holes with additional sand. From this evidence, a jury could find that the condition which caused Mr. Corwin’s injury was created by the City’s construction activities. The City certainly has knowledge of its own construction projects and their results.

Even if the City did not have actual knowledge of the condition of the lakebed, it at least should have known. Landowners have an affirmative duty to invitees to inspect their land for dangerous conditions. *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 132, 606 P.2d 1214 (1980); *Jarr v. Seeco Const. Co.*, 35 Wn. App. 324, 326, 666 P.2d 392 (1983). The lakebed where Mr. Corwin was injured was within the confines of Lake Meridian Park, close to the designated swimming area, and was the only area in which boaters could on- and offload passengers without blocking the boat ramp. In other words, this was an area that the City should have been inspecting due to its likelihood of usage.

Thus, there is a genuine issue of material fact about whether the City knew or should have known about the condition of the area where Mr. Corwin was injured.

2. *A jury could find that Mr. Corwin would not discover the dangerous condition of the lakebed, or would fail to protect himself from it.*

There is a genuine issue of material fact as to whether Mr. Corwin either knew or should have known of the dangerous condition of the lakebed, or whether he would fail to protect himself from it despite knowledge of its existence. At common law, the relevant question is whether “the *danger* or *risk* associated with [a condition] is obvious, or open and apparent.” *Ravenscroft v. Washington Water Power Co.*, 136

Wn.2d 911, 924–25, 969 P.2d 75 (1998) (citing *Swanson v. McKain*, 59 Wn. App. 303, 311, 796 P.2d 1291 (1990)) (emphasis in original). The obviousness of a danger is a question of fact for the jury to decide. *Tincani*, 124 Wn.2d at 135; *Jarr*, 35 Wn. App. at 330.

Here, testimony from multiple witnesses indicates that it was impossible to see the bottom of the lake due to the murkiness of the water. CP 108, 155. Mr. Corwin thus did not know what he might be stepping onto when he got out of his boat to wade to shore. Surely, he could not have anticipated what he found. While a person might reasonably expect to find small to mid-size rocks and pebbles in a lake, he would not normally expect to find cement blocks or rocks over a foot in diameter near the shore of a lake frequently used for swimming.

After getting out of the boat, it is certainly true that Mr. Corwin was able to feel the rocks or rock-like objects underfoot. CP 106. However, Mr. Corwin’s knowledge of the *existence* of the rocky lakebed does not mean that he knew of the *danger* it posed. Further, it was not simply the rocks or rock-like objects that caused Mr. Corwin’s injury, but a gap between them. CP 106. Since Mr. Corwin could not see the rocks or rock-like objects, he also could not see any gaps, particularly how large or deep the gaps might be. Mr. Corwin testified that he continued to walk across the rock or rock-like object because “you don’t think that you’re

going to run into” a sudden drop-off. CP 110. From this evidence, a jury could conclude that Mr. Corwin was unable to appreciate the danger posed by the rocky lakebed.

Even if Mr. Corwin could appreciate the danger, despite not being able to see the bottom of the lake, there is still sufficient evidence from which a jury could find that the City could anticipate that Mr. Corwin and others like him would fail to protect themselves from possible harm. The difference between a landowner’s duty to licensees and his duty to invitees is that the landowner owes a duty to invitees when he has reason to expect that the invitee may subject himself to harm. As explained by the RESTATEMENT (SECOND) OF TORTS:

[R]eason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he [or she] will not discover what is obvious, or will forget what he [or she] has discovered, or fail to protect ... against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable [person] in [that] position the advantages of doing so would outweigh the apparent risk.

RESTATEMENT (SECOND) OF TORTS § 343A, comment f (1965). This particular Restatement comment was adopted by the Washington Supreme Court in *Tincani*. 124 Wn.2d at 140 (“Distraction, forgetfulness, or foreseeable, reasonable advantages from encountering the danger are

factors which trigger the landowner's responsibility to warn of, or make safe, a known or obvious danger.”).

Here, evidence suggests that Mr. Corwin may have crossed the rocky lakebed even if he could see to the bottom. Mr. Corwin testified that he moored his boat just beyond the swimming area so that his friends and family could take turns riding the boat. CP 102-03. The boat could not be moored directly in the swimming area, and bringing the boat back to the ramp was against park rules and would have blocked access to the lake for other boaters. CP 102, 111-12. Where Mr. Corwin parked the boat was the most, if not the only, practical area to on- and offload passengers. Since the rocks in the area were so numerous, it was impossible to get around them; one party member was only able to avoid them by using a floatation device. CP 87. From these facts, a jury could conclude that Mr. Corwin’s inability to see to the bottom would not have changed his calculus of the risk.

3. A jury could find that the City failed to exercise reasonable care in protecting invitees from the dangers of the lakebed.

Finally, there is evidence from which a jury could find that the City did not act reasonably to protect its invitees from harm. As previously noted, there are no documents on file indicating that the City ever removed its old construction projects from the lake. There is also no

evidence to suggest that the City posted any warning signs regarding the dangerous condition on the floor of the lake. Yet, the presence of large, jagged, rock-like objects presented a danger to anyone who might dive under the water or try to walk across the bottom, both common activities at beaches. Although Mr. Corwin was the only person injured that day, Alana and Marianne both testified that they too nearly fell on the highly uneven rock piles. CP 84, 155.

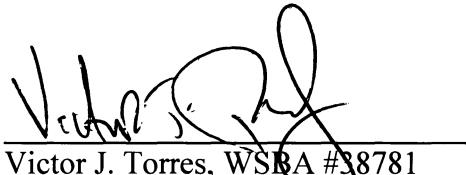
A reasonable jury could conclude from this evidence that the City failed to exercise reasonable care, by failing to warn lake-goers about the condition of the lakebed, failing to fill holes that it knew to be a recurring problem, or by failing to clean up the debris from its decades-old construction projects. In light of this evidence, the trial court erred by granting summary judgment in favor of the City.

VI. CONCLUSION

An invitee is entitled to believe that the landowner has reasonably made the premises safe for his use. Here, Mr. Corwin presented evidence that the City of Kent did not make Lake Meridian safe for boaters and waders, but instead left behind large rocks and holes from various construction projects. The trial court erred when it discounted this evidence and awarded summary judgment in favor of the City.

Accordingly, this Court should REVERSE the decision of the trial court
and remand for further proceedings.

DATED this 20th day of December, 2016.



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CERTIFICATE OF SERVICE

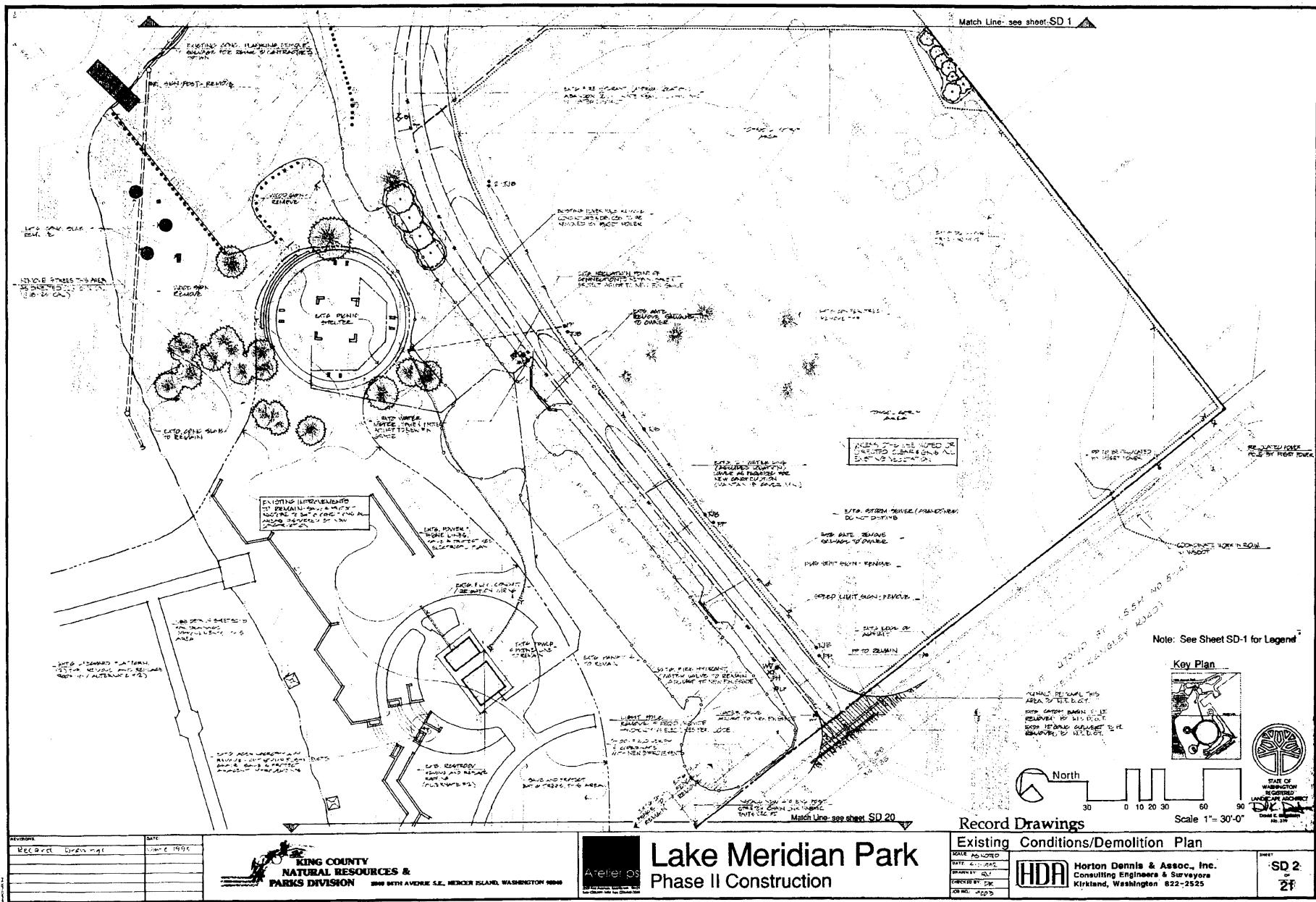
I certify that I caused one copy of the foregoing Opening Brief of Appellant to be served on the following parties of record and/or interested parties by E-mail and ABC Legal Messenger, delivery to the same to the below named attorneys as follows:

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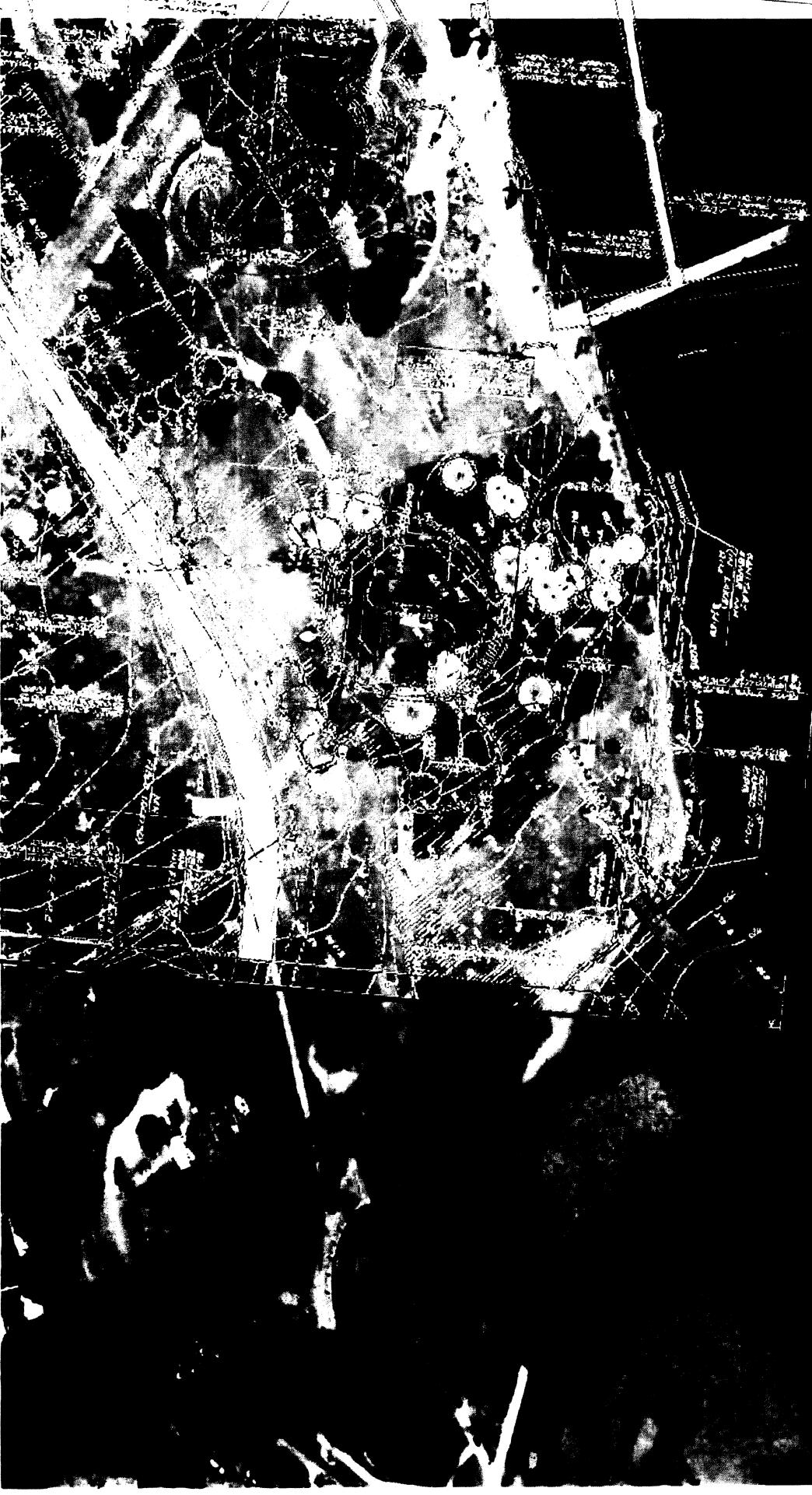
Dated this 20th day of December, 2016, at Auburn, Washington.

Diana Butler
Diana Butler

Appendix A



Appendix B



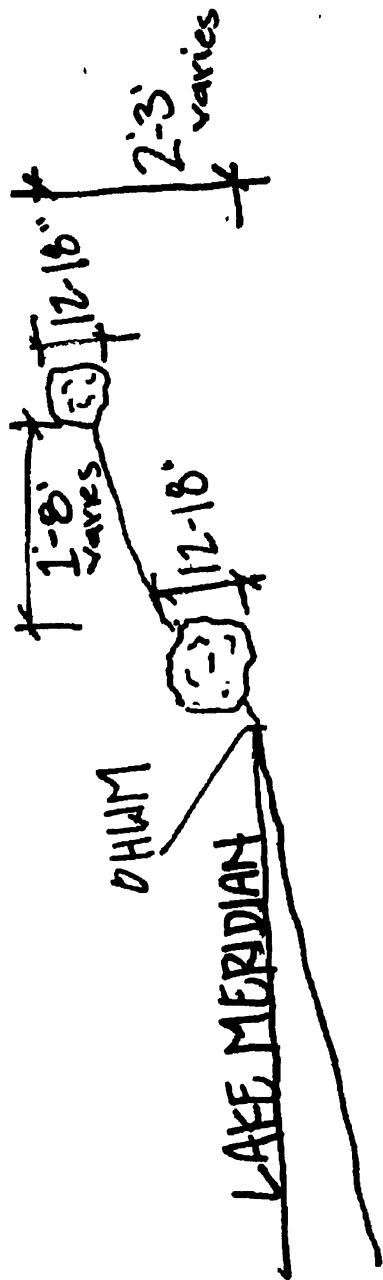
CP146

EXHIBIT:	4
DATE:	2/15/16
Carla Waddell, CCR RPR, CCR	

Appendix C

Appendix D

LAKE MERIDIAN
PROPOSED ROCKERY.
- section -



- * All rocks will be two man rocks in size
- * Fill material in-between tiers will be existing material
- * All rocks will be placed by hand or the use of a small backhoe on shore

NO SCALE

RECEIVED

CITY OF KENT PARKS
LAKE MERIDIAN BULKHEAD
IMPROVEMENTS
#ENV-2004-39 KIVA #RPSA-2042282

JUL 06 2004
CITY OF KENT
PERMIT CENTER