

No. 350479-III

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

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THE ESTATE OF DAVID N. WHEAT BY TENA M. WHEAT, in her  
capacity as Personal Representative of the Estate, et al.,

Plaintiffs/Appellants,

v.

FAIRWOOD PARK HOMEOWNERS ASSOCIATION, a Washington  
corporation; FAIRWOOD PARK I HOMEOWNERS ASSOCIATION,  
a Washington corporation; SPOKANE COUNTY; SPOKANE  
COUNTY UTILITIES DEPARTMENT; and SPOKANE COUNTY  
PUBLIC WORKS DEPARTMENT,

Defendants/Respondents.

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**APPELLANTS' REPLY BRIEF**

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## ARGUMENT

### I. THE TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT FOR THE HOA

As is outlined in Wheat's<sup>1</sup> Amended Opening Brief, the trial court erred in failing to apply the principle set forth in Restatement (Second) of Torts § 367, which has been adopted in Washington. *Zuniga v. Pay Less Drug Stores, N.W.*, 82 Wn. App. 12, 15, 917 P.2d 584, 586 (1996); *Rogers v. Bray*, 16 Wn. App. 494, 496, 557 P.2d 28, 30 (1976). The HOA asserts that Wheat is relying on "the constant trespasser (or similar) doctrine." (HOA Respondents' Br. 13-14) On the contrary, Wheat has expressly acknowledged that "Washington courts have not adopted the 'constant trespasser' doctrine." (Amend. Opening Br. 25)

The principle set forth in the Restatement section is consistent with *Hanson v. Spokane Valley Land & Water Co.*, 58 Wash. 6, 10-11, 107 P. 863, 865 (1910), in which the court noted that an invitation to the public can be implied "when an owner by acts or conduct leads another to believe that the land was intended to be used as he used it" and that the "invitation would continue so long as the way remained open and the public availed itself of such use..." *Hanson*, 58 Wash. at 8-9, 107 P. at 864-65. The *Hanson* case is "based upon the principle that, if the possessor of land

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<sup>1</sup> Appellants will be referred to herein as Wheat.

maintains a private way over his land, under such circumstances as to induce a reasonable belief by those who use it that it is public in character, he is under a duty to exercise reasonable care to maintain it in a reasonably safe condition for travel." *Dotson v. Haddock*, 46 Wn.2d 52, 56, 278 P.2d 338, 340 (1955).

The HOA argues that there was no "manifestation on the part of the HOA to invite Mr. Wheat or the general public onto its property." (HOA Respondents' Br. 19) The HOA misconstrues Wheat's argument and Washington case law in this regard because Wheat does not have to prove that the HOA intended to invite Mr. Wheat or the public onto its property. Instead, it is only necessary to prove that the roadway had an appearance that would lead others to believe that it was a public roadway.

The gates were often open, and the record reveals that members of the public frequently used the roadway. The HOA contends that "Appellants put forth no evidence that these individuals were not members of the HOA or guests of such members." (HOA Respondents' Br. 25) The HOA further asserts that "Appellants do not establish that members of the general public, other than Mr. Wheat, regularly used the access road." (HOA Respondents' Br. 13) However, former HOA president Al Hague testified that persons other than "the ones that live at the end of that street in that smaller cul-de-sac or group of homes up there" were "always trying

to use our park as a running path or driving through it or short cut, or whatever you want to call it." (CP 475) [Hague Dep. at 13:12-19]

Although Al Hague noted that this often occurred at night, that does not negate the appearance that the roadway was open for public use. Neither the Restatement rule nor the *Hanson* case is limited in application to use of a roadway at a particular time of day. In any event, Mr. Wheat's accident occurred during daylight hours, around 5:00 p.m. on May 17, 2014. (CP 325) [Incident Report, p. 1]

The fact that Mr. Wheat had previously used the access road hundreds of times is further evidence that the roadway appeared to be open for public use, at least when the gate(s) were open. Just the day before the accident, HOA's president met a car that had entered the road; and its occupants asked if the area was a public park. (CP 368) [Allen Dep. At 47:18-24]

Moreover, the sign on the east gate, where the accident occurred, is ambiguous in many respects. At the top of the sign are the words "Fairwood Park Recreation Area," and immediately under that are the words "closed for the season." (CP 90) Members of the public could reasonably interpret that language to mean that the recreation area itself was not open, but that the roadway was open for the public to travel through the area on the way to other destinations.

The sign also stated "no entrance when park is closed." (CP 90) By implication, entrance was allowed when the park was not closed and/or when the Fairwood Park Recreation Area was not closed for the season. The sign gave no indication as to when the "season" ended. Public roadways are not always open. For example, a public roadway that leads to a public park may be closed when the park is closed, but that does not change the status or appearance of the road as being for public use.

In addition, the sign stated: "Patrolled By Spokane County Sheriff's Dept." (CP 90) Members of the public could reasonably believe that when public law enforcement officials patrol an area, the area is open to the public. Members of the public may reasonably presume that public law enforcement personnel do not routinely patrol on private roadways.<sup>2</sup> Moreover, public roadways often run across areas where private property lies on both sides of the road.

The HOA points to the fact that "[r]ocks were placed around the north end of the east gate to discourage people from going around the gate." (HOA Respondents' Br. 17) But there is no evidence that Mr. Wheat ever went around the gate, and rocks or other barriers such as guard rails could also be used on a public roadway to prevent vehicles from leaving

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<sup>2</sup> Not all of the property along or in the vicinity of the road was privately owned. The road also provided access to a County-owned pumping station. (CP 388) [Walker Dep. At 14:3-21]

the roadway. The fact that vehicles were discouraged from leaving the roadway is not inconsistent with the appearance of a public roadway.

The HOA also points to the presence of the two gates and a driveway curb as evidence that the road was not public. (HOA Respondents' Br. 17) However, less than five miles from the accident scene is a public road that has gates at both access points. To access the road at Sky Prairie Park, motorists need to drive over a curb, and the perimeter of the road is lined with houses. (CP 629-30, 636, 638, 640)

The HOA attempts to distinguish many of the cases cited by Wheat, but these cases illustrate the many and varied fact patterns under which courts have applied the doctrine that appears in Restatement (Second) of Torts § 367. In each of those cases, as in the present case, there are facts that each party can point to in an effort to prove or disprove that a particular roadway reasonably appeared to be open to the public. That the facts in the present case do not point uniformly toward one result simply highlights the genuine issues of material fact that require resolution by a jury.

The HOA's attempt to distinguish the case of *Rogers*, 16 Wn. App. 494, 557 P.2d 28, is unpersuasive. In *Rogers*, owners of a trailer placed a chain across a private road that led from their trailer to Red Marble Road, which was also a private road that they owned. Although there was no sign

specifically indicating that the trailer access road was private, there were roughly 40 "no trespassing" signs nailed to various trees on both sides of Red Marble Road. There was also a "no trespassing" sign on the chain itself and one on a tree that supported the chain. 16 Wn. App. at 494-95, 557 P.2d at 29. In spite of all of these indications that the access road was not open to the public, and even though the chain was stretched across the road at the time, the court held that there was a jury question as to whether the plaintiff was negligently misled into believing that he was using a public road. Notably, the court indicated that three facts alone were sufficient to create a jury question:

The defendants' knowledge that motorcyclists used Red Marble Road, coupled with (1) the fact that the access road was well used, and (2) the absence of a sign warning travelers that the access road was not for public use, creates by inference a question of fact as to whether Rogers was negligently misled into believing that he was traveling on a road commonly used by the public. *See* 2 Restatement (Second) of Torts s 367 (1965). If Rogers was misled, then he was not a trespasser and defendants had the duty to exercise reasonable care to maintain the road in a reasonably safe condition for travel.

*Id.* at 495-96, 557 P.2d at 29-30.

Similarly, in the present case, there is evidence of the same three criteria: (1) the HOA had actual or constructive notice that Wheat and other members of the public used the access road, (2) the access road was well used, and (3) there was no sign specifically indicating that the road

was not for public use. On the third point, the sign at the east gate did not state that the road itself was never open for public use. In this respect, the sign was ambiguous, and its language was open to interpretation, as is discussed in Wheat's Amended Opening Brief. The sign was particularly ambiguous as to its meaning when the gate was unlocked and open during daylight hours, and there was no indication of when the area was closed for an undefined "season." Thus, there is a jury issue as to whether Mr. Wheat was an invitee under the principle set forth in § 367 of the Restatement.

Assuming, arguendo, that Mr. Wheat was a trespasser, there is a jury question as to whether the HOA acted wantonly. The HOA argues that there is no evidence that "shows intent or positive conduct" on its part and "no evidence that Fairwood HOA intentionally did an act or intentionally failed to do an act ... in reckless disregard for the consequences." (HOA Respondents' Br. 28) On the contrary, as is discussed in Wheat's Amended Opening Brief: (1) the HOA constructed the east gate in a way that it could not be locked solely with the HOA's key, (2) the HOA did not obtain a key from the County for the County's lock, (3) the HOA posted a sign that did not unequivocally indicate that the road was never for public use, and (4) the HOA failed to maintain posts that could securely hold the gates open when they were not locked.

In the alternative, if one assumes that Mr. Wheat was a licensee, there is a jury question as to whether the HOA breached its duty of care. The HOA cites no case holding that the absence of a prior accident precludes liability on the part of a landowner. While Mr. Wheat's accident was unusual, a jury could conclude that the HOA had reason to know that gates that are unsecured when opened could involve an unreasonable risk of harm. *See* Restatement (Second) of Torts § 342. As a recent Louisiana case illustrates, accidents of this kind are not unprecedented. *See Plaia v. Stewart Enters., Inc.*, 2014-CA-0159, 2016 WL 6246912 (La. Ct. App. Oct. 26, 2016). When the east gate was open, it was difficult to see when approached from the west. (CP 331) [Additional Report p. 2] In that respect, the gate was in a condition that the HOA could expect would pose an unrealized danger to Mr. Wheat or others.

It is possible that a jury might ultimately side with the HOA and conclude that it met the applicable standard of care. However, the issue at hand is whether the facts in this case exonerate the HOA as a matter of law. They do not. There are material issues of fact that must be resolved by a jury.

## **II. THE TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT FOR THE COUNTY**

As a preliminary matter, the County maintains that Wheat's Amended Opening Brief contains several factual errors. (County Respondent's Br. at 9-11) First, the County alleges that Wheat "claims that the trial court never ruled on its motions for reconsideration." (County Respondent's Br. at 9) In point of fact, Wheat merely stated, accurately, that when the notice of appeal was filed, the trial court had not yet ruled on the motions. (Amend. Opening Br. at 3) As the trial court observed in its opinion rendered on March 6, 2017, Wheat's notice of appeal was filed "prior to receiving the Court's opinion on reconsideration." (Supplemental Clerks' Papers, document # 87)

The County also contends that Wheat incorrectly described the location of the east gate. (County Respondent's Br. at 9) This is simply a matter of semantics. Wheat does not dispute that the gate was on the HOA's access road. In fact, its location on the access road itself, rather than on North Fairwood Drive, buttresses Wheat's position that a member of the public could turn onto the access road from the public road and reasonably believe that he was still on a public road. Because the east gate

was set back from the public highway, the gate did not prevent a motorist from leaving North Fairwood Drive and turning onto the access road.<sup>3</sup>

The County also challenges Wheat's statement that Mr. Allen "tried to close and lock the gate." (County Respondent's Br. at 10) This is another question of semantics. Wheat does not deny that Mr. Allen closed the gate. Wheat is pointing out that Mr. Allen could not close *and* lock the gate; i.e., he was unable to lock it in the closed position because the County had not given the HOA a key to the County's lock. (CP 369, 406) [Allen Dep. at 3-4; Walker Dep. at 62:15-17]

The County also challenges Wheat's reference to Al Hague's testimony concerning members of the public using the access road. (County Respondent's Br. at 10-11) Hague's reference to frequent use of the road at night does not negate the appearance that the roadway was open for public use. In any event, Mr. Wheat's accident occurred during daylight hours, and the east gate was open when it pierced his golf cart's windshield.

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<sup>3</sup> The County is correct in noting that Wheat's brief erroneously identified the road bordering the west end of the HOA Park as a public road. (County Respondent's Br. at 9). That portion of the road was actually owned at the time by the Spokane County Club. However, the error is insignificant because the salient issue is whether a motorist at the other (east) end of the road (i.e., at its intersection with North Fairwood Drive) could reasonably be misled into believing that the access road is open at that point for entry by the public.

The County argues that Wheat failed to raise on a timely basis the argument that the County's duty does not derive from possession or occupancy of the premises. (County Respondent's Br. at 35-37) It is true that Civil Rule 59 does not permit a plaintiff to propose new theories of the case after "finding a judgment unsatisfactory." (County Respondent's Br. at 36) What the County overlooks is that Wheat raised the argument *before* summary judgment was entered. The summary judgment motions were argued on October 28, 2016, and the trial court granted summary judgment nearly two months later, on December 29, 2016. (RP 3-68; CP 579-88) At the hearing on October 28, Wheat's co-counsel expressly argued the liability theory in question (RP 39-60) and specifically cited and relied on *Palin v. General Construction Co.*, 47 Wn.2d 246, 287 P.2d 325 (1955). (RP 48, 55) Moreover, Judge Plese expressly stated that "I want to hear" Wheat's argument as to this theory of liability. (RP 42) The Judge offered the County "an opportunity if you want to brief it after I get your arguments today," and she also noted that, instead of ruling from the bench, she would take the case under advisement in order to consider Wheat's theory of liability. (RP 59-60) The County's counsel declined the offer of extra time to brief the issue, saying that "I'll leave it up to Your Honor...." (RP 61) He then continued his argument to respond to Wheat's theory of liability. (RP 62-64)

The record clearly reveals that Wheat raised his theory of liability before any judgment was rendered, and the trial court agreed to consider Wheat's theory. Therefore, Wheat's theory was timely raised.

The County also argues that Wheat failed to assign error and argue relative to the trial court's denial of reconsideration. (County Respondent's Br. at 36) That is irrelevant because Wheat's theory of liability against the County was rejected when summary judgment was entered, and Wheat has assigned error to the summary judgement ruling. In her summary judgment ruling, Judge Plese implicitly rejected Wheat's theory of liability by analyzing the County's duty solely in terms of premises liability. (RP 582-88)

In any event, Wheat is permitted to challenge the trial court's denial of the motions for reconsideration because he filed a notice of appeal before the reconsideration motions were denied. *West v. Thurston Cnty.*, 144 Wn. App. 573, 577-78, 183 P.3d 346, 348 (2008) (citing Civil Rule 59(b) and RAP 2.4(f) for the proposition that a litigant's timely notice of appeal of a final judgment dismissing a claim brought up for review the trial court's subsequent order denying reconsideration).<sup>4</sup>

The County argues that the *Palin* case "says absolutely nothing about premises liability or whether an easement holder may be held to

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<sup>4</sup> Under Civil Rule 59(a)(7), Wheat was permitted to seek reconsideration of the summary judgment ruling on the ground that the ruling was contrary to law.

some other standard for an injury occurring on the land." (County Respondent's Br. at 36) The *Palin* case is relevant because it supports Wheat's position that the County's liability does not arise from premises liability principles. Instead, the County can be held liable because its rights as an easement holder allowed it to exercise joint control over the gates on the access road without being in possession or occupancy of the road itself.

The County controlled one of the two locks on the east gate and failed to give the HOA a key. As a result, when the County left its lock in the open position, as it had done at the time of Mr. Wheat's accident, the HOA was unable to keep the gate from being opened. Since the HOA had not installed posts that could secure the gate in an open position, the County created a condition whereby an open gate could swing freely into the road as a vehicle passed near it.

As the *Palin* case indicates, a third party that creates a condition on another party's land can be held liable if the condition causes injury, even though the third party did not own or possess the premises. Under the holding in *Palin*, which is consistent with the principle set forth in Restatement (Second) of Torts § 386, a duty of reasonable care is owed regardless of whether the injured party is a trespasser. See *Knyal v. Illinois*

*Power Co.*, 119 Ill. Dec. 883, 885-86, 169 Ill. App. 3d 440, 444, 523 N.E.2d 639, 641-42 (1988).

The County argues that, as an easement holder, it can be treated as a possessor of the premises in question. (County Respondent's Br. at 37-40) This is contrary to Washington law. "Easements are property rights or interests that give their holder limited rights to use but not possess the owner's land." *State v. Newcomb*, 160 Wn. App. 184, 191, 246 P.3d 1286, 1290 (2011) (citing *City of Olympia v. Palzer*, 107 Wn.2d 225, 229, 728 P.2d 135 (1986)). *See also Kave v. McIntosh Ridge Primary Rd. Ass'n*, 198 Wn. App. 812, 825, 394 P.3d 446, 452 (2017) (noting that an easement is a non-possessory right and that an easement cannot be considered the "land" of the dominant estate owner).

The County cites several out-of-state cases for the proposition that an easement holder may be a possessor of land. (County Respondent's Br. at 39-40) Aside from being inconsistent with Washington case law that views easements as nonpossessory rights, what the out-of-state cases actually illustrate is that an easement holder's potential liability can arise not from merely holding an easement, but rather from the degree of control that the easement holder exercises over the premises. For example, in one of the cases that the County cites, *Stanton v. Lackawanna Energy, Ltd.*, 584 Pa. 550, 886 A.2d 667 (2005), the Pennsylvania Supreme Court observed:

We recognize that the degree of control imparted by an easement "varies with the terms of the easement and the manner in which the easement is exercised." *Leichter*, 516 A.2d at 1252. Thus, not all easement holders will necessarily be considered possessors of the land. It is only where an easement holder exercises sufficient control over property that it would be deemed a possessor under the RULWA and Restatement § 328E.

*Stanton*, 584 Pa. at 568 n.8, 886 A.2d at 677 n.8.

In another Pennsylvania case, the court explained that the question whether an easement holder is a possessor for purposes of premises liability is one of fact:

In order for the party to be liable, it must first be a "possessor" of land. In order for a party to be a "possessor" of land, it must fit one of the following descriptions: it must be in occupation of the land with the intent to control it, it must have been in occupation of the land with intent to control it if no other party has done so subsequently, or it is entitled to immediate occupation if neither of the other alternatives apply. Restatement (Second) of Torts § 328E (1965). The question of whether a party is a "possessor" of land is a determination to be made by the trier of fact. *Leichter v. Eastern Realty Company*, 358 Pa. Super. 189, 193, 516 A.2d 1247, 1249 (1986). In order for an easement holder to be considered a "possessor" of land, the holder must possess sufficient occupation and control over the land. *See Leichter v. Eastern Realty Co., supra* at 196, 516 A.2d at 1251 (Kelly, J., concurring). This factual determination is based upon the resolution of two issues: whether the party holds an easement, and, if so, the manner in which the party exercises the prerogatives of that easement. *Id.* at 194-95, 516 A.2d at 1250. Only after this determination is made can the more crucial inquiry of whether the "possessor" owes a duty of care be reached. *Id.*

*Blackman v. Fed. Realty Inv. Trust*, 444 Pa. Super. 411, 416, 664 A.2d 139, 142 (1995).

Even if it could be said that an easement holder may be a possessor under Washington law, a party's possession would be an issue of fact. In the present case, the trial court never allowed a jury to decide that issue. Obviously the County was either a possessor of the access road or it was not. If it was not a possessor, then it may be held liable under the rationale of *Palin* and Restatement (Second) of Torts § 386 because the County created or maintained a structure or artificial condition in the sense that it controlled a lock on the gate. By withholding a key from the HOA and by preventing the HOA from locking the gate securely, the County can be held liable for creating or maintaining a potentially dangerous condition. Thus, contrary to the County's position, it is not true that the County would owe no duty to Wheat if it was not a possessor. (County Respondent's Br. at 40)

On the other hand, if the County was a possessor, then its liability can be established on the basis of premises liability principles, as is the case with the HOA. That is, a jury should be allowed to decide whether the access road appeared to be open to the public. On that point, the County argues that "Mr. Wheat was using the area as a cut-through specifically to avoid the public streets." (County Respondent's Br. at 11) Mr. Wheat's alleged desire to avoid a busy public street does not mean that he knew the

access road was not open to the public. It simply means that he decided to travel on a less busy street, which appeared to be an optional route that was available to members of the public. Mr. Wheat's golf cart was licensed for use on public streets. (CP 115-16) [Zach Wheat Dep. at 44:23 to 45:6]

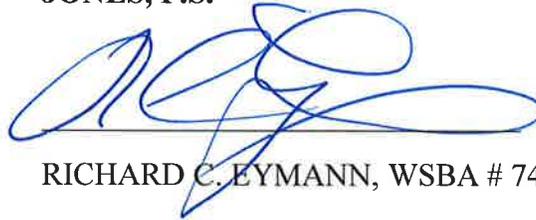
In the alternative, if Mr. Wheat is not treated as an invitee pursuant to Restatement (Second) of Torts § 367, then a jury should decide whether the County breached its duty to him in his capacity as a trespasser or licensee. With reference to potential premises liability, the County did more than "accidentally locking open a gate." (County Respondent's Br. at 28) Rather, the County knowingly participated in an arrangement whereby it knew that if its employees left the gate locked open, the HOA would not be able to correct the County's mistake. The County argues that Restatement (Second) of Torts § 386 does not apply to one who acts in the possessor's behalf, and it points to the potential use of the pumping station to supply water to the HOA. (County Respondent's Br. at 42-43) But Mr. Wheat was not killed at the pumping station, and he was not killed by its operation. His death was caused by the gate. The County has presented no evidence to establish that by withholding a key from the HOA, and by preventing the HOA from securely locking the gate, the County was acting on behalf of or for the benefit of the HOA.

**CONCLUSION**

For the foregoing reasons, Plaintiffs-Appellants respectfully ask this Court to reverse the judgment of the trial court, to remand the case for trial on the merits, and to grant such other relief as may be just and proper.

Respectfully submitted,

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