

No. 350479-III

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

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.

APPELLANTS' AMENDED OPENING BRIEF

Richard C. Eymann, WSBA #7470
EYMANN ALLISON HUNTER JONES
2208 West Second Avenue
Spokane, WA 99201
Telephone: (509) 747-0101
Facsimile: (509) 458-5977

Joseph A. Blumel, III, WSBA #7902
LAW OFFICE OF JOSEPH A. BLUMEL
4407 N. Divisions Street, Suite 900
Spokane, WA 99207
Telephone: (509) 487-1651

Attorneys for Plaintiffs/Appellants

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ASSIGNMENTS OF ERROR

I. The trial court erred in granting summary judgment to Fairwood Park Homeowners' Association and Fairwood Park I Homeowners' Association (collectively "the HOA").

Issues: (1) Did the trial court err in ruling that Mr. Wheat was a trespasser, as a matter of law? Yes. (2) Did the trial court err in ruling that the HOA did not breach any duty of care? Yes. (3) Is there a jury question as to proximate causation? Yes.

II. The trial court erred in granting summary judgment to Spokane County.

Issues: (1) Did the trial court err in ruling that Mr. Wheat was a trespasser, as a matter of law? Yes. (2) Did the trial court err in ruling that the County did not breach any duty of care? Yes. (3) Is there a jury question as to proximate causation? Yes.

STATEMENT OF THE CASE

I. PROCEDURAL FACTS

This wrongful death and survival action arose on May 17, 2014, when a golf cart driven by the decedent, David Wheat, struck the end of a metal pole that served as a gate on North Fairwood Drive in Spokane. (CP

325, 327) [Incident Report, pp. 1, 3] The Plaintiffs-Appellants, who are the Estate of David Wheat and Mr. Wheat's surviving wife and children, filed their initial complaint in Spokane County Superior Court on December 11, 2014. (CP 1-12) An amended complaint was filed on November 2, 2015. (CP 24-31) An order granting the Plaintiffs' motion for voluntary dismissal of Defendant Fairwood Park II Homeowners' Association was entered on March 17, 2016. (CP 37-39) The remaining Defendants-Appellees are Fairwood Park Homeowners' Association and Fairwood Park I Homeowners' Association ("the HOA"), which owned the road and gates where the accident occurred, and Spokane County, which controlled a lock on the gates and used the gates for access to a pump station in the area. (CP 332) [Additional Report p. 3]

The HOA filed a motion for summary judgment on August 19, 2016 (CP 91-238), and Spokane County filed a motion for summary judgment on the same day. (CP 239-53) The trial court heard arguments on the two motions on October 28, 2016. (RP 3-68) The court filed a summary judgment opinion on December 19, 2016 (CP 579-88), and the Plaintiffs filed a motion for reconsideration on December 29, 2016. (CP 589-93) By an order filed on January 5, 2017, the court granted both motions for summary judgment. (CP 601-04) On January 13, 2017, the Plaintiffs filed an amended motion for reconsideration. (CP 606-14) On

February 1, 2017, the Plaintiffs filed a notice of appeal, in which they noted that the trial court had not ruled on their motion for reconsideration. (CP 653-80)

II. STATEMENT OF FACTS

David Wheat ("Mr. Wheat") was killed at approximately 4:58 p.m. on May 17, 2014, on North Fairwood Drive in Spokane. (CP 325) [Incident Report, p. 1] The accident occurred when the windshield of a golf cart in which Mr. Wheat was riding was struck, shattered, and penetrated by the end of a metal pole that served as a gate. (CP 327) [Incident Report, p. 3] The golf cart was licensed for use on public streets. (CP 115-16) [Zach Wheat Dep. at 44:23 to 45:6] The cause of death was blunt force trauma to Mr. Wheat's chest, with contusions and lacerations to the right lung as well as fractured ribs. (CP 333) [Additional Report, p. 4]

A witness, Brad Leonard, told an investigating officer, Samson Palmer ("Officer Palmer"), that he "looked over and saw the golf cart stuck, and a male lying on the ground." (CP 327) [Incident Report, p. 3] Brad Leonard stated that he turned the golf cart off and turned its radio volume down. (CP 327) [Incident Report, p. 3] Officer Palmer reported that he (Palmer) neither saw nor smelled any indication of alcoholic

beverages at the scene. (CP 327) [Incident Report, p. 3] Officer Palmer's incident report¹ states:

[T]he cart struck the gate/pole. The pole crashed through the windshield of the cart, striking the driver, and knocking him out of the cart, onto the pavement. The gate is made out of two metal frames/poles about 2" in diameter at the points/ends. One of the gates was open, and the other was stuck in the golf cart. It appeared that both gates were open, and one got caught on the front of the cart, or the driver swerved into the gate/pole. I noticed that the padlocks to the gates were both locked, so they had to have been opened, to open the gate, and then locked. (Some of the Fairwood residents that were in the area told me the gate is usually opened during the day, and then closed at night, at varying times.)

(CP 327) [Incident Report, p. 3]

Officer Palmer "tried to get someone to secure the gate, but no one in the neighborhood took responsibility to do so." (CP 328) [Incident Report, p. 4] The roadway on which the pole gates were located is owned by the HOA, and the gates are near the intersection of the roadway and Fairwood Drive, which is a public road. (CP 327, 332) [Incident Report, p. 3; Additional Report p. 3] The roadway where the incident occurred is the only road in the Fairwood subdivision that is not owned by Spokane

¹ A police investigator's factual observations may be admitted into evidence under the hearsay exception for public records. *State v. Phillips*, 94 Wn. App. 829, 834, 974 P.2d 1245, 1247 (1999); RCWA § 5.44.040 ("Copies of all records and documents on record or on file in the offices of the various departments of . . . this state . . . shall be admitted in evidence in the courts of this state."). In the alternative, such evidence may be admitted under the business records statute, RCWA § 5.45.020. "Police reports may be business records." *State v. Bellerouche*, 129 Wn. App. 912, 917, 120 P.3d 971, 974 (2005) (citing *State v. Iverson*, 126 Wn. App. 329, 339-40, 108 P.3d 799, 803 (2005), and *State v. Ecklund*, 30 Wn. App. 313, 319 n.4, 633 P.2d 933 (1981)).

County. (CP 357, 378, 411) [Allen Dep. at 23:21-24; 79:17-21; Walker Dep. at 74:15-19]²

The roadway is not unlike any other road in Fairwood. (CP 300) [Simpson Decl. at ¶ 5] Ryan Simpson, a resident in Fairwood since 2011 and whose home is across the street from the roadway, states he has observed walkers, with or without dogs, joggers, runners, including local cross country teams, bicyclists, skateboarders, and all types of motorized vehicles, including golf carts, cars, and trucks, on the roadway at all times during the year. (CP 300) [Simpson Decl. ¶¶ 2, 3, and 6] The roadway is under the jurisdiction of Fairwood Park I. (CP 473) [Hague Dep. at 7:11-14] However, there are three subdivisions within Fairwood Park that also use the roadway. (CP 472-73) [Hague Dep. at 5:17-21 and 7:15-20] According to former HOA president Al Hague, people other than Fairwood Park residents use the roadway area as a "running path, or driving through it, or shortcut, or whatever you want to call it." (CP 475) [Hague Dep. at 13:16-19]

The roadway intersects on the west end with a public road that is not part of the Fairwood Park subdivision, North Highlands Drive. (CP 327, 387) [Incident Report p. 3; Walker Dep. at 13:5-24] The roadway intersects on the east end with Fairwood Drive, a public roadway in the

² Mr. Wheat was not a member of the HOA. (CP 379) [Allen Dep. at 86:2-4]

Fairwood subdivision. (CP 378) [Allen Dep. 79:14] There is a gate at the west end of the property. (CP 474) [Hague Dep. at 12:11-15] The west gate was not locked, and people regularly went through the west gate to travel on the roadway. (CP 477, 491) [Hague Dep. at 16:16-19; Close Dep. at 13:16-24]³

In addition to people using the roadway as stated above, the roadway was used by Spokane County to access a pump station at the west end of the roadway. (CP 388) [Walker Dep. at 14:3-21] The roadway was also used to access a park, playground and recreation area, and swimming pool in the Fairwood subdivision. (CP 357, 388) [Allen Dep. at 23:21-24; Walker Dep. at 14:19-24]

The wastewater pumping station at the west end of the roadway is owned and maintained by Spokane County. A paved roadway leads to the station, providing access from Highland Drive to the west and Fairwood Drive to the east. (CP 417-18) [Crites Dep. at 15:11-16:20] The County has an easement that allows it to access the sewer system in the Fairwood subdivision, and the easement allows for such access throughout the subdivision. (CP 390-91) [Walker Dep. at 16:16-22; 17:11-16] The pumping station can be accessed by way of either the east entrance or the

³ 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)

west entrance of the roadway. (CP 417) [Crites Dep. at 15:11-15] The west entrance has a gate, but it is not kept locked. (CP 419) [Crites Dep. at 18:9-10] The County locked that gate at least twice in the past, but the locks were cut off and removed by unknown persons, so the County stopped trying to lock the gate. (CP 419-21, 440) [Crites Dep. at 18:14-19:22; 21:9-15; Pasby Dep. at 44:5-22] County employees sometimes use the east gate (where Mr. Wheat's accident occurred) to gain access to the pumping station. (CP 394, 422) [Walker Dep. at 32:11-20; Crites Dep. 28:13-22]

The pumping station requires daily maintenance. (CP 392, 403, 416) [Walker Dep. at 22:13-18; 46:10-13; Crites Dep. at 8:21-24] Dan Crites, who performed this daily maintenance, did not have a key to the HOA's lock on the east gate. (CP 423) [Crites Dep. at 33:17-23] Dan Crites was instructed by his supervisor that when he went through a gate, he should leave it as he found it; that is, leave it open if he found it open and closed if he found it closed. (CP 409, 411, 424-25) [Walker Dep. at 70:1-9; 74:1-6; Crites Dep. at 34:2-22; 35:4-6]

According to Al Hague, efforts were made to secure the west gate, including multiple conversations with Spokane County asking Spokane County to secure the west gate. (CP 474) [Hague Dep. at 12:11-23] Al Hague states the west gate belonged to Spokane County and it was

Spokane County's responsibility to secure the gate. (CP 476-77) [Hague Dep. at 15:21-25; 16:1-23] Spokane County employee Joe Close, a 25-year employee and supervisor who worked at the Fairwood Park Pump substation from the 1980s until 2012, states there were two locks on the west gate, but he never saw it locked. (CP 491) [Close Dep. at 13:7-24] He states he assumed the west gate belonged to the HOA. (CP 490) [Close Dep. at 12:9). He denies receiving complaints by the Homeowners' Association regarding the west gate. (CP 490-91) [Close Dep. at 12:21-25; 13:1-6]

Chris Walker, a Spokane County pump station supervisor at the time of the incident, states he had a conversation with the HOA's president who told him "kids were getting into the park area and going down to where the . . . like a basketball court down there" and they were driving their cars onto the court and the HOA's president asked him to secure the gate. (CP 404-05) [Walker Dep. at 52:21-25; 53:1-5] Chris Walker made attempts to lock the gate, but the locks were cut off. Chris Walker told the HOA president, "it's a waste of time and money" (to try to lock the gate) and he said, "yeah - don't worry about it." (CP 404-05) [Walker Dep. at 52:21-25; 53:1-5] Al Hague states he never confronted anyone that was using the roadway or threatened to prosecute anyone that was using the roadway for trespassing. (CP 478-79) [Hague Dep. at 17:18-25; 18:1-5]

In addition to the gate at the west end of the roadway, there is also a gate at its east end. The east gate is where the accident occurred. (CP 331) [Incident Report p. 2] As is stated by Officer Palmer above (and Al Hague states that Officer Palmer is probably accurate), the east gate was usually opened during the day and closed at night at various times. (CP 480) [Hague Dep. at 28:20-25] Al Hague states that Spokane County employees often left the east gate unlocked. (CP 481) [Hague Dep. at 34:20] It was not unusual for Spokane County employees to go through the east gate and then not relock it. (CP 481) [Hague Dep. at 34:22-23] If that happened, no one at the HOA was responsible to contact Spokane County to come and lock the gate so, in that event, the east gate remained unlocked. (CP 482) [Hague Dep. at 36:2-12] Dan Pasby, the HOA's president immediately prior to Al Hague, stated the gates were unlocked most of the time and that the gates were unlocked at times when they should have been locked. (CP 431) [Pasby Dep. at 16:11-13]

Joe Close performed duties at the pump station in his capacity as a tank truck driver, a maintenance man, and a supervisor, and states he also used the east gate. (CP 492) [Close Dep. at 20:7-9] Joe Close states he never had to unlock the east gate because it was never locked. (CP 493) [Close Dep. at 21:2-6] He was asked, when he would go there, would the gates be open. He stated, "most – 90 percent of the time I went up there

they were. I rarely remember an occasion when they were closed, to tell you the truth." (CP 493) [Close Dep. at 21:7-11] He was asked what times of the year he would go there, and he stated, "oh, it could be any time of the year. When in maintenance, I was usually up there in the fall or spring and as supervisor, whenever I was in the area, I would go and check on things. So it could be any time of the year." (CP 493) [Close Dep. at 21:9-17] The roadway was plowed in the winter so the County could get trucks in. (CP 493) [Close Dep. at 21:25-22: 1] Joe Close was asked, "so in addition to going up there in the fall and the spring, and your recollection that 90 percent of the time the gates were open at that time, when you would go up there in the winter do you recall were the gates open?" He stated, "most definitely." (CP 494) [Close Dep. at 22:1-11]

Ryan Simpson states there is no regularity when the east gate is open or closed nor was he ever told there was any restriction on who could use the roadway. (CP 300) [Simpson Decl. ¶ 7] He has observed walkers, joggers, runners, bicyclists, skateboarders, and all types of motorized vehicles, including golf carts, car, and trucks, using the roadway at all times during the year. (CP 300) [Simpson Decl. ¶ 6]

The day before Mr. Wheat was impaled by the east gate's south-side pole on the roadway, the HOA's president Rob Allen stated he was driving by the roadway, the east gate was open, and he saw people driving

on the roadway. The people asked him whether the park area was a public park. After the people left, he tried to close and lock the gate, but could not do so because Spokane County had left the lock unlocked and, accordingly, the gate could not be locked. (CP 368) [Allen Dep. at 47:18-24]

The two gate poles on the east gate, when the gate is open, swing freely. Al Hague states, "they're on hinges and they swing downhill away from the . . . from the street. So by gravity, they open up quite easily and they lock themselves into the post that they snap into when they are fully opened." (CP 483, 486-87) [Hague Dep. at 48:12-15; 57:22-25; 58:1-18] Al Hague described the posts that the gate poles snapped into as follows: "just a post in the ground. Another pipe in the ground with a catch on it that catches the pipe and holds it in place." (CP 483) [Hague Dep. at 48:19-24] He was asked, is there one on each side of the roadway for each end of the pipe? He answered yes. (CP 483) [Hague Dep. at 48:22-24] He stated the posts were there at all times during the course of his residency at Fairwood (from 2004 to 2015). (CP 484) [Hague Dep. at 49:14-16]

Al Hague was asked whether the posts were ever destroyed or removed during the course of his residency, and he stated he was not aware of that. (CP 484) [Hague Dep. at 49: 19-21] He was asked, during the course of his tenure as president or vice president, if it was brought to

his attention that the posts were somehow in a state of disrepair, would that have been an issue that the board would have addressed as far as repairing it. He stated, "well, it was never brought to my attention while I was on the board that there were issues with those posts. So had it been brought to our attention, more than likely we would have repaired them." (CP 484-85) [Hague Dep. at 49:23-25; 50:1-6]

When Mr. Wheat's golf cart struck the south pole of the east gate and he was killed, the post to which that pole was supposed to be attached, to keep it in place and prevent it from moving into the roadway, had been removed and not replaced. (CP 345-48) [Allen Dep. Ex. 9-12] According to Chris Walker, the north post was lying on the north side of the roadway, and had been for approximately two years. Chris Walker states he was aware when the posts were present and described how the gate poles would attach to the posts when opened. He was also aware the posts were in a state of disrepair. (CP 396-401) [Walker Dep. 37:24-25; 38:1-25; 39:1-25; 40:1-8; 41:15-19; 42:5-10]

At the time of the accident, the golf cart was traveling east on the roadway, which runs in an east-west direction. (CP 330, 335) [Additional Report p. 1; Suppl. Report p. 1] The golf course is near Fairwood Drive and Bellwood Drive in Spokane County. (CP 330) [Additional Report p. 1] At the time of the accident, the weather was warm, in the mid-60s

Fahrenheit, with overcast skies and no precipitation. (CP 330) [Additional Report p. 1] Seventeen minutes after the accident occurred, Detective Jack Rosenthal arrived to investigate. (CP 330) [Additional Report p. 1] In his additional report, Rosenthal states, in part, the following:

Both of these gates were affixed to vertical metal posts approximately 4 feet tall and 6 inches in diameter. Attached to the south fence post was a yellow caution sign asking for slow traffic and indicating children playing in the area. Attached to the gate itself was a red and white enforcement sign posted by the Fairwood Park Recreation. This sign indicated the area was private property, homeowners only, no trespassing, no loitering and no entrance when park closed. The north gate had similar warning signs attached.

These warning signs were only visible while approaching the gates from the east. When viewing the gates from the driveway looking east toward Fairwood Drive, the warning signs were white (Back of signs) and not easily seen. I saw no warning signs attached to the gates that would be visible while approaching the gate from within the private grounds.

The gates affix to each other when closed and are secured by two chains and paddle locks [sic]. The locks were closed and attached to the chains on the end of the south gate. It appeared the gates were opened during business hours for the golf course. When opened these gates align in a parallel manner to the driveway. The north gate was still in that parallel position clearly off the roadway path.

From examining the scene it appeared the south gate may have swung slightly inward toward the center of the driveway. This would make the profile of the gate difficult to see while approaching the gate from the west traveling east. The point of impact on the golf cart was just on the right side near the right side mirror. The end of the gate went into the windshield as the cart was moving east

bound. The tip of the gate impacted the window frame (A pillar) then glanced off of the steering wheel.

(CP 331) [Additional Report p. 2]

Detective Rosenthal's additional report states that Rob Allen, the HOA's president, told him that the roadway "has a shared control with Spokane County Public Works due to a pump station located at the west end of the drive." (CP 332) [Additional Report p. 3] The additional report also states:

Mr. Allen stated the gate has two locks on it, one controlled by the HOA, the other controlled by the County Public Works department. The gate is to remain closed and locked. Mr. Allen stated the gate has no trespassing signs posted on it identifying the restrictions imposed by the HOA ...

Mr. Allen told me on the day of the incident⁴ at about 2 p.m. he drove past the gate noticing it was unlocked and opened. He observed a smaller silver car (much like a Mazda or Accura) going down the driveway. Mr. Allen stated he contacted the vehicle and its occupants who indicated they were lost. The occupants and vehicle left the private drive and Mr. Allen closed the gate (not locking it).

Mr. Allen stated he had spoken with some of the residents along the drive and they indicated Mr. Wheat often used the driveway as a shortcut to the golf course. Mr. Allen stated since he closed the gate at about 2 p.m., it was possible Mr. Wheat opened the gate when he went golfing, only to return the same way attempting to drive out of the

⁴ Allen testified that he closed the gate the night before Wheat's accident, not on the day of the accident. (CP 367-68, 382) [Allen Dep. at 46:21 to 47:17; 91:10-21] Allen stated that the motorists he encountered on that night asked him if the area was a public park, and he replied that it was not a public park. (CP 368) [Allen Dep. at 47:7-17] Allen stated that the individual with whom he spoke "did not look like somebody who was from the neighborhood," and that after the motorists drove off, he (Allen) "pulled the gate closed." (CP 368) [Allen Dep. at 47:18-24]

open gate onto Fairwood Drive. Mr. Allen admits this is speculation and has no identifiable witnesses that can verify these accusations.

Mr. Allen stated the HOA insurance company had been provided with the case information and will be in contact with Spokane County Risk Management as there is a dispute on who is in control of locking and securing the gate to limit access to the drive.

(CP 332) [Additional Report p. 3]

Near the scene of the accident is a pool that is owned by the HOA.

(CP 351) [Allen Dep. at 8:21-25] The pool is open during a season that runs from the last day of school in the Mead School District until the first day of school. (CP 354) [Allen Dep. at 15:15-19] During this season, the east gates are open and unlocked all day and are closed and locked at night. (CP 353, 355) [Allen Dep. at 14:18-19, 16:7-23] The gates are also open on some occasions when the pool is closed, such as when there is a soccer practice on a nearby field, a clean-up day, or other special occasions. (CP 356) [Allen Dep. at 20:4-13] The gates were not constructed by Spokane County. (CP 393, 402) [Walker Dep. at 31:4-7; 45:4-10]

Before the accident occurred, a number of vehicles would drive around the gates, so large stones were placed on the sides of the gates to prevent that. (CP 361-63) [Allen Dep. at 37:21-39:8] However, there was enough room between the stones for a pedestrian, bicycle, or golf cart to

pass around the gate. (CP 374) [Allen Dep. at 66:12-20] Although there is evidence that Mr. Wheat had driven his golf cart on the roadway in the past, there is no evidence that he was ever confronted, told to leave, or prosecuted for trespassing.

There were no reflectors on the end of the pole that struck Mr. Wheat's golf cart. (CP 366) [Allen Dep. at 45:4-6] In the past, there were posts near the gates, but Rob Allen testified that these posts were not equipped to keep the arms of the two gates open. (CP 364-65, 372) [Allen Dep. at 40:11-20; 41:1-9; 60:1-15] However, Chris Walker, Spokane County's Waste Water Operations supervisor, testified that these posts were equipped to hold the gates open. (CP 395, 397, 401) [Walker Dep. at 36:11-20; 38:2-18; 42:5-21]⁵ After the accident occurred, the HOA repaired the damaged and missing posts, new posts were installed, with chains that could be used to keep the gates open. (CP 365) [Allen Dep. at 41:21-25] Rob Allen testified that having posts that would keep the gates secured when they were open was a good safety device. (CP 373) [Allen Dep. at 64:17-21]

The gates at the scene of the accident have two locks and two sets of keys, one for the HOA and one for Spokane County. (CP 362) [Allen Dep. at 38:5-7] About 10 people had a key to the HOA's gate. (CP 352)

⁵ Chris Walker testified that one of the former posts was pulled out of the ground and lay on the ground by the road for about two years. (CP 401) [Walker Dep. at 42:5-10]

[Allen Dep. at 10:2-4] Because of the way the sliding mechanism is constructed on the gates, in order to keep the gates shut, one must have two keys—the key that is used for the HOA's lock and a key for the County's lock. (CP 367) [Allen Dep. at 46:17-25] The County's lock is on the south gate. (CP 423) [Crites Dep. at 33:13]

When Rob Allen closed the gates before the accident occurred, the County's lock was in the open position, and he did not have a key for the County's lock, so he could not lock the gates shut. (CP 368-70, 408) [Allen Dep. at 47:24--48:18; 49:3-7; Walker Dep. at 69:6-8] The HOA did not have a key for the County's lock on the gates. (CP 406) [Walker Dep. at 62:3-17] The position of the locks at the time of the accident indicates that the County's lock was used to open the gates. (CP 406-09) [Walker Dep. at 62:10-17, 68:20-25, 69:1-8, 70:4-9] The gates were left in a way that they were locked in the open position. (CP 408, 410) [Walker Dep. at 69:1-5; 71:12-15]

At the time of the accident, the County and the HOA had no agreement for sharing their keys to the gates. (CP 371) [Allen Dep. at 58:4-9] County employee Dan Crites assumed that a county employee left the County's lock on the gates in the open position before the accident occurred. (CP 371) [Crites Dep. at 51:3-10] Chris Walker testified that a

county employee must have left the lock in the open position. (CP 412)
[Walker Dep. at 79:8-18]

Referring to the sign on the south pole of the east gate, Rob Allen stated that the sign "says that it's private property, there's no trespassing allowed, and it refers to the pool is closed for the season." (CP 354) [Allen Dep. at 15:22-24] The sign on the gate does not indicate when the pool "season" begins or ends. (CP 358) [Allen Dep. at 30:3-5] The sign is only on the south pole of the east gate; there is no similar red and white sign on the north pole of that gate. (CP 380-81) [Allen Dep. at 87:7-88:23] Former HOA President Dan Pasby stated that the sign's reference to "closed for the season" pertains only to the pool, not to other portions of the park. (CP 430) [Pasby Dep. at 14:7-17]

Rob Allen is unaware of any notice to the area residents advising them that the use of golf carts to access the country club is in violation of HOA rules. (CP 360, 376) [Allen Dep. at 33:13-18; 72:18-22] He does not know whether anyone ever told Mr. Wheat that it was okay to use the pool access road to get to the golf course. (CP 375) [Allen Dep. at 69:8-11] Before the accident occurred, there was no signage abutting North Highland Drive indicating that the roadway was private. (CP 377) [Allen Dep. at 73:1-5]

Former HOA President Dan Pasby testified that he has found the gates unlocked "most times," including during the off season. (CP 429, 434-35) [Pasby Dep. at 7:24; 21:22-22:2] He noticed that the gates were unlocked at times when they should have been locked. (CP 431) [Pasby Dep. at 16:11-13] At his deposition, he agreed that one cannot tell from reading "closed for the season" on the gate's sign what "closed" means. (CP 432) [Pasby Dep. at 19:19-21] He testified that, prior to Mr. Wheat's death, the HOA board discussed the issue that people were driving golf carts through the roadway. (CP 436-37, 439) [Pasby Dep. at 23:20-24:9; 42:11-14] Dan Pasby stated that when the gate is extended out into the paved portion of the pool access road, it is not a safe situation. (CP 438) [Pasby Dep. at 32:6-14]

The Plaintiffs retained Dr. Richard Gill, a professor of mechanical engineering, to evaluate the hazardous nature of the gates. His detailed opinion and his curriculum vitae are in the record. (CP 303-19) In brief, Dr. Gill opined as follows: (1) the design, condition, and mode of operation for the gate created a life-threatening hidden hazard that was one of the underlying causes of the accident; (2) the hazard existed and was not timely mitigated due to deficiencies in the Defendants' safety and risk management programs; and (3) Mr. Wheat behaved in a reasonable and

foreseeable manner, and there is no scientific basis to assign any significant fault to him. (CP 304-06)

ARGUMENT

Before addressing the merits of this appeal, it is important to recall several basic principles. This Court must apply a *de novo* standard of review when reviewing all trial court rulings made in conjunction with a summary judgment motion. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301, 305 (1998). This standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party, and with the requirement that the appellate court conduct the same inquiry as the trial court. 135 Wn.2d at 663, 958 P.2d at 305. In *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977), *overruled on other grounds*, *Peeples v. Port of Bellingham*, 93 Wn.2d 766, 771, 613 P.2d 1128 (1980), the court observed:

Initially the burden is on the party moving for summary judgment to prove by uncontroverted facts that there is no genuine issue of material fact. *LaPlante v. State*, *supra*, 85 Wn.2d at 158, 531 P.2d 299; *Rossiter v. Moore*, 59 Wn.2d 722, 370 P.2d 250 (1962); 6 J. Moore, *Federal Practice* para 56.07, para 56.15[3] (2d ed. 1948). If the moving party does not sustain that burden, summary judgment should not be entered, irrespective of whether the nonmoving party has submitted affidavits or other materials. *Preston v. Duncan*, *supra*, 55 Wn.2d at 683, 349 P.2d 605, *see also* Trautman, *Motions for Summary*

Judgment: Their Use and Effect in Washington, 45 Wash. L. Rev. 1, 15 (1970). In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences therefrom most favorably for the nonmoving party and, when so considered, if reasonable people might reach different conclusions, the motion should be denied.

89 Wn.2d at 108-09, 569 P.2d at 1155.

A plaintiff may prove the elements of negligence through circumstantial evidence, and "[i]n tort actions, issues of negligence and causation are questions of fact not usually susceptible to summary judgment." *Boguch v. Landover Corp.*, 153 Wn. App. 595, 610, ¶ 24, 224 P.3d 795, 803 (2009). The Court cannot weigh the evidence or weigh the credibility of witnesses. *Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667, 676, 292 P.3d 128, 133 (2012).

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

The trial court erred in granting summary judgment for the HOA because there are material issues of fact regarding (1) Mr. Wheat's status at the time of the accident, (2) the character of the roadway as being impliedly available for use by members of the public, (3) the dangerous nature of the gates, and (4) the cause of the accident.

A. A Jury Question Exists as to Mr. Wheat's Status at the Time of the Accident

In a premises liability action, a land possessor's duty of care is governed by the entrant's common law status as an invitee, licensee, or trespasser. *Tavai v. Walmart Stores, Inc.*, 176 Wn. App. 122, 127–28, 307 P.3d 811, 814 (2013). When the facts are disputed, the question of an entrant's status is for the jury to decide. *Beebe v. Moses*, 113 Wn. App. 464, 467, 54 P.3d 188, 189 (2002). In this case, the trial court ruled that Mr. Wheat was a trespasser as a matter of law. In doing so, the court erroneously failed to apply a special principle that applies to individuals who reasonably believe a roadway is open to the public, whereby the applicable duty is one of reasonable care. Section 367 of the Restatement (Second) of Torts provides:

Dangerous Conditions on Land Appearing to be a Highway

A possessor of land who so maintains a part thereof that he knows or should know that others will reasonably believe it to be a public highway is subject to liability for physical harm caused to them, while using such part as a high way by his failure to exercise reasonable care to maintain it in a reasonably safe condition for travel.

Restatement (Second) of Torts § 367.

This principle applies when a private road branches off from a public highway and persons traveling on the public highway would reasonably regard the private road as being a continuation of the public highway. *Id.* § 367 cmt. c. Washington courts have adopted this principle. *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).

Under the principle of liability that is set forth in § 367, the usual standard of care that would generally apply to trespassers or licensees does not apply. *Zuniga*, 82 Wn. App. at 15, 917 P.2d at 586. Instead, the duty that is owed is a duty to exercise reasonable care to maintain the private way in a reasonably safe condition for travel. *Dotson v. Haddock*, 46 Wn.2d 52, 56, 278 P.2d 338, 340 (1955).

In the *Rogers* case, a motorcyclist was injured when he struck a chain that was stretched across a private road that led to the defendants' trailer. The road was 150 feet off another road (Red Marble Road) that was also owned by the defendants but commonly used by the public. About 40 "no trespassing" signs were nailed to various trees on both sides of Red Marble Road. In addition, a "no trespassing" sign was hung from the chain, and another one was on a tree that supported the chain. No sign

indicated that the trailer access road was a private road. The sole issue was the plaintiff's status and the defendants' duty of care. Reversing a grant of summary judgment for the defendants, the court remanded for trial and explained:

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 § 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. *See Mills v. Orcas Power & Light Co.*, 56 Wn.2d 807, 819, 355 P.2d 781 (1960).

16 Wn. App. at 495-96, 557 P.2d at 29-30.

In *Lucier v. Meriden-Wallingford Sand & Stone Co.*, 153 Conn. 422, 216 A.2d 818 (1966), a motorcyclist was killed when he ran into a cable barrier that was maintained by the defendant across a private road. The road extended between the termini of two public highways, and it led to the defendant's gravel processing plant, which was closed at the time. When the plant was open—during daylight hours on weekdays—the cable was down, and cars traveled freely on the road. There was a sign on a telephone pole about 10 feet off the road, measuring eight by 10 inches

that read "Private Property Keep Out." Affirming a verdict for the plaintiff, the *Lucier* court ruled that the defendant could be held liable under the rule set forth in § 367. *Id.* at 429, 216 A.2d at 822; *see also Reider v. City of Spring Lake Park*, 480 N.W.2d 662 (Minn. Ct. App. 1992) (motorcyclist and his passenger were not trespassers on church property; road on which motorcyclist was riding appeared to be a public road, and none of the signage posted by church warned of specific danger); *Carroll v. Lily Cache Builders, Inc.*, 30 Ill. Dec. 221, 74 Ill. App. 3d 264, 392 N.E.2d 986 (1979) (where roadway in subdivision, ownership of which had been retained by the developer, appeared to be open to public use for vehicular and pedestrian access to the dwellings located there as well as for access to other construction sites around circular cul-de-sac, the implied invitation to residents of the subdivision and to the public to enter on the private way gave rise to a duty of due care on the part of the owner).

Although Washington courts have not adopted the "constant trespasser" doctrine, *Sikking v. Nat'l R.R. Passenger Corp.*, 52 Wn. App. 246, 249, 758 P.2d 1003, 1005 (1988), Washington courts have recognized that a private road may appear to be open to the public, and that when a private road is frequently used by members of the public, there is an implied invitation to use it. *Hanson v. Spokane Valley Land & Water*

Co., 58 Wash. 6, 10-11, 107 P. 863, 865 (1910); *West v. Shaw*, 61 Wash. 227, 229, 112 P. 243, 245 (1910); *cf. Gasch v. Rounds*, 93 Wash. 317, 320-21, 160 P. 962, 964 (1916) (noting that the requirement of mutual business interests does not apply when there is an implied invitation to use a private way to travel across private property, as opposed to situations where there is an implied invitation to enter private premises for some other purpose).

In the *Hanson* case, the plaintiff was injured when he fell into a canal that crossed a privately owned road. Ruling that he was an invitee, the court explained:

While the complaint alleges that the road was a private road and way of necessity, it also alleges, in that same connection, that the road was traveled over by the public generally, constantly, and daily for some years prior to January 1, 1908. The effect of these allegations is that the road was a public way over private land. The whole allegation taken together could mean nothing less. It is not claimed that the plaintiff was the owner of the way, but he certainly had the same right as any of the public to use it. While the complaint does not directly allege an invitation to the public, it appears that the public made use of the way for 'some years prior to January 1, 1908, and that the way connected with the public highway on the north of section 4. This amounts to an implied invitation, because public user, long continued, will imply an invitation. *Phillips v. Library Co.*, 55 N.J.L. 307, 27 Atl. 478. Or it may 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 such use is not only acquiesced in by the owners,

but is in accordance with the intention or design for which the way was adapted or allowed to be used. *Turess v. New York S. & W. R. Co.*, 61 N.J.L. 314, 40 Atl. 614.

It follows, therefore, that the respondent was not a mere licensee. He was an invitee under the alleged facts. Such invitation would continue so long as the way remained open and the public availed itself of such use, and, while continued, the owners and others would be liable the same as though such road were regularly laid out and owned by the public.

Hanson, 58 Wash. at 8-9, 107 P. at 864-65.

In the present case, the trial court ruled that no reasonable person could have found that the HOA's roadway was a continuation of the public roadway. (CP 585) This was reversible error because there is a jury question as to whether the east gate and its sign were adequate to negate the appearance that the pool access road, which adjoined Fairwood Drive, was an extension of that public road, or was otherwise available for use by members of the public.

First, although the sign said "private property," it did not say that the roadway itself was private. A traveler could reasonably believe that the reference to "private property" referred to properties adjacent to the road, and that mere passage across the private property, using the road, was not prohibited. Such a belief would be particularly reasonable when the gates were unlocked and open. Similarly, the references to "no trespassing" and

"no loitering" could reasonably be interpreted to mean that persons who were not homeowners in the subdivision could not loiter or trespass on common areas or residential lots in the subdivision, but could lawfully pass through the subdivision to resume or continue traveling on public roadways. This interpretation would be particularly reasonable when the gates were unlocked and open.

Third, the most prominent language on the sign, which was in red letters, states "Closed For The Season." However, there was no information indicating when the "season" started or ended. A sign that announces a road is closed for the season can reasonably be read to mean that, conversely, the road is open during the season, whenever that may be. A traveler could reasonably believe that the language on the sign that referred to trespassing and loitering was only operative after the "season" ended.

Similarly, the sign's reference to "no entrance when park is closed" could reasonably be interpreted as being operative only after the "season" ended. A traveler's belief that the road was available for public use would be particularly reasonable when, as in the present case, the gates were unlocked and open.

Finally, regular use of a private road by members of the public is evidence of an implied permission to use the road. *Rogers*, 16 Wn. App. at 495-96, 557 P.2d at 29-30. The mere fact that there are chains, cables, or gates across a private road is not determinative, as is evident in a number of the cases cited above. In the present case, there is evidence that members of the public often used the roadway: Rocks were added in an effort to reduce traffic flow, but there was still room for pedestrians, bicycles, and golf carts to gain access to the road. (CP 368) [Allen Dep. at 66:12-20] There is evidence that the gates were kept open during business hours for the purpose of providing access to the golf course. (CP 331) [Additional Report, p. 2] The HOA's board had discussed the issue of people driving golf carts through the pool access road. (CP 436-37, 439) [Pasby Dep. at 23:20-24:9; 42:11-14] Indeed, just a day before the accident occurred, Rob Allen encountered motorists at the gates, which were open, and these motorists were unsure whether the road was part of a public park. (CP 368) [Allen Dep. at 47:7-24]

Based on the evidence in this case, a jury could reasonably conclude that there was an implied invitation for the public to use the road and/or that motorists would believe the road was public, particularly when

the gates were unlocked and open.⁶ The trial court erred in ruling that, as a matter of law, no reasonable person could think that the roadway was a continuation of the public road. (CP 585) The court's ruling flies in the face of evidence that the roadway was often used by members of the public who did not belong to the HOA. Thus, pursuant to Restatement (Second) of Torts § 367, a jury question exists as to whether the HOA owed a duty of reasonable care to Mr. Wheat.⁷

In the alternative, a jury could reasonably conclude that Mr. Wheat was a licensee. A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent or tolerance. *Beebe*, 113 Wn. App. at 467, 54 P.3d at 189; *Home v. N. Kitsap Sch. Dist.*, 92 Wn. App. 709, 718, 965 P.2d 1112, 1117-18 (1998). The term "licensee" includes persons who come on the land solely for purposes of their own. *Home*, 92 Wn. App. at 718, 965 P.2d at 1117-18. There are numerous classes of people who may qualify as licensees, even in the absence of an

⁶ Evidence that Mr. Wheat had traveled through the gate in the past does not prove that he knew the roadway was not open for public use. In fact, the frequency with which he and other members of the public used the roadway suggests that it was reasonable for him to conclude that the roadway was available for public use at certain times.

⁷ The Plaintiffs are not contending that a premises owner always has a duty to keep a gate locked if the owner chooses to construct a gate. However, if an owner uses a gate, a jury could find that reasonable care requires that the owner maintain the gate in a way that, if it is opened, it will not cause foreseeable injury to those who enter the premises.

express invitation to enter. In *Singleton v. Jackson*, 85 Wn. App. 835, 935 P.2d 644 (1997), the court explained:

Given the numerous means by which a possessor may expressly or tacitly consent to entry, the factual situations in which persons have been found to be licensees is extensive and includes:

[T]hose taking short cuts across the property or making merely permissive use of crossings and ways or other parts of the premises; loafers, loiterers, and people who come in only to get out of the weather; those in search of their children, servants or other third persons; spectators and sightseers not in any way invited to come; those who enter for social visits or personal business dealings with employees of the possessor of the land; tourists visiting a plant at their own request; those who come to borrow tools or to pick up and remove refuse or chattels for their own benefit; salesmen calling at the door of private homes, and those soliciting money for charity; a stranger entering an office building to post a letter in a mail-box provided for the use of tenants only.

W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 60, at 413 (5th ed. 1984) (footnotes omitted).

Id. at 840 n.1, 935 P.2d at 647 n.1.

In *Seeholzer v. Kellstone, Inc.*, 80 Ohio App. 3d 726, 610 N.E.2d 594 (1992), an operator of a four-wheel, all-terrain vehicle was injured when he struck a cable stretched across a pathway in a wooded area on the defendant's property. The plaintiff testified that he and others had often used the property for swimming, fishing, and riding; that he was unaware

that the property was closed to the public; and that he never saw a "no trespassing" sign. *Id.* at 728, 610 N.E.2d at 595-96. On the other hand, the property manager testified that he hired a caretaker to keep the property posted and to keep people out, that the police chief had been asked to keep trespassers off the property, that some people had been arrested for trespassing but not prosecuted, and that a "no trespassing" sign was in the immediate vicinity of the accident site. *Id.* at 728-29, 610 N.E.2d at 596. Based on this evidence, the plaintiff argued that there was a jury question whether he was a licensee. Agreeing, the *Seeholzer* court reasoned as follows:

It is well recognized that acquiescence by a landowner in the public use of his premises can amount to a permission or license, thereby elevating the entrant's status from that of trespasser to licensee and that continued tolerance of the presence of trespassers can amount to acquiescence. *Wills v. Frank Hoover Supply* (1986), 26 Ohio St.3d 186, 190, 26 OBR 160, 163-164, 497 N.E.2d 1118, 1121-1122, fn. 1; 62 American Jurisprudence 2d (1990) 466-467, Premises Liability Section 109; Annotation, 44 A.L.R.3d, *supra*, at 373, Section 5[a]; 5 Harper & James, *The Law of Torts, supra*, at 197, Section 27.7.

In this case it is undisputed that appellee knew that "trespassers" made significant use of its property. It is disputed, however, that their presence and/or the use of the property was permitted or tolerated. Hauser stated that he hired a caretaker and instructed the police to remove trespassers, and that the caretaker erected signs and a cable. Appellant's witnesses state that they used the property often and widely as far back as 1946, were never instructed to

leave even though the police were present, that trash cans were provided, that they never saw a "no trespassing" sign, and that they believed the property to have been open to the public. Clearly, therefore, a genuine issue of material fact exists as to appellee's acquiescence.

Id. at 734, 610 N.E.2d at 599-600.

In summary, there are material issues of fact as to whether the public could reasonably believe that the HOA's access road was available for public use when the gates were unlocked and open, and there was no indication of the definition of "season." In the alternative, there are issues of fact as to whether Mr. Wheat was a licensee or a trespasser.

B. A Jury Question Exists as to Whether the HOA Breached Its Duty of Care

If a jury concludes that the roadway appeared to be open for public use when the gates were unlocked and open or that the public was impliedly invited to use the road at such times, then a jury question exists as to whether the HOA exercised reasonable care. Detective Rosenthal reported that he "saw no warning signs attached to the gates that would be visible while approaching the gate from within." (CP 331) [Additional Report, p. 2] There were no reflectors on the end of the pole that struck Mr. Wheat. (CP 366) [Allen Dep. at 45:4-6] No chains or other devices were present to keep the gates all the way open, so as not to obstruct the

road, when the gates were open. (CP 365) [Allen Dep. at 41:21-25] This evidence creates a jury question as to whether the HOA exercised reasonable care.

In the alternative, this evidence creates a jury question as to whether the HOA breached the duty owed to licensees, such duty being as follows:

Dangerous Conditions Known to Possessor

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

- (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
- (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
- (c) the licensees do not know or have reason to know of the condition and the risk involved.

Restatement (Second) of Torts § 342.

The fact that no prior accident had occurred at the HOA's east gate is not dispositive as to whether the HOA breached its duty. "[F]or a defendant to be held liable for maintaining a dangerous condition, proof as to foreseeability of the particular manner or nature of the occurrence is not necessary. It is sufficient if the general type of danger is reasonably

foreseeable." *Thomas v. Hous. Auth. of City of Bremerton*, 71 Wn.2d 69, 72, 426 P.2d 836, 838 (1967). When it was open, the east gate was difficult to see when approached from the west. (CP 331) [Additional Report p. 2] In that respect, the gate was a condition that the HOA could expect would pose an unrealized danger to Mr. Wheat or others.

Moreover, Mr. Wheat's accident was reasonably foreseeable. Just last year, a similar accident was discussed in a Louisiana case. In *Plaia v. Stewart Enterprises, Inc.*, 2014-CA-0159, 2016 WL 6246912, at *1 (La. Ct. App. Oct. 26, 2016) (*see* Appendix attached), a motorist was struck by a solid steel traffic pole gate that swung into the road and pierced the windshield of her vehicle.⁸ In that case, two wooden "tie posts" were installed to hold swinging gates open during the day. The gates were secured to the tie posts with metallic snap shackles. 2016 WL 6246912, at *4. On the day of the accident, one of the gates was not properly secured, and it swung open, pierced the windshield of the plaintiff's vehicle, and injured her. The court observed that the gates were unreasonably dangerous because they were not properly secured when opened:

The omission of a padlock and the ease with which the gate could be unlatched by anyone created a dangerous

⁸ The *Plaia* court noted that a similar accident had previously occurred at the same location. In the earlier incident, the pole of the gate impaled a motorist's vehicle but did not injure the driver. *Plaia*, 2016 WL 6246912, at **2, 4 n.4.

condition and an unreasonable risk of harm that led to this unfortunate accident. The problem was not the tie post itself—it was that the gate could swing freely into the roadway if not properly anchored.

Id. at *15.

In the present case, as in *Plaia*, a jury could reasonably conclude that the HOA breached its duty by leaving the gate so that it could be unlocked and left unsecured when it was opened.

Even if a jury concludes that Mr. Wheat was a trespasser, there is an issue of fact as to whether the HOA acted wantonly. While there is no evidence that the HOA willfully intended to injure Mr. Wheat, there is evidence of wanton conduct, that is, an act performed intentionally with a reckless indifference to probable injurious consequences. *See generally Evans v. Miller*, 8 Wn. App. 364, 367, 507 P.2d 887, 889 (1973). A County employee opened the County's lock and left it so that it could not be locked by the HOA. (CP 368-70, 406-09) [Allen Dep. at 47:24--48:18; 49:3-7; Walker Dep. at 62:10-17, 68:20-25, 69:1-8, 70:4-9] The HOA did not obtain a key from the County, and so the HOA failed to ensure that the gates could be locked shut. (CP 406) [Walker Dep. at 62:3-17]

Rob Allen, the HOA's president, knew that the gates were unlocked shortly before the accident occurred. (CP 369) [Allen Dep. at 3-18] A jury could reasonably find that the HOA was recklessly indifferent

to the probability that the unlocked gates, which were hard to see when they were open and approached from the west, would be opened and/or remain open, as a hazard to golf carts, bicyclists, or pedestrians approaching from the west.

The present case is distinguishable from *Johnson v. Schafer*, 110 Wn.2d 546, 756 P.2d 134 (1988). In that case, the issue of wantonness turned on the fact that the defendants neither knew nor should have known that trespassing motorcyclists would be expected to use their private road. "Because the guardian has failed to present evidence that the Schafers knew or should have known that trespassing motorcyclists could have been expected to use the road, there is no evidence from which to infer that the Schafers committed wanton misconduct." *Id.* at 551, 756 P.2d at 136. By contrast, in the present case, if a jury finds that Mr. Wheat was a trespasser, then the jury could also find that the HOA knew or should have known that trespassers would use the road if the gates were left unlocked. There was evidence that members of the public regularly used the road, and the issue had been addressed by the HOA's board of directors. (CP 436-37, 439) [Pasby Dep. at 23:20-24:9; 42:11-14]

C. A Jury Question Exists as to the Issue of Proximate Causation.

The evidence indicates that the HOA's president knew that a Spokane County employee left the gate unlocked, so that the HOA could not lock it. (CP 368-70, 408, 410, 412) [Allen Dep. at 47:24-48:18; 49:3-7; Walker Dep. at 69:1-8; 71:12-15; 79:8-18] This allowed the gates to be opened by anyone, so that the gates could be left in a position that made it difficult to see them from the west. (CP 331) [Additional Report p. 2] There were no posts to which the gates could be attached when open. (CP 365) [Allen Dep. at 41:21-25] Since the gate was difficult to see when it was approached from the west, the HOA's failure to ensure that the gates were locked, or the failure to secure the gates if they were opened, was a proximate cause of the accident.

There may be more than one proximate cause of an injury, and the concurring negligence of a third party does not necessarily break the causal chain from original negligence to final injury. *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 378 P.3d 162 (2016). Proximate causation is ordinarily a jury question, including the question of whether a third party's act is a superseding or a concurring cause. *Travis v. Bohannon*, 128 Wn. App. 231, 242, 115 P.3d 342, 347-48 (2005). In the absence of testimony from a witness to the accident, there is a presumption that Mr. Wheat was

exercising due care for his own safety at the time of the accident. *Hutton v. Martin*, 41 Wn.2d 780, 787-88, 252 P.2d 581, 585-86 (1953); *McCoy v. Courtney*, 25 Wn.2d 956, 964-65, 172 P.2d 596, 601-02 (1946).

By leaving the gate in a position that it could neither be locked shut nor secured if opened, the HOA knowingly permitted the gate to be opened by any third party. Thus, it is not necessary for the Plaintiffs to prove that the HOA left the gate open.⁹ "Washington has long held that if an intervening or subsequent cause is foreseeable, the chain of proximate causation is not broken. The test applicable is whether or not in the natural course of events the appellant should have known the intervening act was likely to happen." *Bell v. McMurray*, 5 Wn. App. 207, 212, 486 P.2d 1105, 1109 (1971). In this case, a jury question exists on the issue of proximate causation.

⁹ In the *Plaia* case, the court noted the following evidence as to the cause of the accident: "Mr. Hall testified that there were two primary causes of the accident. First was the presence of an untethered 20-plus foot long metal gate in the roadway; second was that had the gate remained tethered to the tie post, the gate would not have been moving freely inside the roadway. Mr. Hall confirmed that the architect's tie post plans called for a padlock. He agreed that the architect's plans should have been followed. In his expert opinion, an adequate solution to the problem of the gates blowing open would have been to use not only a latch but also a padlock as backup security." 2016 WL 6246912, at *26.

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

A. The County Owed a Duty of Reasonable Care Irrespective of Mr. Wheat's Status

In assessing the County's potential liability for the accident, the trial court applied an incorrect standard of care. The court ruled that the County could be liable only if it acted willfully or wantonly. (CP 584) This ruling was based on the court's view that Mr. Wheat was a trespasser. (CP 584) However, the County owed a duty of reasonable care regardless of Mr. Wheat's status.

The County's liability does not arise from its possession or occupancy of the premises. Rather, its liability arises from its conduct with respect to the gates: (1) the County failed to provide a key to the HOA, and (2) the County left the gate in a condition that prevented the HOA from locking it shut. Section 386 of the Restatement (Second) of Torts provides:

**Persons Other Than Possessor, Members of His Household,
and Those Acting on His Behalf Who Create Dangerous
Condition**

Any person, except the possessor of land or a member of his household or one acting on his behalf, who creates or maintains upon the land a structure or other artificial condition which he should recognize as involving an unreasonable risk of physical harm to others upon or

outside of the land, is subject to liability for physical harm thereby caused to them, irrespective of whether they are lawfully upon the land, by the consent of the possessor or otherwise, or are trespassers as between themselves and the possessor.

As an Illinois court has explained, when a party creates or maintains an unsafe condition on land, liability is based on that party's conduct, not upon its ownership or possession of the land:

[T]he court in *Johnson v. City of St. Charles* (1916), 200 Ill. App. 184, clearly stated that the status of that decedent as a trespasser was immaterial as the defendant was not one who could grant permission to enter the premises. We conclude the rule of *Johnson* and of the Restatement (Restatement (Second) of Torts § 386 (1965)) is the better rule, because as far as a defendant not being an occupier or one closely connected thereto is concerned, whether the injured party has appropriate authority to be on the premises is entirely fortuitous.

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).

This principle is consistent with cases that recognize liability of an easement holder based on its use of another's property, even though the easement holder neither owns nor possesses the property. *E.g.*, *Clark v. New Magma Irrigation & Drainage Dist.*, 208 Ariz. 246, 250, 92 P.3d 876, 880 (Ct. App. 2004) ("[W]e agree that an easement holder has a duty to act reasonably under the circumstances in its use of the servient estate, but conclude that the duty does not extend beyond the scope of that use.");

Hartman v. Walkertown Shopping Ctr., Inc., 113 N.C. App. 632, 638, 439 S.E.2d 787, 791 (1994) (owner of an easement has a duty to keep the easement in repair and may be liable in damages for injuries caused to third persons).

This principle is also consistent with *Palin v. General Construction Co.*, 47 Wn.2d 246, 287 P.2d 325 (1955). In the *Palin* case, the defendant construction company contracted to build dikes around the plaintiff's oil storage tank, which was located on land that was owned by King County. In the course of performing its work, the defendant's bulldozer damaged a valve on the tank. The defendant's crew made a temporary repair to the valve but failed to warn the tank's owner and failed to secure the valve to prevent tampering by unauthorized persons who might come onto the premises. When the crew returned the next day, they discovered that the valve had been opened by some unknown person during the night, and 200,000 gallons of the plaintiff's oil had escaped from the tank. 47 Wn.2d at 249-50, 287 P.2d at 327. The *Palin* court affirmed a verdict against the defendant company for the value of the lost oil, even though the defendant did not own the property. Notably, the court based its ruling on a negligence standard, not on a standard of willful or wanton conduct.

In the present case, the County may be held liable for its negligent conduct with respect to its lock on the east gate, regardless of Mr. Wheat's status as a trespasser, licensee, or invitee, and regardless of the fact that the County did not own the property. A jury question exists as to whether the County exercised reasonable care under the circumstances.

B. In the Alternative, a Jury Question Exists as to Mr. Wheat's Status at the Time of the Accident

If this Court disagrees that Mr. Wheat's status does not determine the scope and nature of the County's duty, then the analysis would be essentially the same as is set forth in Part I(A) above. As is discussed therein, a jury question exists as to whether one could reasonably believe that the HOA's access road was available for public use when the gates were unlocked. In the alternative, there are issues of fact as to whether Mr. Wheat was a licensee or a trespasser, as is also discussed in Part I(A) above. Therefore, the trial court erred in granting summary judgment for the County on the basis that Mr. Wheat was, as a matter of law, a trespasser on the day he was killed.

C. A Jury Question Exists as to Whether the County Breached Its Duty of Care

If a jury concludes that the roadway appeared to be open for public use when the gates were unlocked and open, or that the public was impliedly invited to use the road at such times, then a jury question exists as to whether the County exercised reasonable care. Detective Rosenthal reported that he "saw no warning signs attached to the gates that would be visible while approaching the gate from within." (CP 333) [Additional Report, p. 4] There were no reflectors on the end of the pole that struck Mr. Wheat. (CP 366) [Allen Dep. at 45:4-6] No chains or other devices were present to keep the gates all the way open, so as not to obstruct the road when the gates were open. (CP 365) [Allen Dep. at 41:21-25] It was difficult to see the gate when it was partially open and was approached from the west. (CP 331) [Additional Report, p. 2] A County employee left the gates unlocked in the open position, such that the HOA had no way to lock them shut. (CP 368-70, 408, 410, 412) [Allen Dep. at 47:24-48:18; 49:3-7; Walker Dep. at 69:1-8; 71:12-15; 79:8-18]

The present case is similar to the *Plaia* case that is discussed above, in which a motorist was struck by a solid steel traffic pole gate that swung into the road and pierced the windshield of her vehicle. In that case, two wooden "tie posts" were installed to hold swinging gates open during

the day. The gates were secured to the tie posts with metallic snap shackles. 2016 WL 6246912, at *4. On the day of the accident, one of the gates was not properly secured, and it swung open, pierced the windshield of the plaintiff's vehicle, and injured her. The court observed that the gates were unreasonably dangerous because they were not properly secured when opened:

The omission of a padlock and the ease with which the gate could be unlatched by anyone created a dangerous condition and an unreasonable risk of harm that led to this unfortunate accident. The problem was not the tie post itself—it was that the gate could swing freely into the roadway if not properly anchored.

Id. at *15.

In *Plaia*, the jury apportioned 15 percent of fault to landscapers, who opened the gates but did not properly secure them to the tie posts that were designed to hold them open. *Id.* at *29. In the present case, the County left the gates in a condition that prevented the HOA from locking them shut. The County either left the gates open or left them in a position that would allow anyone else to open them and leave them unsecured. As in *Plaia*, a jury in the present case could reasonably conclude that the County breached its duty by leaving the gates so that they could be unlocked and left unsecured. This evidence creates a jury question as to whether the County exercised reasonable care.

In the alternative, this evidence creates a jury question as to whether the County breached the duty owed to licensees, such duty being as follows:

Dangerous Conditions Known to Possessor

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved.

Restatement (Second) of Torts § 342.

The gates were constructed by the HOA and operated or maintained in a way that both the HOA and Spokane County knew that the gates could be difficult to see if they were left open without being secured to posts on the side of the road. Neither actual nor constructive notice of a condition must be proved when, as here, the defendants created the dangerous condition. *Erdman v. Lower Yakima Valley, Wash. Lodge No. 2112 of B.P.O.E.*, 41 Wn. App. 197, 205, 704 P.2d 150, 156 (1985).

In the present case, the profile of the gate was "difficult to see while approaching the gate from the west." (CP 331) [Additional Report, p. 2] The issue is not whether the gates were open and obvious when closed; the issue is whether the gate pole that struck Mr. Wheat was plainly visible as Mr. Wheat approached it, and that is a jury question.

Even if a jury concludes that Mr. Wheat was a trespasser, there is an issue of fact as to whether the County acted wantonly. While there is no evidence that the County willfully intended to injure Mr. Wheat, there is evidence of wanton conduct, that is, an act performed intentionally with a reckless indifference to probable injurious consequences. *See generally Evans*, 8 Wn. App. at 367, 507 P.2d at 889. A County employee opened the County's lock and left it so that it could not be locked by the HOA. Chris Walker testified that a County employee must have opened the lock before going through the gate. (CP 412) [Walker Dep. at 79:8-18] A jury could reasonably find that a County employee was recklessly indifferent to the probability that the unlocked gates, which were hard to see when they were open and approached from the west, would be opened and/or remain open, as a hazard to golf carts, bicyclists, or pedestrians approaching from the west.

If a jury finds that Mr. Wheat was a trespasser, then the jury could also find that the County knew or should have known that trespassers would use the road if the gates were left unlocked. There was evidence that County employees were regularly in the vicinity and that members of the public regularly used the road. (CP 392, 394, 403-05, 416, 422, 492) [Walker Dep. at 22:13-18; 32:11-20; 46:10-23; 52:21-25; 53:1-5; Crites Dep. at 8:21-24; 28:13-22; Close Dep. at 20:7-9] A jury could reasonably conclude that the County knew or should have known that the presence of rocks and gates was an indication that the HOA was attempting to address a problem of regular trespassing.

D. A Jury Question Exists as to the Issue of Proximate Causation

The evidence indicates that a County employee left the gate unlocked, so that the HOA could not lock it. (CP 368-70, 408, 410, 412) [Allen Dep. at 47:24-48:18; 49:3-7; Walker Dep. at 69:1-8; 71:12-15; 79:8-18] This allowed the gates to be opened by anyone, so that the gates could be left in a position that made it difficult to see them from the west. Since the gate was difficult to see when it was approached from the west, the County's act of leaving the gate in a locked open position was a proximate cause of the accident, because that act allowed anyone to open

the gates and leave them open. In the *Plaia* case, the court noted that the accident was caused by the presence of an untethered 20-plus-foot long metal gate in the roadway, and the failure to properly secure it to a post. 2016 WL 6246912, at *26.

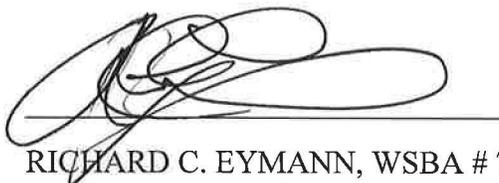
There may be more than one proximate cause of an injury, and the concurring negligence of a third party does not necessarily break the causal chain from original negligence to final injury. *N.L.*, 186 Wn.2d 422, 378 P.3d 162. Proximate causation is ordinarily a jury question, including the question of whether a third party's act is a superseding or a concurring cause. *Travis*, 128 Wn. App. at 242, 115 P.3d at 347-48. In the trial court, the County speculated that Mr. Wheat may have taken his eyes off the road in front of him (CP 541-42), but there is no evidence at all to support such rank speculation. In the absence of testimony from a witness to the accident, there is a presumption that Mr. Wheat was exercising due care for his own safety at the time of the accident. *Hutton*, 41 Wn.2d at 787-88, 252 P.2d at 585-86; *McCoy*, 25 Wn.2d at 964-65, 172 P.2d at 601-02.

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,

**EYMANN ALLISON HUNTER
JONES, P.S.**



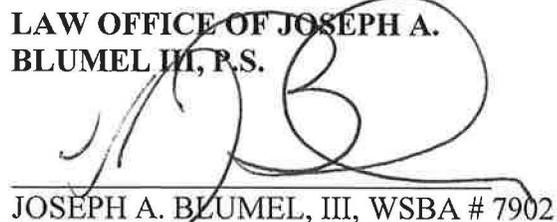
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RICHARD C. EYMANN, WSBA # 7470

2208 West Second Avenue
Spokane, WA 99201
Telephone: 509-747-0101
Fax: 509-458-5977

-AND-

**LAW OFFICE OF JOSEPH A.
BLUMEL III, P.S.**



A handwritten signature in black ink, appearing to read 'J. Blumel, III', is written over a horizontal line.

JOSEPH A. BLUMEL, III, WSBA # 7902

4407 N. Division Street, Suite 900
Spokane, WA 99207
Telephone: 509-487-1651

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2017, I caused a true and correct copy of the foregoing Appellants' **Amended** Opening Brief to be served on the following via the means indicated:

Scott C. Cifrese Paine Hamblen 717 W. Sprague Avenue, Suite 1200 Spokane, WA 99201-3505 (509) 455-6000 (509) 838-0007 <i>Attorneys for Fairwood Homeowners Ass'n</i>	VIA FIRST CLASS MAIL <input type="checkbox"/> VIA EMAIL <input type="checkbox"/> VIA HAND DELIVERY <input checked="" type="checkbox"/> VIA FACSIMILE <input type="checkbox"/>
Paul L. Kirkpatrick Timothy J. Nault Kirkpatrick & Startzel, P.S. 1717 S. Rustle, Ste. 102 Spokane, WA 99224 (509) 455-3647 <i>Attorneys for Spokane County</i>	VIA FIRST CLASS MAIL <input type="checkbox"/> VIA EMAIL <input type="checkbox"/> VIA HAND DELIVERY <input checked="" type="checkbox"/> VIA FACSIMILE <input type="checkbox"/>
Joseph A. Blumel, III Law Office of Joseph A. Blumel, III 4407 N. Division St., Suite 900 Spokane, WA 99207-1696 (509) 487-1651 joseph@blumellaw.com <i>Co-Counsel for Plaintiffs</i>	VIA FIRST CLASS MAIL <input type="checkbox"/> VIA EMAIL <input checked="" type="checkbox"/> VIA HAND DELIVERY <input type="checkbox"/> VIA FACSIMILE <input type="checkbox"/>

DATED this 21st day of June, 2017

EYMANN ALLISON HUNTER JONES P.S.

By: 
RICHARD C. EYMANN, WSBA #7470
Email: eymann@eahjlaw.com
2208 West Second Avenue
Spokane, Washington 99201
Telephone: (509) 747-0101
Facsimile: (509) 458-5977
Attorneys for Plaintiffs/Appellants