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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

CASE NO. 350479

COURT OF APPEALS, STATE OF WASHINGTON  
DIVISION III

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

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,

RESPONDENTS

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BRIEF OF RESPONDENTS  
FAIRWOOD PARK HOMEOWNERS ASSOCIATION and FAIRWOOD  
PARK I HOMEOWNERS ASSOCIATION

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## **I. INTRODUCTION**

David Wheat, decedent of Appellants, was killed when he drove into a well-marked metal gate while driving his golf cart on a private road owned by Appellees Fairwood Park Homeowners Association/Fairwood Park I Homeowners Association (collectively, “Fairwood HOA” or “the HOA”).

Mr. Wheat’s death was a tragedy. But the only duty owed by the HOA to Mr. Wheat, a trespasser using a private road at his own peril, was to avoid willful and wanton injury. The trial court correctly found that, even when the evidence was viewed in the light most favorable to Appellants, the HOA did not breach this duty. Because the Appellants could not prove an essential element of their case, the trial court properly granted summary judgment in favor of the HOA. This Court should affirm.

## **II. STATEMENT OF ISSUES**

A. Whether the HOA owed a duty to Mr. Wheat (other than the duty owed to a trespasser to avoid willful and wanton injury) when Mr. Wheat did not have the HOA’s express or implied permission to use its private road and used the road to advance his own purposes?

B. Whether the HOA breached a duty owed to Mr. Wheat by maintaining a well-marked metal gate on its private property, which

Mr. Wheat knew existed having driven past it hundreds of times and having the same type of gate at his place of business?

### **III. STATEMENT OF THE CASE**

Fairwood HOA is the homeowner's association for the residents of Fairwood Park, a housing development in north Spokane.

One of the amenities operated by the HOA, for the exclusive benefit of its residents and their guests, is a swimming pool and park. *See* CP at 46, 53 (Allen Dep.) (access limited to HOA members and their guests); CP at 71 (Crites Dep.) (describing pool and park). A private road accesses a parking lot that residents can use when visiting the swimming pool and park. CP at 48 (Allen Dep.). *See Appendix, p. 1 (Diagram illustrating location of private road, swimming pool, and park within Fairwood Park development)*. Spokane County also uses the private access road (pursuant to an easement) to access a pump station located near the HOA pool. CP at 60 (Walker Dep.). The private access road connects to other roads at points east and west. CP at 60 (Walker Dep.). To the west is a private road within another private housing development that leads to the back entrance of the Spokane Country Club. *Id.*; CP at 512 (Allen Decl.). To the east is Fairwood Drive, a road within the Fairwood Park development. CP at 60 (Walker Dep.). Gates limit access at both entrances of the access road. CP at 69-70 (Crites Dep.). *See also*

*Appendix, pp. 2 (photograph of the east gate) and 5 (photograph of west gate to include Spokane County Pump House).* Mr. Wheat suffered fatal injuries when he came into contact with the east gate while driving on the HOA's private access road.

On the day of the accident, Mr. Wheat was returning from golfing at the Spokane Country Club. Mr. Wheat was operating a street-legal golf cart, CP at 77-78, and he used the HOA's private access road as a shortcut from the Country Club to his residence located outside Fairwood Park. Apparently, this was Mr. Wheat's preferred route to get to and from the Country Club. CP at 81 (Z. Wheat Dep.); CP at 86 (T. Wheat Dep.). Mr. Wheat was an avid golfer and he golfed at the Country Club at least once a week. CP at 79 (Z. Wheat Dep.). Sometimes his wife or son accompanied him. CP at 77 (Z. Wheat Dep.); CP at 86 (T. Wheat Dep.). Mr. Wheat's wife estimated that Mr. Wheat had used the HOA's access road some 400 times prior to the accident. CP at 89 (T. Wheat Dep.).

Mr. Wheat was never a member of Fairwood HOA.<sup>1</sup> CP at 81 (Z. Wheat Dep.); CP at 87 (T. Wheat Dep.). Mr. Wheat's wife testified that she did not know of anyone from Fairwood HOA giving Mr. Wheat permission to use the access road. CP at 87 (T. Wheat Dep.). Indeed, HOA

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<sup>1</sup> Mr. Wheat did, however, live in the Wandermere Estates development. CP at 153. Presumably, he was a member of the development's homeowners' association and understood the concept of private amenities of the homeowners' association.

President Robert Allen testified that Fairwood HOA did not give Mr. Wheat permission to use the access road. CP at 52-53 (Allen Dep.).

The access road is the private property of Fairwood HOA. CP at 55-57. To make this clear, the HOA affixed a double-sided sign on the east gate, visible when approaching the gate from either direction that reads:

Fairwood Park Recreation Area  
CLOSED FOR THE SEASON  
PRIVATE PROPERTY  
HOMEOWNERS ONLY  
NO TRESPASSING  
NO LOITERING  
NO ENTRANCE WHEN  
PARK IS CLOSED  
VIOLATORS SUBJECT TO ARREST  
AND WILL BE PROSECUTED  
PATROLLED BY  
SPOKANE COUNTY SHERIFF'S DEPT.

CP at 90 (T. Wheat Dep. Ex. 23). *See also Appendix, p. 4 (photograph of the sign affixed to the east gate).* (In addition to this sign, two other reflective “slow, children playing” signs were attached to each post of the east gate. CP 54, 380.)

The HOA's policy is to lock the east gate during the Mead School District school year. CP at 47 (Allen Dep.). During the summer months, the HOA would open the east gate during the day, but close it at night. *Id.* Sometimes the HOA could not lock the east gate because only Spokane County had a key to unlock the mechanism that would permit the HOA to close and secure the gate with its own lock. CP at 50 -51 (Allen Dep.); CP at 62 (Walker Dep.); *see also Appendix, p. 3 (photograph of locking sleeve on the east gate)*. To further block unauthorized users, the HOA placed rocks around the poles of the east gates to the sides of the access road. CP at 48 (Allen Dep.). This was done to prevent vehicles, such as golf carts, from driving around the gate when the gate was locked. *Id.*

Beyond the fact that the access road is gated at both ends and is marked with a conspicuous sign that reads, *inter alia*, "Private Property" and "No Trespassing," other indicia suggests that the road is not for public use. First, to access the road, a traveler would have to go up a driveway curb and across a sidewalk from Fairwood Drive. CP at 511. Second, the access road itself is narrower than public streets, contains two speed bumps, and is not bordered by sidewalks, driveways, or mailboxes. CP at 511-12. Third, there are no stop signs at either end of the access road. CP at 512. Finally, more than any other kind of road, the access road resembles a private driveway. *E.g.*, CP at 60 (Walker Dep.).

Mr. Wheat was killed when he ran his golf cart into the end of the metal pole that makes up part of the east gate.<sup>2</sup> On the night before the accident, HOA President Robert Allen closed the gate, but could not lock it because the Spokane County lock prevented it. CP at 50 (Allen Dep.). Prior to this accident, HOA President Robert Allen knew of no other incidents or injuries associated with the east gate. CP at 513 (Allen Decl.).

Appellants filed suit alleging that the HOA's and Spokane County's negligence resulted in Mr. Wheat's death. CP at 3-9; 24-31. After substantial discovery, the HOA and Spokane County filed motions for summary judgment seeking dismissal of Appellants' action. The trial court granted the motions and dismissed the case. The trial court found that Mr. Wheat was a trespasser and that the HOA did not breach its duty to Mr. Wheat to avoid willful and wanton injury. CP at 579-88. In the alternative, the trial court found that even if Mr. Wheat was a licensee, the HOA did not breach its duty to Mr. Wheat to warn of hidden dangers that posed an unreasonable risk of harm. *Id.*

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<sup>2</sup> The accident occurred on the HOA's private access road, not on North Fairwood Drive as claimed by Appellants, App. Br. at 3. Also, at the time of the accident, there were no posts to secure the east gate in its open position. That the HOA installed posts after the accident (as noted by Appellants, App. Br. at 16) is inadmissible evidence of a subsequent remedial measure. ER 407.

#### **IV. STANDARD OF REVIEW**

This court reviews a trial court's grant of summary judgment de novo. *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). When reasonable minds can reach but one conclusion, questions of fact may be determined as a matter of law. *Ruff v. King County*, 125 Wn.2d 697, 704, 887 P.2d 886 (1995). The purpose of summary judgment is to avoid a useless trial. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963).

#### **V. ARGUMENT**

"A cause of action for negligence requires the plaintiff to establish (1) the existence of a duty owed, (2) breach of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the injury." *Tavai v. Walmart Stores, Inc.*, 176 Wn. App. 122, 127, 307 P.3d 811 (2013). In this case, viewing the evidence in the light most favorable to Appellants, the trial court properly found that the HOA did not breach a duty owed to Mr. Wheat and, thus, the HOA is entitled to judgment as a matter of law. Because Appellants cannot satisfy an essential element of

their claim, a trial would be useless and the trial court did not err in granting summary judgment in favor of Fairwood HOA. This Court should affirm.

A. **There are No Genuine Issues of Material Fact, and Reasonable Minds Could Not Disagree, that Mr. Wheat was a Trespasser, or, at Most a Licensee, and Not an Invitee or an Implied Invitee.**

“The legal duty owed by a landowner to a person entering the premises depends on whether the entrant falls under the common law category of a trespasser, licensee, or invitee.” *Iwai v. State*, 129 Wn.2d 84, 90–91, 915 P.2d 1089 (1996). The landowner owes the highest duty to an invitee, a lesser duty to a licensee, and a minimal duty to a trespasser. *See infra*. “Whether a duty exists is initially a question of law.” *Howard v. Horn*, 61 Wn. App. 520, 523, 810 P.2d 1387 (1991); *see also Ford v. Red Lion Inns*, 67 Wn. App. 766, 769, 840 P.2d 198 (1992) (noting that when the facts regarding a visitor’s entry onto property are undisputed, the visitor’s legal status as invitee, licensee, or trespasser is a question of law).

The trial court properly found that the only duty the HOA owed to Mr. Wheat was the duty a landowner owes to a trespasser. Reasonable minds could not disagree that Mr. Wheat was a trespasser. Mr. Wheat entered onto the HOA’s property, which was clearly marked as private, without the permission of the HOA. He knew that the access road was

private property and could not have reasonably believed that it was a public highway. Mr. Wheat was not a licensee because the HOA did not consent, either expressly or impliedly, to Mr. Wheat's use of the access road. Finally, no argument was made that Mr. Wheat was an invitee, and Mr. Wheat was not an *implied* invitee because the access road cannot be mistaken for a public highway and public use of a private roadway does not create an implied invitation.

**1. *Mr. Wheat Was a Trespasser.***

“A trespasser is one who enters the premises of another without invitation or permission, express or implied, but goes, rather, for his own purposes or convenience, and not in the performance of a duty to the owner or one in possession of the premises.” *Winter v. Mackner*, 68 Wn.2d 943, 945, 416 P.2d 453, 454 (1966). “One who enters upon the premises of another as a trespasser does so at his peril.” *Id.* A landowner's only duty to trespassers is to avoid willfully or wantonly injuring them. *Zuniga v. Pay Less*, 82 Wn. App. 12, 13-14, 917 P.2d 584 (1996).

It is undisputed that the access road was the HOA's private property. CP at 48 (Allen Dep.). It is undisputed that Mr. Wheat was on the property for his own purposes. *See* CP at 81 (Z. Wheat Dep.); CP at 86 (T. Wheat Dep.) (admitting that Mr. Wheat used the access road to travel to and from the Spokane Country Club). It is undisputed that Mr. Wheat

did not have the HOA's permission to use the access road. CP at 52-53 (Allen Dep.); CP at 81 (Z. Wheat Dep.); CP at 87 (T. Wheat Dep.). Reasonable minds could not disagree that Mr. Wheat was a trespasser; accordingly, as a matter of law, Mr. Wheat's legal status at the time he sustained his fatal injuries was that of a trespasser.

**2. Mr. Wheat Was Not a Licensee.**

Appellants argue that there are genuine issues of material fact regarding whether Mr. Wheat was a licensee. App. Br. at 30-32. The Court need not reach this issue because, as a matter of law, Mr. Wheat was a trespasser. If the Court does reach this issue, it should conclude, as a matter of law, that Mr. Wheat was not a licensee.

A licensee is "a person who is privileged to enter or remain on land only by virtue of the possessor's consent." *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986) (citing RESTATEMENT (SECOND) OF TORTS § 330); see also *Singleton v. Jackson*, 85 Wn. App. 835, 839, 935 P.2d 644 (1997) ("[T]he determination of whether a person is a trespasser or a licensee hinges on whether the possessor has granted consent or permission to enter the property."). Although in certain circumstances, consent to enter private property may be implied, "[n]otice that consent has been withdrawn can be accomplished in a variety of ways, including

the posting of a ‘No Trespassing’ or ‘No Soliciting’ sign.” *Singleton*, 85 Wn. App. at 840.

In *Singleton*, a religious solicitor slipped and fell on the wet porch of a house where she was soliciting. 85 Wn. App. at 837-38. The Court of Appeals found that a homeowner impliedly invited the solicitor to enter the homeowners’ property when the homeowner did not post signs or install physical barriers indicating that the solicitor was not welcome. *Id.* at 842. In the absence of signs or barriers, “it was reasonable for [the solicitor] to believe that she had permission to approach the . . . house and attempt to contact its occupants.” *Id.* The Court of Appeals went on to find that the homeowner did not breach its duty to the solicitor because the homeowner had neither actual nor constructive knowledge of an alleged dangerous condition. *Id.* at 844. The Court of Appeals affirmed the dismissal of the action brought by the religious solicitor. *Id.* at 845.

In this case, Mr. Wheat was not a licensee because Fairwood HOA explicitly withheld consent to Mr. Wheat by maintaining physical barriers on its property and by posting a “No Trespassing” sign on the east gate. Under these circumstances, Mr. Wheat could not have reasonably believed that the HOA consented to Mr. Wheat’s use of the driveway. Because Mr. Wheat did not have the HOA’s implied or explicit consent to use the access road, he was not a licensee.

Appellants cite to *Seeholzer v. Kellstone, Inc.*, 610 N.E.2d 594 (Ohio Ct. App. 1992) for the proposition that whether a person is a licensee or a trespasser is a question of fact. App. Br. at 31-33. In *Seeholzer*, the plaintiff was injured when, while driving a recreational vehicle on the defendant's land, he struck a cable stretched across a road. In that case, there was conflicting evidence about the landowner's position towards people who entered his land. The defendant's land was a wooded area on an island, which plaintiff, along with members of the public, used for fishing, swimming, and dirt biking/ATV-ing. Defendant did not dispute that he knew that "trespassers made significant use of its property." *Id.* at 599. In response to defendant's summary judgment motion, the plaintiff submitted his own affidavit, along with six other affidavits of people who used the defendant's land that all represented that they believed the property open to the public, they used the property for a variety of recreation purposes, they never observed a "No Trespassing" sign, trash cans were placed around the property, and no attempt had been made to keep the public from the premises. *Id.* at 728. Given the evidence presented in *Seeholzer*, there was a genuine issue of material fact regarding whether plaintiff was a trespasser or a licensee.

In the case at bar, however, the evidence is not conflicting. Setting aside the fact that Appellants cite an Ohio case, Appellants cannot show

that trespassers made significant use of the HOA's property. There is no question that people use the access road, e.g., CP at 300 (Simpson Decl.), but Appellants do not establish that members of the general public, other than Mr. Wheat, regularly used the access road. More importantly, and unlike the property owner in *Seeholzer*, Fairwood HOA had a clearly placed "No Trespassing" sign on the east gate and the road was gated at both ends. The HOA did not provide amenities (such as trash cans) to people using the access road and in fact made efforts to keep people *off* the access road (e.g., using rocks to block path around east gate, Mr. Allen telling a lost driver that the park was private and attempting to shut the gate). In other words, no conflicting evidence as to the HOA's position exists and reasonable minds could not differ that Fairwood HOA intended to withhold consent to Mr. Wheat and did not expressly or impliedly invite Mr. Wheat to use the driveway. Accordingly, as a matter of law, Mr. Wheat was a trespasser, not a licensee.

**3. *Mr. Wheat Was Not an Implied Invitee.***

Appellants do not argue that Mr. Wheat was an invitee. Appellants, however, argue that Mr. Wheat was an implied invitee on the HOA's property under two theories: (1) under Restatement § 367, Mr. Wheat was an implied invitee by virtue of the private road having the appearance of a public highway, and (2) under the constant trespasser (or similar) doctrine,

Mr. Wheat was an implied invitee by the alleged public use of the access road. Both arguments fail as a matter of law.

a. **Mr. Wheat was not an implied invitee on the access road because the access road could not be mistaken for a public highway.**

Appellants argue that the trial court failed to apply a limited exception to a landowner's duty to trespassers that requires the owners of private roads to exercise reasonable care when the owner "knows or should know that others will reasonably believe [the private road] to be a public highway." RESTATEMENT (SECOND) OF TORTS § 367. This rule does not apply in this case because no reasonable person could believe that the access road was a public highway.

Restatement § 367 represents a *limited* exception to the general rules governing duties owed to trespassers. *See, e.g., Bosiljevac v. Ready Mixed Concrete Co.*, 153 N.W.2d 864, 867 (Neb. 1967) (noting that Restatement § 367 has its "limitations and in instances where the possessor of the land erects a barricade which is readily observable or posts notices indicating the nature of the private way, such rules are not applicable."). Two Washington cases address how the § 367 exception is applied and are instructive. *See Zuniga*, 82 Wn. App. 12 (*holding* § 367 exception does not apply); *Rogers v. Bray*, 16 Wn. App. 494, 557 P.2d 28 (1976) (*holding* § 367 exception does apply).

In *Zuniga*, a truck pulling out of a drug store loading bay inadvertently ran over the leg of a homeless man who was sleeping in the loading bay. 82 Wn. App. at 13. The homeless man sued the drug store and urged the court to apply § 367 to conclude that the drug store owed him a duty of care because he reasonably believed that the loading bay was a public highway. *Id.* at 15. The trial court granted summary judgment in favor of the drug store. *Id.* at 13. The Court of Appeals affirmed, noting that no reasonable person could find that the loading bay was a public roadway due to the fact that the bay was covered by an overhanging building and the entrance was partially obstructed by two concrete pillars. *Id.* at 15. The Court of Appeals further noted that the plaintiff admitted that he knew the area was not a public street; he testified that the area “look[ed] like a work area;” and, he slept there because it was “not out in the streets.” *Id.*

In *Rogers*, the Court of Appeals reached a contrary result based on the unique facts of the case. In that case, a motorcyclist was injured when, while driving on a private driveway, he struck a chain hung across the road by the road’s owner. 16 Wn. App. at 495. This chain was hung 150 feet from the spot where the driveway branched off from Red Marble

Road<sup>3</sup>. *Id.* From the intersection of the two roads, the driveway appeared well used and no signage or chains were visible. *Id.* The owner had posted no trespassing signs on the chain and on one of the trees supporting the chain, but no signs alerted a driver on Red Marble Road that the intersecting driveway was private property. *Id.* at 495. The Court of Appeals found summary judgment inappropriate in that case because the road's owner knew that motorcyclists used Red Marble Road, the private road appeared well used, and there was no sign warning travelers that the private road was not for public use. *Id.* Under these facts, the Court of Appeals found that reasonable minds could infer that the motorcyclist was "negligently misled into believing that he was traveling on a road commonly used by the public." *Id.* at 495-96.

In the case at bar, as in *Zuniga*, reasonable minds could not differ that Fairwood HOA's access road cannot be confused with a public highway. According to Mr. Wheat's widow, Mr. Wheat had passed the east gate and the sign many, perhaps upwards of 400, times. CP at 89 (T. Wheat Dep.). Further, prior to his death, Mr. Wheat maintained a gate identical to Fairwood HOA's east gate at his place of business. (CP at 87,

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<sup>3</sup> Red Marble Road was a private road, but the owners did not dispute that it was used by the general public. *Rogers*, 16 Wn. App. at 494. For all intents and purposes, Red Marble Road was a public highway.

142 (T. Wheat Dep.)) One can only assume that Mr. Wheat did not consider his driveway to his private business a public highway. It is beyond dispute that Mr. Wheat understood that the driveway was private property and this understanding is similar to the admissions of the plaintiff in *Zuniga* (i.e., that he knew the loading dock was not a public highway). And, just as the structure of the loading dock in *Zuniga* suggested that it was not a public highway, the characteristics of the Fairwood HOA's access road overwhelmingly suggest that it was not a public highway. These characteristics include:

- The driveway is gated on both its east and west ends. (CP at 69 (Crites Dep.); CP at 511-12 (Allen Decl.))
- Through the west gate, Fairwood HOA's driveway connects to a private road for access to another private development and to the back entrance of the Spokane Country Club. CP at 512 (Allen Decl.).
- On the east gate, there is a sign that states "No Trespassing" and "Private Property." CP at 511 (Allen Decl.).
- To access the driveway, a person has to go up a driveway curb and across a sidewalk on Fairwood Drive; and it appears you are going into a private residence driveway. *Id.*
- Rocks were placed around the north end of the east gate to discourage people from going around the gate. *Id.*

- The access road is narrower than the public streets within the Fairwood neighborhood. *Id.*; *see also* CP at 69 (Crites Dep.).
- There are no driveways or mailboxes located along the access road as with public streets in the neighborhood. CP at 511 (Allen Decl.).
- There are no sidewalks or curbs along the access road as with public streets in the neighborhood. CP at 512 (Allen Decl.).
- There are two speed bumps located on the access road prior to reaching the striped parking lot. *Id.*
- There is no stop sign located at either end of the access road. *Id.*
- The road does not have a name. CP at 48 (Allen Dep.); CP at 60 (Walker Dep.); CP at 69 (Crites Dep.).

In this case, as in *Zuniga*, no person could reasonably believe that the access road was a public roadway.

This case is distinguishable from *Rogers*. In *Rogers*, the court identified the absence of a sign marking the road as private property as a key factor in showing the existence of questions of fact. Further significant in *Rogers* was the fact that when a motorist driving along Red Marble Road approached the turn off to the private driveway, nothing would notify the motorist that the private road was private. The private road in *Rogers* appeared “well used” and no chain or sign was visible at the

intersection of the two roads. Here, however, the access road was gated at both ends, was clearly marked as private property, and possessed other characteristics suggesting it was not a public highway. *See supra*. Unlike *Rogers*, no reasonable person would be confused or “misled” into believing that Fairwood HOA’s driveway was a public road, as it has none of the characteristics of a public highway.

Appellants argue that 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 . . . was an extension of that public road, or was otherwise available for use by members of the public.” App. Br. at 27. Appellants observe that the gates being open implied an invitation and that language contained on the sign affixed to the east gate could be interpreted to mean that the access road was open to the public during the season when the pool was open. *Id.* at 27-28. But these arguments ignore the physical characteristics of the access road that distinguish it from a public highway. Moreover, the fact that the gate was open and that certain language on the sign can be construed to create a limited invitation in certain circumstances (i.e., when the park is “open” or in “season”) does not show a manifestation on the part of the HOA to invite Mr. Wheat or the general public onto its property. *See, e.g., State v. Poulos*, 942 P.2d 901, 903-04 (Or. 1997) (affirming trial court’s suppression of evidence of an unlawful

search and rejecting prosecutor's argument that signs exhibited on defendant's property (stating, inter alia, "No Trespassing," "No Hunting," and "Guard Dog") could be construed in ways that would not have prohibited entry); *State v. Christensen*, 953 P.2d 583, 587 (Idaho 1998) ("[C]itizens . . . should not have to convert the areas around their homes into the modern equivalent of a medieval fortress in order to prevent uninvited entry by the public.").

Appellants cite a number of cases from jurisdictions outside Washington in support of their argument that there are questions of fact as to whether Fairwood HOA impliedly invited Mr. Wheat to use its private road because the access road appeared to be a public highway. The cited cases are distinguishable.

In *Lucier v. Merident-Wallingford Sand & Stone Co.*, 216 A.2d 818 (Conn. 1966), a gravel plant operator maintained a rusty cable across a private roadway leading to the gravel plant. At its lowest point, the chain was approximately two feet above the surface of the road. *Id.* at 821. A "grimy metal plate" was attached to the chain. *Id.* The surrounding brush was the same color as the rusty chain. *Id.* There were no other warning signs posted to alert persons that the road was private, although there was a "Private Property" sign about nine or ten feet from the road on an adjoining piece of land not owned by the gravel operator. *Id.* at 822. In

contrast, in this case, the HOA's east gate is made of thick steel bars (not a rusty chain that blends in with its surroundings) and there are at least three signs affixed to the east gate, one of which states, inter alia, "No Trespassing."

In *Reider v. City of Spring Lake Park*, 480 N.W.2d 662 (Minn. Ct. App. 1992), a church placed an earthen berm across its private road. No signs indicated the road was private property and the road had the appearance of being a public road. *Id.* at 667. The church also "knew that motorists were repeatedly misled to believe the road was public." *Id.* Moreover, the private roadway had "no physical barriers" or other obvious materials such as lights or colored reflectors to warn of the berm. *Id.* Again, in this case, the characteristics of the HOA's access road distinguish it from a public highway, the east gate is marked with at least three signs, and the HOA did not have prior knowledge of non-HOA members using the road.

In *Carroll v. Lily Cache Builders, Inc.*, 392 N.E.2d 986, 987 (Ill. App. 1979), the plaintiff broke her ankle while traversing a cul-de-sac that had been left unfinished and the developer's heavy trucks used the cul-de-sac to reach other construction sites. In that case, the cul-de-sac would have been a public highway if it had been complete. But because it was unfinished and still used by the developer, the Illinois court found that

“logic and justice” dictated that the cul-de-sac was a private road that appeared open to the public and, thus, the case fell within the ambit of Restatement § 367. The facts of *Carroll* are entirely distinct from the facts of this case.

In sum, the rule set forth in Restatement § 367 does not apply in the instant case because Appellants cannot show that Mr. Wheat “reasonably believe[ed] [the private road] to be a public highway.” Accordingly, the Court should find that Mr. Wheat was a trespasser and that Fairwood HOA only owed him a duty to avoid willfully and wantonly injuring him.

**b. The fact that people, and possibly members of the public, used the access road does not change Mr. Wheat’s status and the Court should reject Appellants’ argument to apply the constant trespasser (or similar) doctrine.**

Appellants argue that 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.” App. Br. at 25. Appellants’ argument seems to be that, given anecdotal evidence of the public use of the access road, Mr. Wheat was an invitee on the HOA’s access road by the HOA’s implied invitation. *Id.* at 25-26 (citing, inter alia, *Hanson v. Spokane Valley Land & Water Co.*, 58 Wash. 6, 10-11, 107 P. 863 (1910)). This argument is similar to

Appellants' argument for the application of Restatement § 367 except that Appellants seek to establish an implied invitation through a history of public use, rather than the access road's appearance as a public highway. To the extent that Appellants ask the Court to apply the constant trespasser (or similar) doctrine, the Court should decline this invitation for the following reasons.

First, Washington appellate courts have refused to adopt the constant trespasser doctrine because doing so would "blur" the lines of the common law distinctions between invitee, licensee, and trespasser. *Sikking v. Nat'l R.R. Passenger Corp.*, 52 Wn. App. 246, 249–50, 758 P.2d 1003 (1988) (citing *Younce v. Ferguson*, 106 Wn.2d 658, 724 P.2d 991 (1986)).

Second, even if Washington followed the constant trespasser doctrine, the doctrine would not apply to this case. The RESTATEMENT (SECOND) OF TORTS § 334, articulating the constant trespasser doctrine, states:

A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an **activity** involving a risk of **death or serious bodily harm** with reasonable care for their safety.

(Emphasis added.) RESTATEMENT § 334 comments and case annotations make clear that the rule is only applied when the land owner is carrying on

an activity involving a risk of death or serious injury, such as operating a railroad or high voltage electricity. *E.g.*, RESTATEMENT § 334, Cmt. b. *Cf. Burgess v. State*, 74 A.3d 581, 591 (Conn. Super. Ct. 2012) (state park not liable for plaintiff's injuries from jumping off cliffs because the park was not carrying on any highly dangerous activities). In this case, the HOA was not carrying on any activities on its private property similar to operating a railroad or high voltage electricity that presented a risk of death or serious bodily injury.

Moreover, none of the cases cited by Appellants in support of their implied-invitation-through-public-use/constant-trespasser-doctrine argument presents circumstances similar to this case.

*Hanson* involved “a well-defined and traveled public road,” which the public travelled upon “generally, constantly, and daily.” 58 Wash. at 7. In that case, the landowner did more than acquiesce to the public's use—the court found that public use was “the intention or design for which was the way was adapted or allowed to be used.” *Id.* at 8. The circumstances in the instant case are dramatically different. Here, the access road is meant to be used by HOA owners, not the general public. This was made obvious by the gates, the “No Trespassing” sign on the gate and the rocks placed on either side of the gate. Appellants presented anecdotal evidence that pedestrians, bicyclists, and even cross-country teams used the access road.

*E.g.*, CP at 299-300 (Simpson Decl.). But Appellants put forth no evidence that these individuals were not members of the HOA or guests of such members. Thus, this is no evidence of “general, constant, and daily” *public* use as was the case in *Hanson*. The HOA never intended, and in fact actively discouraged, public use.

Appellants’ reliance on *West v. Shaw*, 61 Wash. 227, 113 P. 243 (1910) and *Gasch v. Rounds*, 93 Wash. 317, 160 P. 962 (1916) does not advance Appellants’ argument as both cases reversed judgments in favor of the plaintiff-trespasser.

*West* involved an injury that occurred on property that the owner had enclosed with a fence, and after the owner may have ordered certain people to keep off his property and posted certain signs that were torn down. 61 Wash. at 227-28. In that case, the jury returned a verdict for the plaintiff, but the Washington Supreme Court reversed finding that the trial court did not properly instruct the jury on whether the owner had revoked any implied permission to enter his land. *Id.* at 228-30. *West* does not mandate reversal of the dismissal of the case at bar. There were also questions of fact in *West* that precluded dismissal as a matter of law, including the extent of the owner’s actions to keep people off his property.

In *Gasch*, the plaintiff was injured when, in seeking to purchase light fixtures from a tenant of the defendant, he fell into a hole that was

part of a new addition to defendant's building. 93 Wash. at 319. The jury returned a verdict for the plaintiff, but the Washington Supreme Court reversed. As the plaintiff entered defendant's property for business purposes, the Washington Supreme Court applied rules that were unique to a person's entry onto the land of another "for a purpose connected with the business in which the occupant is engaged." *Id.* at 321. The Court found that the plaintiff had no business purpose for entering defendant's building, and, thus, was a trespasser. And because defendant did not act wantonly or willfully in bringing about the plaintiff's injuries, the Court reversed the judgment and dismissed plaintiff's case. *Id.* at 323-24. In the instant case, Mr. Wheat did not enter the HOA's private property for business purposes. Thus, *Gasch* is largely inapposite, and frankly, is a prime example of how summary judgment is appropriate when, viewing the facts in the light most favorable to the plaintiff, reasonable minds could not differ that the plaintiff was a trespasser.

In sum, the HOA did not impliedly invite Mr. Wheat onto its access road. That occasional members of the general public may have used the road is not evidence that the HOA intended or designed the access road to be used by the public. No implied invitation existed to change Mr. Wheat's status as a trespasser under the constant trespasser (or similar) doctrine.

**B. The HOA Did Not Breach a Duty Owed to Mr. Wheat Either as a Trespasser or Licensee.**

Appellants argue that there are genuine issues of material fact regarding whether the HOA breached a duty to Mr. Wheat. App. Br. at 33-37. Appellants make three arguments corresponding to Mr. Wheat's status as (1) an implied invitee based on Restatement § 367 or the constant trespasser (or similar) doctrine, (2) a licensee, and (3) a trespasser. However, the HOA did not owe a duty of reasonable care because neither Restatement § 367 nor the constant trespasser (or similar) doctrine applies. Moreover, reasonable minds could not differ that the HOA did not breach the lower duties owed to trespassers and licensees.

**1. *The HOA Did Not Act Willfully and Wantonly.***

A landowner's *only* duty to trespassers is to avoid willfully or wantonly injuring them. *Zuniga*, 82 Wn. App. at 13-14. "Whether the doctrine of wanton misconduct applies is initially a question of law for the court. Each case must be viewed on its own facts." *Johnson v. Schafer*, 110 Wn.2d 546, 548, 756 P.2d 134 (1988). "Wanton misconduct is not negligence, since *it involves intent rather than inadvertence*, and is positive rather than negative." *Id.* at 549 (internal quotation omitted, emphasis in original). "It is the intentional doing of an act, or intentional failure to do an act, *in reckless disregard of the consequences*, and under such surrounding circumstances and conditions that a reasonable man

would know, or have reason to know, that such conduct would, *in a high degree of probability*, result in substantial harm to another.” *Id.* (internal quotations omitted, emphasis in original).

Appellants claim that there is an issue of fact as to whether the HOA acted willfully and wantonly in bringing about Mr. Wheat’s injuries. App. Br. at 36-37. Appellants assert the following as evidence of Fairwood HOA’s allegedly wanton misconduct:

- “A County employee opened the County’s lock and left it so that it could not be locked by the HOA,” App. Br. at 36;
- “The HOA did not obtain a key from the County, and so the HOA failed to ensure that the gates would be locked shut,” *id.*;
- “[HOA President Allen] knew the gates were unlocked shortly before the accident occurred,” *id.*

Appellants’ evidence is woefully lacking. None of Appellants’ evidence shows intent or positive conduct on the part of Fairwood HOA. Appellants provide no evidence that Fairwood HOA intentionally did an act or intentionally failed to do an act regarding the east gate in reckless disregard for the consequences. Further, Appellants charge Mr. Allen with knowledge that the gates were unlocked on the night of the incident. But Appellants offer no evidence that Mr. Allen or Fairwood HOA knew “with

a high degree of probability” that the east gate’s condition could result in death or serious bodily injury. Fairwood HOA had no knowledge of other incidents or accidents involving the gates, much less knowledge to “a high degree of probability” that the gates could cause substantial harm. *See* CP at 513 (Allen Decl.). Here, it is a stretch to infer from Appellants’ evidence that that Fairwood HOA acted negligently. And wanton misconduct involves a showing *beyond* negligence because “*it involves intent rather than inadvertence, and is positive rather than negative.*” *Johnson*, 110 Wn.2d at 549.

Plaintiffs cite to *Evans v. Miller*, 8 Wn. App. 364, 368, 507 P.2d 887 (1973), App. Br. at 36, a case in which the Court of Appeals found that there was insufficient evidence presented to determine whether a landowner acted wantonly. In *Evans*, a motorcyclist was injured when, while driving on a private road, he struck a cable strung across the road. *Id.* at 365. The case went to trial but the trial court dismissed the action at the close of evidence. *Id.* One of the issues on appeal was whether plaintiff had put forth enough evidence to show that the landowner had acted wantonly. *Id.* at 365. The court of appeals reversed the dismissal of the case because the record was unclear whether the landowner act wantonly. *Id.* at 368. In providing instructions for the retrial of the case, the Court of Appeals noted that the fact that the cable was dirty, rust colored, and

blended into the surrounding terrain, as well as the landowner's knowledge of an earlier motorcycle accident with the same cable, *might* constitute evidence of wanton misconduct. *Id.* at 368-69.

This case is distinguishable from *Evans*. The facts of *Evans* are extreme. The case involved a partially concealed cable strung across the road at neck height. Moreover, the landowner knew of a previous accident involving the cable. The facts in this case are not extreme. Fairwood HOA's east gate is not concealed: it is made of thick metal bars and has at least three signs attached to it, two of which are readily visible when using the driveway regardless of whether the gates are open or shut. Moreover, Mr. Wheat had driven by the gate no fewer than 400 times and was well aware of the gate. Ironically, Mr. Wheat had a similar gate at the entrance of his place of business. Finally, Fairwood HOA knew of no other accidents involving the gate. In these circumstances, reasonable minds cannot differ that Fairwood HOA's conduct was not wanton.

Whether Fairwood HOA acted wantonly is an issue of law for the court to decide. *Johnson*, 110 Wn.2d at 548. Viewing the evidence in the light most favorable to Plaintiffs, reasonable minds could not differ that Fairwood HOA did not act wantonly because the HOA took no intentional or positive actions to harm Mr. Wheat and had no knowledge, to a high degree of probability, that the gate posed a risk of substantial bodily harm.

**2. *The HOA Did Not Breach a Duty to Mr. Wheat as a Licensee.***

A licensee must prove three elements to prove that a possessor of land breached his duty of care: (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. *Meml v. Reimer*, 85 Wn.2d 685, 689, 538 P.2d 517 (1975) (*citing* RESTATEMENT (SECOND) OF TORTS § 342, at 210 (1965)). A landowner “will be held liable only if [all three] elements are met.” *Anderson v. Weslo, Inc.*, 79 Wn. App. 829, 835, 906 P.2d 336 (1995).

Even assuming for purposes of analysis only that Mr. Wheat was a licensee, Fairwood HOA did not, as a matter of law, breach a duty to Mr. Wheat as Appellants cannot meet the first and third elements of the Restatement § 342 test.

Regarding the first element, the HOA did not have reason to know of a dangerous condition that was not reasonably discoverable to Mr. Wheat. The east gate is not a hidden danger. *See, e.g., Gaboury v. Ireland Road Grace Brethren, Inc.*, 446 N.E.2d 1310, 1315 (Ind. 1983)

(“The closing of a driveway by a cable, a gate, or other form of obstruction is not so unusual a situation in our society that it can be considered a dangerous or hazardous condition . . .”). To the contrary, in this case, the gate was open and obvious and Mr. Wheat had driven past the gate hundreds of times. Indeed, Mr. Wheat had a substantially similar gate at his place of business.

Regarding the third element, the HOA had no knowledge that the gate posed a danger to users of the access road. It is undisputed that neither Mr. Allen nor Fairwood HOA knew of any reports concerning incidents or accidents involving the east gate. *See* CP at 513 (Allen Decl.). The HOA did not know, or have reason to know, of a condition with the gate that involved risk to others.

In sum, because the gate was not a hidden danger and because Fairwood HOA had no actual or constructive knowledge that the gate was dangerous, as a matter of law, Fairwood HOA did not breach a duty owed to Mr. Wheat as a licensee.

Appellants rely on *Thomas v. Hous. Auth. of City of Bremerton*, 71 Wn.2d 69, 426 P.2d 836 (1967) for the proposition that a defendant is liable for maintaining a hazardous condition when a general type of danger is reasonably foreseeable. App. Br. at 34-35. However, *Thomas* does not apply. First, *Thomas* was not a premises liability case. Plaintiffs

were not licensees, but rather tenants in defendants' apartment building (presumably, invitees). Appellants do not address how *Thompson* applies to the instant case. Even if *Thompson* did touch on the landowner-licensee issue, the case is distinguishable. *Thomas* involved a water boiler set to heat the water to maximum temperature in an apartment complex filled with children. Defendant had numerous technicians service the boiler and none made any effort to adjust the water temperature. The case at bar does not involve an open and obvious hazardous condition.

Appellants further cite to an unpublished Louisiana case, *Plaia v. Stewart Enterprises, Inc.*, 2016 WL 6246912 (La. Ct. App. Oct. 26, 2016), for the proposition that Mr. Wheat's accident was reasonably foreseeable. Like *Thomas*, the *Plaia* case did not address breach of a duty to a licensee or the Restatement § 342 rule. *Plaia* does not apply to the case at bar and is clearly distinguishable. In that case, the plaintiff was injured when picking up her child from preschool (presumably, the plaintiff was an invitee). Moreover, there was ample evidence that the defendant knew that the gate was dangerous. Before the plaintiff's injury, a similar incident had occurred approximately six years earlier, at which point the defendants took steps to secure the gate while it was in its opened position. *Id.* at \*2. Moreover, there were many issues on appeal in *Plaia*, but none involved defendants' breach of a duty. The excerpt Appellants cited in Appellants'

Opening Brief at pages 35-36 comes from the Court's discussion of a disputed award of attorney fees. *Id.* at \*15. Accordingly, any discussion in *Plaia* touching on defendants' liability for maintaining the gate responsible for the plaintiff's injuries is dicta.

*Thomas* and *Plaia* do not support that the HOA breached a duty to Mr. Wheat as a licensee. Those cases do not apply the rule that Washington courts apply in these circumstances, which is set forth in Restatement § 342, and are further distinguishable on their facts and on the issues that were subject to appeal. Here, the parties agree that the three element Restatement § 342 test applies. *See* App. Br. at 34. Therefore, it is unclear why Appellants seek to blur the lines of this test by using reasonable foreseeability as a deciding factor regarding whether the HOA breached its duty to Mr. Wheat as a licensee. This is not the law of Washington and this Court should reject Appellants' attempt to interject vague general negligence principles into a premises liability action. *See Younce v. Ferguson*, 106 Wn.2d 658, 666, 724 P.2d 991 (1986) (emphatically rejecting argument to reject common law classifications of trespasser, licensee, and invitee, and noting that the Court was "not ready to abandon [classifications] for a standard with no contours."). The trial court did not err in finding that, as a matter of law, the HOA did not breach a duty owed to Mr. Wheat as a licensee. This Court should affirm.

C. **Factual Questions Regarding Proximate Cause Do Not Justify a Trial; Appellants' Claim Fails Because the HOA Did Not Breach a Duty Owed to Mr. Wheat.**

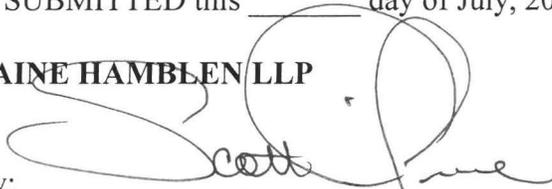
The Court need not consider Appellants' argument that there are genuine issues of material fact regarding the proximate cause of Mr. Wheat's injuries. "Summary judgment in favor of the defendant is proper if the plaintiff fails to make a prima facie case concerning an essential element of his or her claim." *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001). At summary judgment, the HOA did not make an argument as to proximate cause. The trial court also did not reach the issue of proximate cause because Appellants could not establish the breach of a duty owed. *See Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 68, 1 P.3d 1167 (2000) ("Principles of judicial restraint dictate that if resolution of an issue effectively disposes of a case, [the Court] should resolve the case on that basis without reaching any other issues that might be presented.") (Internal quotation marks omitted). This Court should affirm on the same basis.

**VI. CONCLUSION**

For all of the reasons discussed herein, Fairwood HOA respectfully requests that this Court affirm the trial court's order granting summary judgment and dismissing Plaintiff's action.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of July, 2017.

**PAINE HAMBLEN LLP**

By:  \_\_\_\_\_

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## DECLARATION OF SERVICE

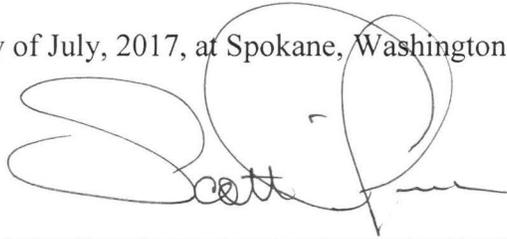
The undersigned declares under penalty of perjury under the laws of the State of Washington that a true and accurate copy of the document to which this declaration is affixed was sent via regular mail, postage prepaid, on this day, to:

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Dated this 21<sup>st</sup> day of July, 2017, at Spokane, Washington.

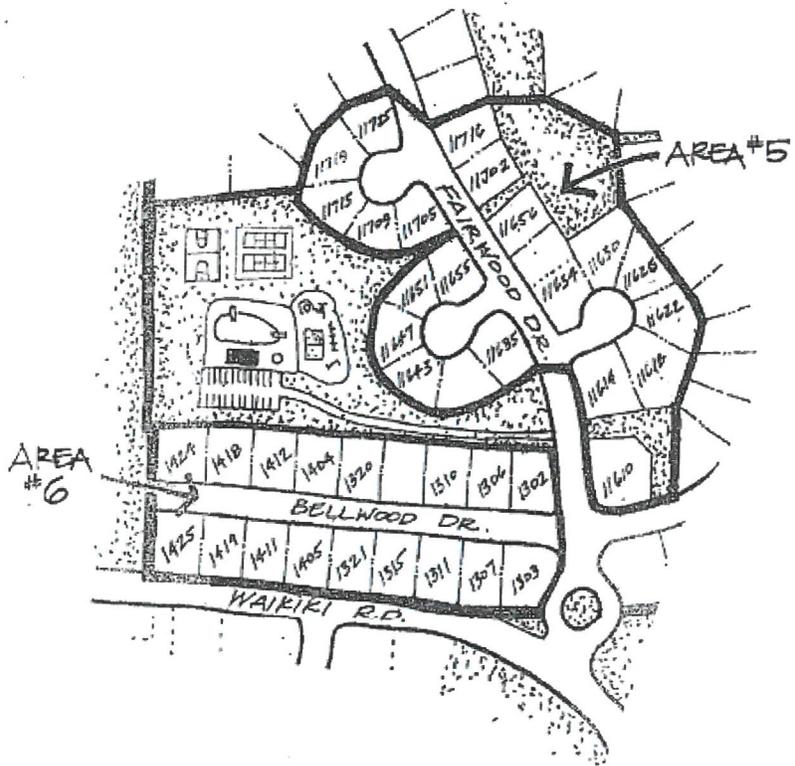
A handwritten signature in black ink, appearing to read "Scott C. Cifrese", written over a horizontal line.

Scott C. Cifrese

# APPENDIX

# Fairwood Park

Areas 5 and 6



CP at 57.



CP at 97 (east gate, viewed from outside).



CP at 98 (locking sleeve on east gate).



CP at 90.



CP at 97 (west gate, viewed from outside).