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

NO. 350479-III

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

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

Plaintiffs/Appellants,

vs.

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

Defendants/Respondents.

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**BRIEF OF RESPONDENT SPOKANE COUNTY**

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## **I. INTRODUCTION**

This case arises from an unfortunate accident where David N. Wheat ran his golf cart into a gate located at the entrance of a private park owned by the Fairwood Homeowners' Association. Mr. Wheat had just used the HOA Park as a cut-through on his way back from the Spokane Country Club. His purpose in doing so was to avoid a busy public street which led to the main entrance of the Country Club.

Mr. Wheat was not a member of the HOA and did not have permission to be in the Park. The private driveway to the Park was gated on both ends and there was a sign posted on the very gate Mr. Wheat struck, informing persons that the HOA Park was "private property" for "homeowners only" and that trespassers were prohibited. The trial court properly concluded that Mr. Wheat was a trespasser and that Spokane County—which had an easement in the park for purposes of operating a wastewater pump station—did not breach its duty to avoid willful or wanton infliction of injury.

Alternatively, the County breached no duty toward Mr. Wheat even if he were a licensee. The trial court correctly concluded that the landowner could expect that Mr. Wheat would discover the gate and its characteristics when the gate was readily observable, Mr. Wheat had gone

through the area hundreds of times before without permission, and in fact had the same type of gate at an insurance brokerage he owned and frequented. The court of appeals should affirm summary judgment in favor of the County on appeal.

**II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- A. Did the trial err in granting the County's motion for summary judgment, where Mr. Wheat was a trespasser and Spokane County breached no duty to avoid willful or wanton infliction of injury? (No.)
- B. Did the trial court abuse its discretion in denying the Estate's motion for reconsideration, including on a new theory of liability which the Estate had not previously briefed and supported? (No.)

**III. STATEMENT OF THE CASE**

**A. Undisputed facts**

Mr. Wheat was fatally injured on May 17, 2014, when he drove his street-legal golf cart into the arm of a gate located on private property owned by the Fairwood Park Homeowners Association. CP 115-16, 150, 222, 226. The gate was at the entrance to a park which contained a swimming pool and other amenities paid for by the HOA residents and

intended for their use only. CP 183-85, 204, 217-18, 223-25. Mr. Wheat had cut through this park on his way back from the Spokane Country Club (now the Kalispel Golf and Country Club), where he had golfed earlier that day. CP 150-51, 155-57. Mr. Wheat was not a member of the HOA and did not have permission to go through the park. CP 123, 148, 161.

The same arm of the same gate that Mr. Wheat struck had a sign on it informing persons that the HOA Park was “**PRIVATE PROPERTY**” intended for “**HOMEOWNERS ONLY,**” and that trespassing was prohibited. CP 163-65, 178, 194, 207-08. This double-sided sign was visible to persons from inside and outside the park and when the gate was open or closed. CP 215-16, 222, 226.<sup>1</sup>

It was apparently Mr. Wheat’s practice to drive his street-legal golf cart from his residence at the Wandermere golf course (located a few miles north) to the Spokane Country Club three or four times per week for two or three years prior to the accident. CP 116-29, 134-35, 138-39, 144-48, 152-55, 156-61, 167-170, 171-75. Each time he would drive south down a public street, Mill Road, and then cut through the HOA Park to avoid a busy east-west public street with a narrow shoulder, Waikiki Road. *Id.* Mr. Wheat would then retrace this same path home. *Id.*

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<sup>1</sup> See appendix for color copies of relevant photographs.

Mr. Wheat had driven past the “no trespassing” sign hundreds of time since acquiring the street-legal golf cart. CP 173-75. He would do this from spring to fall, including times when the park and pool were closed for the season and the gates would have been closed and locked. CP 158-59, 186-87. Mr. Wheat’s wife, plaintiff-below Tena Wheat, accompanied Mr. Wheat on a few of these journeys and testified that she knew the park was private property. CP 158, 161. Mr. Wheat never approached the HOA to ask for permission to go through the park. CP 127, 149, 159, 168-69, 177.

The night before the accident, the president of the HOA, Rob Allen, had observed some people in the park who did not appear to belong there and asked them to leave. CP 195-97. Mr. Allen closed the gates behind them. *Id.* While Mr. Allen could and did close the gates, he could not lock them shut. CP 186-87, 195-201, 217. There was a dual-locking mechanism on the gate with separate locks for the HOA and Spokane County. *Id.* The County’s lock had been placed such that the gate could not be locked from the HOA’s side. *Id.* Once the gate was closed, it would remain closed until pushed open. CP 217. Mr. Allen analogized his action the night before to closing the door to one’s house but not locking it. *Id.*

Mr. Wheat had driven through the HOA Park earlier on the same day of the accident and golfed a round of golf at the Country Club. CP 150-51, 155-57, 169-70. There is no evidence that anyone else, including anyone from Spokane County, opened the gates that day. CP 170, 200, 214-15.

The County had a permanent, exclusive easement in the HOA Park for the purposes of constructing and maintaining a wastewater pump station. CP 238. The pump station serviced homes in the Fairwood HOA. CP 229, 238, 390-92. The County had a right of ingress and egress through the gate Mr. Wheat struck. CP 238. There is no evidence that the County built or maintained the gate. CP 61, 204.

The gate Mr. Wheat struck was located at the east end of the HOA Park. The private access driveway leading to the HOA Park ran perpendicular to Fairwood Drive and the gate was back off the public roadway. CP 511, 518. One would go up over a curb and across a sidewalk on Fairwood Drive to get on to the private access driveway. *Id.* There was a bulletin board at the entrance to the park. *Id.* After going through the gate with the “no trespassing” sign,<sup>2</sup> one would go over two speed bumps on a long, curved road before reaching a striped parking lot

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<sup>2</sup> In addition to the “no trespassing” sign, both of the gate posts were adorned with bright yellow “slow, children playing” signs. CP 54, 380.

for the HOA Park's amenities, including a walled-off pool. CP 511-12, 520-24. The private access driveway is narrower than all other roads in the subdivision. CP 511, 518, 524. There are no residential driveways off the private access driveway, no mailboxes, no sidewalks, and no stop sign at either end. CP 511-12. The entire HOA Park was enclosed by fences or abutting private residences. CP 139, 512-13.

The County's pump station was located in the southwest corner of the HOA Park, next to the parking area and on the other side of the park from the gate Mr. Wheat struck. CP 512, 520. Along the south end of the pump station was a short alley which led to another gate on the west end of the park. *Id.* Mr. Wheat would apparently get out of his golf cart and open the man gate at the west end of the park, and then carefully maneuver his golf cart through it. CP 128-29. The man gate opened on to a private road meant to access the Highlands community further to the north. CP 512. Across this private road was the back entrance to the Spokane Country Club which Mr. Wheat would access. *Id.* The gated back entrance to the Country Club had signs on it indicating that the Country Club was private property for club members only and that trespassing was prohibited. CP 512, 528.

The HOA took measures to discourage trespassing over the years. CP 186-193, 196, 203, 211-13, 220-21, 511. Mr. Allen testified that when the HOA learned that persons had been circumventing the east gate, they placed rocks on the side of the gate to discourage this activity. CP 188- 93. The HOA had also become aware of kids going into the park at night through the west gate. The HOA worked with the County to put a lock on the west gate several times, although this lock kept getting cut by unknown persons. CP 211-13. While other people would (of course) use the HOA Park for a variety of recreational purposes, there has been no showing that these people were not members of the HOA or their authorized guests, or that the County would have reason to know or did know that they were not members of the HOA. CP 89, 176.

There is no indication that the configuration of the east gate ever changed during the time that Mr. Wheat would cut through the HOA Park. CP 125, 130-31, 136-137, 162-63. There is also no indication that any other accident ever occurred at the gate. CP 131, 149, 513. Mr. Wheat had a gate at the insurance brokerage that he owned and frequented which was “just like” the gate he hit in the HOA Park. CP 142-43, 146-47.

## **B. Procedural history**

The Estate of Mr. Wheat filed suit against the Fairwood Park HOA and Spokane County, claiming that Mr. Wheat was injured by a hazardous condition upon the land. CP 24-31.<sup>3</sup> Both defendants moved for summary judgment on all claims brought against them. CP 91-109, 239-53. The Estate argued that both defendants could be held liable under premises liability principles. CP 254-276.

The trial court granted the motions for summary judgment on multiple grounds. CP 601-03. The court found that Mr. Wheat was a trespasser and that the defendants had not engaged in willful or wanton misconduct. Alternatively, the court concluded that no duty was breached even if Mr. Wheat were a licensee. CP 579-88. The Estate moved for reconsideration of the Court's order granting summary judgment. CP 589-93, 606-52. The Estate presented new evidence which was previously available to it and argued that Spokane County owed some duty other than one imposed under premises liability principles. *Id.* The trial court entered an order denying reconsideration.

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<sup>3</sup> Mrs. Wheat, Zac Wheat, and Cassidy Wheat also filed suit as individuals but are collectively referred to along with the Estate.

**C. Errors in the Estate's statement of the case**

The Estate's brief contains several errors and statements taken out of any reasonable context. The Estate's assertions should be closely scrutinized on review.

The Estate claims that the trial court never ruled on its motions for reconsideration. This is incorrect. The court considered the Estate's original motion for reconsideration and its amended motion, and denied relief thereon.<sup>4</sup>

The Estate also wrote that the gate was on North Fairwood Drive, a public road. *Appellants' Amended Brief* at 1, 3. But the gate was indisputably on a private access driveway off of Fairwood Drive. One must go up and over a curb and across a sidewalk on Fairwood Drive before reaching the gate on the private access driveway. Similarly, the Estate wrote that the Highlands road bordering the west end of the HOA Park is a public road. *Appellants' Amended Brief* at 5. The record cites provided by the Estate do not support this assertion. *See* CP 327, 387. Rather, the actual evidence is that the Highlands road was a private road and identified as such. CP 512.

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<sup>4</sup> The County has filed a supplemental designation of clerk's papers to reflect these proceedings.

The Estate claims that when Mr. Allen ejected persons from the HOA Park the night before Mr. Wheat's accident, he "tried to close and lock the gate, but could not do so." *Appellants' Amended Brief* at 11. This is misleading. Mr. Allen's testimony was that he could (and did) close the gate but that he could not lock it. CP 186-87, 195-201, 217.

The Estate also claims that a past president of the HOA, Al Hague, testified that people other than Fairwood Park residents would use the roadway. *Appellants' Amended Brief* at 5. The Estate neglects to mention that Mr. Hague continued on to state: "And we kept trying to keep them out because the biggest problem we had was in the – at night, and particularly in the summer, we'd keep those gates locked so that we could keep the kids out of there because there was drug activity. And we were trying to protect the vandalism from the pool area and the recreational area." CP 475.

Moreover, Mr. Hague's testimony was that a particular group of persons were breaking into the area through the west gate and that he tried to have the west gate locked to prevent this (but the locks kept getting cut off), and that he took other measures to discourage trespassing. CP 474-78. Mr. Allen, who had been president of the HOA since 2012, similarly

testified that the HOA did not want trespassers in the park and took measures to keep them out. CP 186-193, 196, 203, 211-13, 220-21.<sup>5</sup>

#### **IV. ARGUMENT**

Mr. Wheat was a trespasser on the land. He was using the private access driveway to the HOA Park without invitation or permission and for his own purposes of cutting through to the Spokane County Club, where he was a member and had golfed earlier that day. The County did not breach its duty to avoid willful or wanton injury by failing to lock the gate.

The Estate raises several strained arguments in an effort to establish a greater duty of care. Mr. Wheat had apparently trespassed through the area on many prior occasions and the Estate claims that others would trespass through the area as well. But Washington has explicitly rejected the “constant trespasser” doctrine and therefore prior incidents of trespassing cannot give rise to a heightened duty of care under the law.

The Estate also claims that Mr. Wheat was negligently led to believe that the private access driveway was a public highway. But Mr. Wheat was using the area as a cut-through specifically to avoid the public streets. Mr. Wheat’s wife, who accompanied him on just a few of his

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<sup>5</sup> The Estate also claims that Mr. Hague testified that County employees often left the east gate unlocked without noting that Mr. Hague goes on to state “but they would come back and lock it, or somebody else would lock it up.” CP 481.

unauthorized trips down the private access road, knew that the HOA Park was a private area. Moreover, the private access driveway was gated on both ends and the very gate which Mr. Wheat struck had a “no trespassing” sign affixed to it which stated that the area was private property intended for homeowners only. Other characteristics of the private access driveway – which ended at a striped parking lot for HOA amenities and the County’s pump station – made it clear that this driveway was not an extension of the public roads. The law is clear that no general duty of reasonable care is owed under these circumstances.

The Estate further claims that Mr. Wheat had implied permission to use the private access driveway. But one does not have implied license to take a private driveway to private amenities which the person is not entitled to use – nor is there an implied permission to use such private driveway as a cut-through on your way to the golf course. And even if an implied license could be found in the first instance, such permission was certainly revoked by the presence of a gate on each end of the private access driveway as well as the “no trespassing,” “private property” sign. Again, the law is clear that an implied license will not be found under such circumstances.

While there is no question that Mr. Wheat was a trespasser, the trial court correctly concluded that even if he was a licensee the defendants breached no duty owed to him. The County could expect that Mr. Wheat would discover the gate and its characteristics, which were plainly there to be seen. No accident has ever been reported at this gate, which had existed in the same form for years prior to the accident. Mr. Wheat went by the gate hundreds of times before and had an identical type of gate at the insurance brokerage that he owned and visited daily.

Finally, the Estate claims that the County should be held to a different standard than those imposed under premises liability. The Estate failed to properly raise and support this argument below and has still failed to show that the County was not a “possessor of land” on appeal. But even if the County were not a possessor of land, the Estate has failed to establish that the County owed Mr. Wheat any duty absent application of premises liability principles. This Court should affirm the rulings of the trial court, which properly dismissed the complaint.

**A. Standard of review**

A trial court’s order on summary judgment is reviewed de novo. *See, e.g., Washington Fed’n of State Emps. v. Office of Fin. Mgmt.*, 121 Wn. 2d 152, 157, 849 P.2d 1201 (1993). Summary judgment is

appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A party opposing summary judgment “may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on affidavits considered at face value.” *Meyer v. Univ. of Washington*, 105 Wn. 2d 847, 852, 719 P.2d 98 (1986).

A trial court’s decision to deny a motion for reconsideration is reviewed for an abuse of discretion. *River House Dev. Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 231, 272 P.2d 289 (2012).

**B. Mr. Wheat was a trespasser upon the land**

Under Washington law, the duty of care owed by a possessor of land is governed by the entrant’s status as an invitee, licensee, or trespasser. *Van Dinter v. City of Kennewick*, 121 Wn. 2d 38, 41, 846 P.2d 522 (1993). Where the material facts are not in dispute, the legal status of the entrant is a question of law. *Ford v. Red Lion Inns*, 67 Wn. App. 766, 769, 840 P.2d 198 (1992).

1. Mr. Wheat was not a member of the HOA, did not have permission to be on the land, and entered the land for his own purpose of using the private access driveway as a cut-through

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.” *Witner v. Mackner*, 68 Wn. 2d 943, 945, 416 P.2d 453 (1966). Washington law continues to recognize the lesser duty owed to trespassers on the land because “even in modern society it is significant that a trespasser does not come upon property under a color of right.” *Younce v. Ferguson*, 106 Wn. 2d 658, 665, 724 P.2d 991 (1986).

The undisputed evidence is that Mr. Wheat’s accident occurred in a private park belonging to the HOA. CP 184-85, 217-18, 224-25. Mr. Wheat was not a member of the HOA, nor had he received permission to cut through its private park. CP 123, 127, 148-49, 159-61, 168-69, 177. Mr. Wheat’s purpose in going through the area was to avoid using a busy public street, Waikiki Road, for his journey to the Spokane Country Club. CP 121, 134-35, 148.<sup>6</sup> Under the undisputed facts of this case, Mr. Wheat was a trespasser upon the land.

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<sup>6</sup> Mr. Wheat could have taken the public road he knew was available, he could have rented a golf cart at the Country Club, he could have golfed without a cart, or he could have obtained and used a trailer to transport his golf cart to the Country Club. CP 120, 153-54, 167-68. He chose to do none of these things and instead used a private area as a cut-through without permission.

2. The fact that Mr. Wheat had previously trespassed through the HOA Park, and that others allegedly did so, cannot elevate his status on the land

In arguing for a great duty of care, the Estate focuses largely on evidence that Mr. Wheat had been through the area before and that there were other instances of trespassers entering the Park. But this cannot give rise to a higher duty of care under Washington law. *Sikking v. Nat'l R.R. Passenger Corp.*, 52 Wn. App. 246, 247-50, 758 P.2d 1003 (1988).

In *Sikking v. Nat'l R.R. Passenger Corp.*, the plaintiff was severely injured while trespassing on the defendant's railroad tracks. *Id.* at 247. The trespasser had entered the property without permission and for the purpose of hopping a train to Seattle. *Id.* The plaintiff claimed that he was owed a duty of reasonable care under the "constant trespasser" doctrine because the railroad defendant knew that transients often entered the land without permission. *Id.* at 248. The court explicitly rejected the constant trespasser doctrine, noting that it had never been adopted in Washington and was contrary to binding precedent. *Id.* at 248-49 (discussing Restatement (Second) of Torts § 334). Thus, the trial court properly granted summary judgment because the defendant owed no duty but to avoid willful or wanton injury to the plaintiff. *Id.* at 246-27. *Sikking* remains good law and the Estate did not challenge it before the trial court or before this Court on appeal.

3. There is no evidence that Mr. Wheat was negligently misled into believing that the private access driveway was a public highway

Under narrow circumstances, the usual rule of limited liability to trespassers does not apply where “the trespasser is negligently led into believing that a private road is a public road.” *Zuniga v. Pay Less Drug Stores*, 82 Wn. App. 12, 15, 917 P.2d 584 (1996) (citing *Johnson v. Schafer*, 47 Wn. App. 405, 408, 735 P.2d 419 (1987) (“*Johnson I*”), *rev’d on other grounds*, 110 Wn. 2d 546, 756 P.2d 134 (1988) (“*Johnson II*”); *Rogers v. Bray*, 16 Wn. App. 494, 557 P.2d 28 (1976)).

In *Zuniga v. Pay Less Drug Stores*, the Washington Court of Appeals found this doctrine inapplicable as a matter of law. 82 Wn. App. 12. In *Zuniga*, the trespasser was hit by a truck and injured while he was sleeping near a loading dock in an alley. *Id.* at 13. The trespasser claimed that the appearance of the loading dock misled him into believe that it was public property. *Id.* at 15. The court rejected this claim, stating that there was no factual basis for applying the rule. *Id.* The trespasser stated that he had gone to sleep at the loading dock precisely because it was “not out in the streets.” *Id.* Thus, the trespasser admitted that he knew the area was not a public street. *Id.*

*Johnson v. Schafer* is also instructive on this issue. There, a fourteen-year old boy was seriously injured and his passenger killed when

their motorcycle struck a cable that was strung across the defendant's road. *Johnson I*, 47 Wn. App. at 406. The pair had turned on to the private road to access a nearby supermarket. *Id.* The plaintiff was not licensed to drive the motorcycle, the motorcycle itself was unlicensed, and the plaintiff and his passenger were trying to reach their destination without traveling on public roads. *Id.* at 409. The plaintiff also admitted that there was nothing about the defendant's road that caused him to believe that he was on a public road and that there were "Private Property" and "No Trespassing" signs posted at the turn-off to the private road. *Id.* at 409-10.

Under these facts, the court of appeals in *Johnson I* concluded that the plaintiff had not been negligently led to believe he was on a public road and was therefore a trespasser. *Id.* The case was later appealed to the Washington Supreme Court, where the plaintiff did not challenge the finding that he was a trespasser. *Johnson II*, 110 Wn. 2d at 548.<sup>7</sup>

As in *Zuniga* and *Johnson I*, there is no evidence that Mr. Wheat actually thought that the private access driveway was a public highway, nor could he have reasonably believed it was a public highway. Mr. Wheat's wife, who occasionally traveled with him in the golf cart, testified

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<sup>7</sup> The court in *Johnson I* concluded that there was nonetheless sufficient evidence to send the question of wanton misconduct to the jury and ordered remand for trial. 47 Wn. App. at 411-12. The Supreme Court reversed this holding and reinstated the trial court's order dismissing the case. *Johnson II*, 110 Wn. 2d at 548-51.

that she knew the area was private property belonging to the HOA. CP 161. And like the plaintiffs in *Zuniga* and *Johnson I*, Mr. Wheat used the private access driveway specifically because he wanted to avoid a public street. CP 121, 134-35, 148.

In addition, there was a “NO TRESPASSING” sign posted on the east gate that Mr. Wheat would have traveled by hundreds of times before. CP 173-75, 178, 207-08, 215-16, 222, 226. Thus, the circumstances are even stronger here than in *Zuniga*, where the court found the rule inapplicable despite the absence of a “no trespassing” sign. 82 Wn. App. at 15.

Moreover, the private access driveway had gates at both the east and west end. CP 146-47, 161, 233-34. In fact, the portion of the west gate through which Mr. Wheat traveled was not large enough to accommodate a vehicle and Mr. Wheat would often need to get out of his golf cart, open that section of the gate, and carefully maneuver his way through before continuing east along the private access driveway. CP 128-29, 233-34. Mr. Wheat was not driving a standard motor vehicle but rather a recreational golf cart which is specifically designed to go areas other than public highways. CP 115-16, 144-45, 153-54. As Mr. Wheat traveled east on his golf cart, he would have gone by the County pump station, a striped

parking lot for the pool and other amenities in the Park, and over two speed bumps as he made his way to the east gate. CP 510-28.

The entire park was bordered by fencing and houses and there had been rocks placed around the east gate to prohibit people from circumventing it. CP 188-93, 510-28. There were no residential driveways off of the private pool access driveway, there were no mailboxes located along the driveway, there were no sidewalks, and there was no stop sign at either end of the private access driveway. CP 510-28. When approaching the private access driveway from the east one had to go up over a curb and sidewalk, and there was an information board posted at the entrance. *Id.* The private access driveway was narrower than the public streets located within the neighborhood. *Id.* The access driveway was bordered to the west by a private road, across which was an entrance to the private Spokane County Club. *Id.* Access to the Country Club was also conspicuously marked with signage informing persons that it was a private area and trespassers were not allowed. *Id.*

The presence of the gates on each end of the HOA Park and the sign on the east gate Mr. Wheat struck were alone sufficient to dispel any possibility that this was a public road. In *Huyck v. Hecla Mining Co.*, 612 P.2d 142 (Idaho 1980), the plaintiff was injured when his motorcycle

struck a barrier along a private roadway. The plaintiff had traveled the road many times before in recent years and there was no indication that the plaintiff believed it to be a private road. *Id.* at 143. In addition, the barrier the plaintiff had struck was readily observable. *Id.* at 144. The court held that the plaintiff was not misled into believing he was on a public highway and affirmed summary judgment in favor of the defendant. *Id.* This was true even though there were no signs indicating that the road was private property. *Id.* at 143. As the court stated:

The rules regarding the existence of an implied invitation, when it is difficult to distinguish a private road or way from a public road, have their 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.

*Id.* at 144 (quoting *Bosiljevac v. Ready Mix Concrete Co.*, 153 N.W.2d 864, 867 (Neb. 1967) (emphasis added).

The Estate relies on *Rogers v. Bray*, 16 Wn. App. 494, in arguing that that the “negligently led to believe it was a public highway” rule should apply. In *Rogers*, the defendant strung a chain across an access road leading to his trailer. *Id.* at 494. The access road branched off of Red Marble Road, which was located in a rural area. *Id.* There were “no trespassing” signs along Red Marble Road but no signs indicating that the trailer access road was a private road. *Id.* at 494-95. In addition, the

plaintiff claimed he had not seen the “no trespassing” signs along Red Marble Road. *Id.* at 495. The plaintiff was proceeding along Red Marble Road on a motorcycle when he turned onto the trailer access road and hit the chain. *Id.* The court found that there was an issue of material fact as to whether the plaintiff was negligently misled into believing that the trailer access road was a public roadway. *Id.* at 495-96. “If [the plaintiff] was misled,” the court noted, “then he was not a trespasser and defendants had the duty to exercise reasonable care . . . .” *Id.* at 496 (emphasis added).<sup>8</sup>

*Rogers* is highly distinguishable from the instant case. First, in *Rogers* there was no indication that the plaintiff knew he was traveling on a private roadway. Indeed, the court in *Rogers* was careful to couch its language in terms of whether the plaintiff could show that he was actually misled at trial. *Id.* at 496; *see also Lin v. Nat’l R.R. Passenger Corp.*, 889 A.2d 798, 803 (Conn. 2006) (rule applies only to those who were “in fact misled”). Second, there is no indication that the plaintiff in *Rogers* had traveled the road hundreds of times before. Third, there is no indication in this case that Mr. Wheat did not see the “no trespassing” sign. Fourth, there is no discussion in *Rogers* of the characteristics of the trailer access

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<sup>8</sup> No Washington case has followed *Rogers v. Bray* since it was decided in 1976, although it was distinguished by *Johnson I*, 47 Wn. App. at 408-10, and *Zuniga*, 82 Wn. App. at 15.

road and whether it was consistent with other public roadways in the area. Fifth, there was no sign in *Rogers* indicating that the trailer access road itself was a private road and in this case the HOA access driveway was clearly marked with a sign saying “No Trespassing,” “Private Property,” and “Homeowners Only.” Finally, there were no readily observable gates in *Rogers* but rather a chain which the plaintiff had not seen and could not have known was there. *See id.* at 494-95.<sup>9</sup> *Rogers* only further establishes that the rule has no application in this case.

4. There is no evidence that Mr. Wheat had implied permission to use the HOA Park, which was gated off on both entrances and marked with a sign stating “no trespassing,” “private property”

The Estate also claims that Mr. Wheat was an implied licensee at the time of his injury. Because Washington courts have specifically rejected the “constant trespasser” doctrine, Mr. Wheat’s previous incidents

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<sup>9</sup> The cases cited by the Estate from other jurisdictions are similarly distinguishable. *See Reider v. City of Spring Lake Park*, 480 N.W.2d 662, 664-65, 667 (Minn. Ct. App. 1992) (plaintiff injured on what he actually believed was a public roadway, which roadway the city used to own, still appeared to be a frontage road, had no signs indicating it was private property, had no physical barriers such as a gate, was the site of prior accidents by people being misled into thinking it was a public road, and traffic engineer and city clerk testified that would reasonably believe it was a public road); *Carroll v. Lily Cache Builders, Inc.*, 392 N.E.2d 986, 987-88 (Ill. App. Ct. 1979) (roadway in new development appeared to be a public roadway but had not yet been turned over to municipality by private developer, which was still building in the area); *Lucier v. Meriden-Wallinford Sand & Stone Co.*, 216 A.2d 818, 821-22 (Conn. 1966) (plaintiff injured by cable strung across private road which extended between two public highways, served as means of access to defendant’s business which was generally open to the public, and there were no signs posted on the defendant’s land indicating that it was private property). *Dotson v. Haddock*, 46 Wn. 2d 52 (1955), also cited by the Estate, has nothing to do with a person injured on a roadway – much less a roadway allegedly appearing to be a public highway.

of trespassing on the HOA Park and alleged instances of others trespassing cannot elevate the duty of care owed. *Sikking*, 52 Wn. App. at 247-50. In addition, the Washington Supreme Court has refused to find implied permission based on a homeowner's alleged acquiescence on prior visits to his property. *Witner*, 68 Wn. 2d at 944-45.

Under Washington law, implied permission to enter the land will not be found in areas that are fenced or gated off, or which contain no trespassing signs. *See Singleton v. Jackson*, 85 Wn. App. 835, 840-42 & n.2, 935 P.2d 644 (1997). In the seminal Washington case on implied permission, *Singleton v. Jackson*, the plaintiff was injured after contacting the occupant at the front door. *Id.* at 838. The defendant claimed that the plaintiff was a trespasser at the time of injury. *Id.* The court of appeals held that a stranger generally has implied permission to approach the front entrance of a residence and attempt to contact the occupant. *Id.* at 840.

However, the court noted that implied permission would not be found where the possessor of land has taken steps to revoke it. *Id.* Importantly, an implied license to enter the land will not be found where there is a "no trespassing" or "no solicitation sign," or where physical barriers such as a gate or fence have been placed in the path. *Id.* at 840, 842; *see also State v. Rose*, 128 Wn. 2d 388, 392, 909 P.2d 280 (1996) (in

absence of a fence or a sign prohibiting entry, police officers had implied consent from homeowner to approach porch of mobile home); Restatement (Second) of Torts § 330 cmt. e (signs and gates will negate any implied permission).

In this case, there were gates on both ends of the private access driveway and a “no trespassing,” “private property” sign on the very gate which Mr. Wheat struck. The park was completely enclosed by fences and private residences. The HOA had put rocks near the east gate in an attempt to discourage trespassers from circumventing the gate and took other measures to keep trespassers out of the park. CP 187-93, 196, 202-03, 211-13, 220-21.

In fact, the entire area was private property—from the Spokane Country Club where Mr. Wheat was a member and had golfed that afternoon, to the HOA Park itself. CP 152, 83-85, 204, 217-28, 224-25, 510-28. It has not been disputed that Mr. Wheat lived in an HOA at the Wandermere golf course and would have known that HOAs contain private amenities paid for by homeowners and intended for homeowners’ use only. CP 116-117, 152-55, 246, 535, 583.

Furthermore, the private access driveway in this case led not to a residence that people may approach to contact the occupant, but to a series

of amenities for Homeowners' use only. There is no evidence that Mr. Wheat thought he had permission to use Park's amenities. In fact, Mr. Wheat's undisputed purpose was to bypass those amenities altogether and use the private access driveway as a cut-through to the Country Club.

Incredibly, the Estate suggests that Mr. Wheat was not a trespasser because, while the HOA had placed rocks around the east gate to prevent access, people could nonetheless walk, bike or ride their golf carts through the rocks. The Estate similarly notes that Mr. Wheat was never forcibly removed from the premises or prosecuted for trespass. It is absurd to suggest that a person loses his right to exclude others from their land simply because steps they have taken to keep people out are sometimes ignored or disrespected. *See Estate of Zimmerman v. Southeastern Penn. Transp. Auth.*, 168 F.3d 680, 686 (3d Cir. 1999) ("failure to take sufficient precautions to prevent people from entering the land" insufficient to find implied consent, especially where landowner took steps to remove unwanted entrants). If Mr. Wheat was circumnavigating the gate and rocks that would only further establish that he knew beyond a shadow of a doubt that he was trespassing on the land.

The Estate relies on an Ohio case, *Seeholzer v. Kellstone, Inc.*, 610 N.E.2d 594 (Ohio Ct. App. 1992). But *Seeholzer* only supports the

County's position. In *Seeholzer* the court found that a plaintiff who was injured on the defendant's road could be an implied licensee because there was a dispute as to whether there were any "no trespassing" signs on the property. *Id.* at 596, 600. In this case, it is undisputed that there was a "no trespassing," "private property" sign which Mr. Wheat would have traveled by hundreds of times before. Moreover, there was not a gate on the roadway in *Seeholzer* but rather an unmarked steel cable that could not readily be seen. 610 N.E.2d at 598. In this case there were two gates which were readily observable and known to Mr. Wheat.

Also in *Seeholzer* there was a dispute as to whether trespassers' use of the property was permitted or tolerated, whereas in this case there is no evidence that the County knew of and acquiesced in non-homeowners' alleged use of the property. Again, the HOA took significant steps to keep trespassers out of its park when it learned of their presence. Finally, there was evidence that the plaintiff in *Seeholzer* believed the property was open to the public, *see* 610 N.E.2d at 596, 600, whereas undisputed evidence in this case is to the contrary. The undisputed facts of this case establish that Mr. Wheat did not have implied permission to use the HOA Park or its private access driveway, was not negligently led to believe he was traveling on a public highway, and was a trespasser upon the land.

**C. Spokane County did not engage in willful or wanton misconduct**

A trespasser enters the premises of another at his peril. *Witner*, 68 Wn. 2d at 945. Generally, a possessor of land “owes no duty to a trespasser, except to refrain from causing willful or wanton injury to him.” *Ochampaugh v. City of Seattle*, 91 Wn. 2d 514, 518, 588 P.2d 1351 (1979). The Court has described wanton misconduct as follows:

Wanton misconduct is not negligence, since it involves intent rather than inadvertence, and is positive rather than negative. 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.

*Johnson II*, 110 Wn. 2d at 549 (emphasis in original). Whether wanton misconduct may be found is initially a question of law. *Id.* at 548.

There is no evidence in this case that the County intentionally did anything in reckless disregard of probable substantial harm to Mr. Wheat. Failing to replace posts that fell into disrepair does not demonstrate intent, although the County did not own or maintain the gate at issue. Accidentally “locking open” a gate (which can still be shut) hardly constitutes wanton disregard of an extreme risk. The gate had existed in

the same form for many years prior to the accident and there is no evidence of other accidents occurring there. CP 131, 149, 205-06.

The Estate generally cites to *Evans v. Miller*, 8 Wn. App. 364, 507 P.2d 887 (1973), without elucidation. *Evans* is highly distinguishable. In that case, a trespasser was injured when he struck a “concealed cable” which was “stretched neck-high” across a private roadway between two trees. *Id.* at 368. Here we have a gate which was there to be seen, including by Mr. Wheat who had apparently been through the area many times before. In *Evans*, the defendant knew trespassing motorcyclists used the road (this was his reason for putting up the wire), *see id.* at 369, but in this case there is no evidence that the County knew of trespassers driving street-legal golf carts through the HOA Park and measures had been taken to prohibit trespassing. *Evans* also involved prior accidents that had occurred at the same place and the court of appeals remanded for determination of whether the defendants knew of the prior accidents. *Id.* at 368-69. Here there is no evidence of any prior accidents at the gate, much less that the County knew of any such accidents. *Evans* involved “graphic notice both that motorcyclists used the road and that the neck-high cable constituted a dangerous condition likely to cause death or seriously bodily injury.” *Johnson II*, 110 Wn. 2d at 550 n.1 (distinguishing *Evans*, 8 Wn.

App. 364). The circumstances of this case are markedly different and could not support a finding of wanton misconduct.

**D. Even if Mr. Wheat was a licensee, Spokane County could have expected that he would discover the gate and its characteristics**

Even if Mr. Wheat was a licensee, Spokane County did not breach any duty owed to him. A possessor of land breaches a duty to a licensee only where:

(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.

*Younce*, 106 Wn. 2d at 667-68 (quoting Restatement (Second) of Torts § 342). Each element must be met to impose liability. *See, e.g., Anderson v. Weslo, Inc.*, 79 Wn. App. 829, 835, 906 P.2d 336 (1995).

This standard “does not impose a duty on the landowner to act as an insurer for the benefit of his licensees.” *Memel v. Reimer*, 85 Wn. 2d 685, 689, 538 P.2d 517 (1975). A landowner is not required to “prepare a safe place, or . . . affirmatively seek out and discover hidden dangers.” *Id.*

The trial court correctly concluded that summary judgment would be appropriate even under the duty of care owed to a licensee. There is no evidence that the County knew the gate was allegedly open and intruding into the roadway; there is no evidence that the County put the gate in this position; and there is no evidence of other accidents or complaints regarding the gate. *See Singleton*, 85 Wn. App. at 843-45 (summary judgment appropriately entered for homeowner did not know of deck's alleged slippery condition and had no recollection of anyone else ever slipping prior to the plaintiff's fall).<sup>10</sup>

But even where an occupier of land has knowledge of a dangerous condition on the land, the occupier will not be held liable unless it should expect that the licensee will not discover the condition or appreciate the risk. *E.g., Thompson v. Katzer*, 86 Wn. App. 280, 289, 936 P.2d 421 (1997). Dismissal is appropriate where a Plaintiff cannot satisfy this element. *See id.* at 289-90 (landowner could expect licensee to discover snow and ice on driveway and appreciate that it is slippery).

*Rock v. Concrete Materials, Inc.*, 362 N.Y.S.2d 258 (N.Y. App. Div. 1974), is directly on point. In that case, a licensee snowmobiler was

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<sup>10</sup> The Estate claims that notice is unnecessary where the defendant created the alleged condition, but the County did not own or maintain the gate that Mr. Wheat struck and there is no evidence that it put the gate in the alleged hazardous position.

killed when he crashed into a gate located on the defendant's private roadway. *Id.* at 259-60. The court affirmed judgment in favor of the defendant, noting that there was no evidence that the gate was a dangerous structure which the snowmobiler could not have discovered for himself. *Id.* at 261-62. The court noted that the gate was not hidden or concealed; that its presence was well-known to snowmobilers; that the decedent had himself snowmobiled in the vicinity of the gate on prior occasions; and that the only known prior accident at the gate involved a snowmobiler who had intentionally tried to drive under it. *Id.* at 261.

A recent unpublished decision from Division III is also directly on point. In *Cardon v. Estate of Bredesen*, the plaintiff was injured when an ATV she was riding fell into a portion of the defendant's road which had previously collapsed. 188 Wn. App. 1037, 2015 WL 4064752 at \*1 (2015) (unpublished opinion). The plaintiff licensee had lived at the defendant's rural home for four months prior to the accident. *Id.* at \*1, 6. This Court affirmed summary judgment because there was no evidence the defendant should have expected that the plaintiff would not discover the condition. *Id.* at \*7-8. The Court noted that the plaintiff was an adult who was experienced in driving the ATV on the property and had used the same driveway many times before the accident occurred. *Id.* at \*7.

In this case, there was no reason for the County to expect that Mr. Wheat would not discover the gate and its characteristics. Mr. Wheat had traveled past the gate along the private access driveway hundreds of times before. CP 173-75. He knew there was a gate there or at the very least the County certainly could have expected him to discover it. In fact, Mr. Wheat passed through the gate earlier that day and there is no known evidence of anyone else opening the gate since the HOA president had closed it the night before. CP 150-51, 155-57, 169-70. Mr. Wheat's son, who traveled through the HOA Park with Mr. Wheat on a few occasions, acknowledged that he could see the gate was there, knew what it looked like, and saw that there were not any posts to hold the gate open. CP 136-37, 162-63. Moreover, the east gate that Mr. Wheat struck was "just like" the gate Mr. Wheat had at his own business which he visited almost every day. CP 142-43, 146-47. Finally, there are no known prior accidents at the gate and the fact that so many people had gone through the gate over the years "stands in the way of any inference" that the County should have known it was not likely to be observed. *See Rock*, 362 N.Y.S.2d at 261.

The estate's reliance on *Plaia v. Stewart Enterprises*, 2016 WL 6246912 (La. Ct. App. 2016), is entirely misplaced. *Plaia* is an unpublished Louisiana case and the court's decision is apparently subject

to revision or withdrawal. More importantly, the issues decided in *Plaia* are irrelevant to this case. *Plaia* centered around how the trial court managed the trial, whether the plaintiff should have been allowed to recover certain damages, and indemnification and contractual lease issues subject to cross-claims between the multiple defendants. *See id.* The portions of the case relied upon by the Estate focus on whether the co-defendants breached lease and indemnification provisions as to each other and not the plaintiff. *See id.* at 12-31. *Plaia* did not deal with any duty owed to the plaintiff under premises liability. *Id.*<sup>11</sup>

*Plaia* is also factually distinguishable. In *Plaia* there was no evidence the plaintiff was a trespasser, that the plaintiff had been through the gate hundreds of times before and knew of its characteristics, or that the plaintiff had an identical type of gate at her own place of business—and there was evidence in *Plaia* that a similar accident had occurred before at the same gate. *Id.* at \*5. There was also evidence about how the particular accident occurred in *Plaia*, including that the gate swung into the road right in front of the plaintiff’s vehicle with no time to observe the precise conditions and react, and that it was landscapers on the defendants’

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<sup>11</sup> The source of any duty owed to the plaintiff in *Plaia* is not clear but may have been predicated on Louisiana Civil Code Article 2317 and 2317.1, applying to injury from “things” in a person’s possession. 2016 WL 6246912 at 28. There has been no showing that Louisiana’s statute for injury from “things” is applicable in Washington.

land who actually opened the gate and left it open. *Id.* at 1, 29. In this case it is not known how the accident occurred or who opened the gate (or even that it was not Mr. Wheat who opened it on his way to the Country Club earlier in the day).

The undisputed facts of this case demonstrate that the County breached no duty owed to Mr. Wheat regardless of his status as a licensee or trespasser. Thus, summary judgment should be affirmed even if there is a genuine issue of material fact as to Mr. Wheat's status on the land.

**E. Spokane County owed no greater duty of care than that imposed under premises liability law**

The Estate argues on appeal that Spokane County should be held to a different standard than that of a possessor of land. The Estate failed to timely raise and support this argument below and his still failed to properly present the argument on appeal. Even if the Estate could show that the County was not a possessor of land, the Estate has failed to establish that the County owed Mr. Wheat any duty at all absent application of premises liability principles.

1. The Estate failed to properly raise and support this argument before the trial court and on appeal

The Estate failed to argue that Spokane County should be held to a different standard in its briefing on summary judgment, even though it had

months to draft a response to the County's summary judgment after the hearing was twice moved at the Estate's request. CP 265-74, 672-80; Spokane County LCR 56. The Estate did not raise this issue until oral argument and the County properly objected. RP 4-5, 37-62.

Even at oral argument and a later motion for reconsideration, the Estate only cited to *Palin v. General Construction Co.*, 47 Wn. 2d 246, 287 P.2d 325 (1955). RP 48, CP 592, 612-13. *Palin* says absolutely nothing about premises liability or whether an easement holder may be held to some other standard for an injury occurring on the land. *See id.* *Palin* concerned only the negligence of a contractor in how they did their work, resulting in a strictly economic harm of lost oil. *Id.* at 249-51.

“Civil Rule 59 does not permit a plaintiff, finding a judgment unsatisfactory, to suddenly propose a new theory of the case.” *E.g.*, *Eugster v. City of Spokane*, 121 Wn. App. 799, 811, 91 P.3d 117 (2004). Moreover, the Estate has also failed to properly present the issue on appeal. The Estate failed to assign error and present argument relative to the trial court's denial of its reconsideration. *See* RAP 10.3. Even if the Estate had appealed the order on reconsideration, it would be subject only to an abuse of discretion standard. *See River House Dev. Inc.*, 167 Wn. App. at 231.

The Estate also argues for the first time on appeal that the County may be held liable under the Restatement (Second) § 386. RAP 9.12 limits appellate review of an order granting or denying summary judgment to “only evidence and issues called to the attention of the trial court.” *See also Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008) (new arguments may not be raised on appeal). The Estate should be precluded from advancing this new theory of liability before the Court.

2. The Estate incorrectly assumes that Spokane County was not a possessor of land under Washington law

The Estate’s argument on appeal assumes that the County is not a “possessor of land” for purposes of premises liability law. *See* Restatement (Second) of Torts § 386 (section applies to “[a]ny person, except the possessor of land or a member of his household or one acting on his behalf” (emphasis added)).

Washington courts define a possessor of land as “a person who is in occupation of land with intent to control it.” *E.g., Jarr v. Seeco Const. Co.*, 35 Wn. App. 324, 327, 666 P.2d 392 (1983 (citing Restatement (Second) of Torts § 328E). Washington law is also clear that one who is acting on behalf of the possessor of land “is subject to the same liability, and enjoys the same freedom from liability . . . as though he were the possessor of land.” *Jarr*, 35 Wn. App. at 328; *Williamson v. Allied Group, Inc.*, 117

Wn. App. 451, 456-57, 72 P.3d 230 (2003) (emphasis added). Washington premises liability law is broad and brings many persons within its ambit – including, even, a listing agent who is simply showing a property. *See Jarr*, 35 Wn. App. at 326-28.

The Estate has failed to explicitly argue, much less establish, that the County was not a possessor of land. It is worth noting that the County had a perpetual exclusive easement in the HOA Park along with the right of ingress and egress, CP 238, and that the Estate's entire complaint against the County is predicated on the County's failure to lock the gate which Mr. Wheat struck.

The Estate cites to *New Magma Irrigation & Drainage District*, 92 P.3d 876 (Ariz. Ct. App. 2004), but apparently wishes to turn the holding of that case on its head. In *New Magma*, a defendant drainage district had a right-of-way easement over a piece of property to access an irrigation canal. *Id.* at 877. A fourteen-year old boy was killed when he drove an off-road motorcycle a steel cable that the property owner had strung across a portion of the property. *Id.* at 878. On appeal, the court held that the drainage district did not owe a duty to the decedent because the cable fence fell outside the scope of its easement. *Id.* at 879-81. The drainage district did not install or maintain the fence and the fence was not

otherwise related to its use of the property. *Id.* Thus, the court of appeals affirmed summary judgment for the drainage district. *Id.* at 881.

Application of *New Magma* would result in Spokane County owing no duty to Mr. Wheat. It would not, as the Estate apparently argues, translate into a duty of reasonable care owed by the County – especially since the injured person in *New Magma* was assumed to be an invitee and not a trespasser. *See id.* at 879. Moreover, the court in *New Magma* recognized an easement holder could be a possessor of land for premises liability purposes. *See id.*<sup>12</sup>

Other courts have similarly held that an easement holder may be a possessor of land with the corresponding duties (and freedom from liability) under premises liability law. *See Stanton v. Lackawanna Energy, Ltd.*, 886 A.2d 667, 677 (Pa. 2005) (noting that an easement holder who is a possessor of land is “subject to the same liability as any other possessor of the premises”); *Wagner v. Doehring*, 553 A.2d 684, 688-89 (Md. 1989) (easement holder who is a possessor of land is entitled to limited liability against trespassers); *McLaughlin v. Bardsen*, 145 P. 954, 956 (Mont. 1915) (easement holders in possession of the land “are to be treated as the

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<sup>12</sup> The Estate also relies on *Hartman v. Walkertown Shopping Center, Inc.*, 439 S.E.2d 787 (N.C. Ct. App. 1994), which simply held that a shopping center has the duty to maintain its premises in a safe condition for its invitees. *Id.* at 791. Such holding has no application to this case.

owners” and enjoy the same freedom from liability to trespassers). This is in accord with Washington law, which applies the Restatement test to determine whether any person – easement holder or otherwise – is a possessor of land.

3. If the County was not a possessor of land, then the Estate has failed to show that the County owed Mr. Wheat any duty at all

Even assuming, arguendo, that the Estate is correct and the County is not a possessor of land—the result of this argument would be that the County owed no duty to Mr. Wheat. This was the result in *New Magma*, 92 P.3d at 881. Certainly, the County did not owe a duty to lock the gate for Mr. Wheat’s benefit. This is not an attractive nuisance case, where it might be argued that the County had some affirmative duty to keep trespassers out of the property. The Estate’s argument – even if accepted at this very late date – would simply result in the County’s being entitled to summary judgment on the absence of any duty owed. *See, e.g., Nivens v. 7-11 Hoagy’s Corner*, 133 Wn. 2d 192, 943 P.2d 286 (1997). It is the plaintiffs’ burden to establish the duty owed in a negligence action. *Id.*

The Estate now claims, for the first time on appeal, that the Restatement (Second) of Torts § 386 provides a duty owed by the County. Section 386 states:

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 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.

*Id.* Even if this Court were to 1) disregard the Estate's failure to properly raise and argue the issue before the trial court and on appeal; 2) find that the County is not a possessor of land; and 3) adopt Section 386 of the Restatement (Second) of Torts, the County would still be entitled to summary judgment for the following reasons:

First, Section 386 applies only to a structure which the person "creates or maintains upon the land." The County built a pump station in the HOA Park, clear on the other side of the park from where Mr. Wheat's accident occurred. There is no evidence that the County constructed or maintained the gate that Mr. Wheat hit. The County simply had a lock on that gate so that it could access the pump station per its right of ingress and egress.

Second, Section 386 applies only to conditions which are "likely to cause serious physical harm or death." Restatement (Second) of Torts § 386 & cmt. b. The example given in the restatement is a power

company stringing high voltage tension wires across the land. *Id.* illus. 1. Similarly, the sole case the Estate cites in support of its reliance on Section 386 involves a live electrical line placed too close to a building. *Knyal v. Illinois Power Co.*, 523 N.E.2d 639, 640 (Ill. App. Ct. 1988). Here, the County simply placed a building on the land to house an existing pump station. The County did not put the gate on the land, but even if it had a gate is hardly “likely to cause serious physical harm or death” like a live, highly-charged electrical wire.

Finally, Section 386 does not apply to one who acts on behalf of the possessor of land. As the comments note, the rule set forth in Section 386 applies only to persons “not in acting in the possessor’s behalf but for their own purposes.” Restatement (Second) of Torts § 386 cmt. a. The Restatement drafters explained this rule as follows:

[T]he members of the possessor's household and other licensees acting on his behalf share the possessor's privilege to ignore an actual possibility or even probability that others will trespass upon the land. Such persons are using the land in a manner and for purposes essential to the possessor's enjoyment thereof. Where, however, a possessor permits or invites others to come upon his land to use it for their own purposes, there is no longer any such reason for permitting them to share in those privileges of the possessor which permit him to ignore the actual probability of the intrusion of trespassers, and which relieve him from liability for his failure to exercise reasonable care to make the land safe for the reception of licensees.

*Id.* cmt. b. Thus, in the Restatement’s illustration of a high voltage tension wire strung across the land, the electric company would not be held to the standard of Section 386 if “the maintenance of the wires on B’s land is not only with B’s permission but also for the purpose of supplying B with electric service.” *Id.* Illus. 1.

In *Knyal v. Illinois Power Co.*, as relied upon by the Estate, the Illinois Court of Appeals adopted the reasoning set forth in the Restatement’s illustration and stated: “when wires are on the premises of an occupier to supply service to the occupier, the party maintaining the wires has sufficient connection to the occupier to place it in the same position in regard to trespassers as that of the occupier.” 523 N.E.2d at 642. Illinois courts have repeatedly affirmed dismissal and held Section 386 inapplicable to an injury to trespassers where the defendant’s power lines serviced the property. *See Booth v. Goodyear Tire & Rubber Co.*, 587 N.E.2d 9, 12 (Ill. App. Ct. 1992); *Hansen v. Goodyear Tire & Rubber Co.*, 551 N.E.2d 253, 256 (Ill. App. Ct. 1990).

The Estate has not shown that the County installed the pump station for its own purposes and not to supply the HOA with sewer services. While this issue was not raised before the trial court, the County notes that the record shows that its pump station supplied sewer services to

services to the Fairwood subdivision. Fairwood HOA granted Spokane County an easement for “mutual benefit” to construct, operate and maintain a sewer system in the area, including construction of the pump station. CP 238. The pump station and sewer system serviced the Fairwood subdivision. CP 229, 238, 390-92. Section 386 is therefore inapplicable as a matter of law because the County’s purpose in using the land was to benefit the HOA.

**F. The Estate relies on inadmissible evidence in attempting to establish a genuine issue of material fact**

Only admissible evidence may be considered by the Court at summary judgment. CR 56(e). The Estate relies on several items that are inadmissible but which nonetheless fail to establish a genuine issue of material fact even if considered. The County restates its evidentiary objections raised before the trial court, CP 542-44.

First, the Estate heavily relies on subjective narrative from police reports. But under Washington law, “[p]olice reports are a subjective summary of the officer’s investigation” and therefore constitute inadmissible hearsay. *In re Detention of Coe*, 175 Wn. 2d 482, 505, 286 P.3d 29 (2012) (citing *State v. Hines*, 87 Wn. App. 98, 101-02, 941 P.2d 9 (1997)). Such subjective narrative does not meet either the business record

or public record exception to the hearsay rule. *Id.* at 504-05.<sup>13</sup> It should also be noted that these reports contain factual inaccuracies no party to this action would dispute. For example, the “no trespassing” sign is reported as being visible only from outside the HOA Park but photos taken at the scene of the accident demonstrate beyond all doubt that the sign was double-sided. CP 222, 226.

Second, the Estate’s response brief contains reference to liability insurance which is generally prohibited by ER 411. Third, the Estate’s brief makes reference to subsequent remedial measures which are inadmissible to establish negligence under ER 407.

Finally, the Estate makes passing reference to an expert witness it retained, Dr. Richard Gill. Dr. Gill’s declaration is rife with speculation, would not be helpful to the jury, and should be disregarded at summary judgment. CP 303-07. For example, Dr. Gill speculates that Mr. Wheat was driving in a “reasonable and foreseeable manner” but failed to see the gate because of its alleged characteristics. No one can testify how the

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<sup>13</sup> The Estate claims that documents containing only factual information may be admitted under the public records or business records exception. *See, e.g., State v. Phillips*, 94 Wn. App. 829, 834, 974 P.2d 1245 (1999). This applies to documents like fingerprint records and routine booking records that state simple, uncontroverted facts which cannot be subject to serious dispute. *See id.* These exceptions specifically do not apply to incident reports “containing the officer’s observations and a summary of the officer’s investigation.” *Id.* (citing *Hines*, 87 Wn. App. at 101-02).

accident occurred or how Mr. Wheat was driving (or where his attention was focused) in the moments leading up to the accident. Dr. Gill also states that “Mr. Wheat was using the facility in a reasonable, foreseeable, and intended manner” but it is undisputed that the HOA Park was intended for use by homeowners only and that Mr. Wheat was not a member of the HOA. Dr. Gill also states that “unbeknownst to Mr. Wheat the gate was left in a hazardous state” but Mr. Wheat may have been the very person who opened the gate as he traveled to the Spokane Country Club earlier that same day. At the very least Mr. Wheat would have seen the gate when he drove past it a few hours earlier. CP 150-51, 155-57, 169-70. Such conclusory and speculative expert testimony must be excluded. *See Cho v. City of Seattle*, 185 Wn. App. 10, 20, 341 P.3d 309 (2014); *Moore v. Hagge*, 158 Wn. App. 137, 155, 241 P.3d 787 (2010); *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001) (“conclusory or speculative expert opinions lacking an adequate foundation will not be admitted” at summary judgment).

The speculative nature of Dr. Gill’s declaration is made most apparent by paragraph 4(i) where Dr. Gill recognizes that the gate could be seen but that “a reasonable and prudent operator could have failed to have detected [sic] the hazardous gate.” Dr. Gill simply states that Mr.

Wheat might have failed to see the gate because of its allegedly dangerous characteristics, but this is insufficient to establish causation as a matter of law. In fact, Dr. Gill does not state anywhere in his declaration that his opinions are made on a more probable than not basis, thereby excluding his testimony as an expert witness. *See Bruns v. PACCAR, Inc.*, 77 Wn. App. 201, 215, 890 P.2d 469 (1995) (expert testimony that does not meet a “more probable than not” standard not helpful to trier of fact). Although these materials do not raise a genuine issue of material fact, the Court should disregard them in reviewing the summary judgment order.

**V. CONCLUSION**

The trial court did not err in granting Spokane County’s motion for summary judgment and did not abuse its discretion in denying the Estate’s motion for reconsideration and amended motion. Therefore, this Court should affirm dismissal of the Estate’s claims.

Respectfully submitted this 21<sup>st</sup> day of July, 2017.

  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 21<sup>st</sup> day of July, 2017, I caused to be served a true and correct copy of the preceding document to the following attorney of record as follows:

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Jan Hartsell  
of Kirkpatrick & Startzel, P.S.

## APPENDIX

1. Photo submitted in Paul L. Kirkpatrick's Declaration (Sub #49, CP 138)
2. Photo submitted in Paul L. Kirkpatrick's Declaration (Sub #49, CP 139)
3. Photo submitted in Paul L. Kirkpatrick's Declaration (Sub #49, CP 178)
4. Photo submitted in Paul L. Kirkpatrick's Declaration (Sub #49, CP 222)
5. Photo submitted in Paul L. Kirkpatrick's Declaration (Sub #49, CP 226)
6. Photo submitted in Robert L. Allen's Declaration (Sub #64, CP 516)
7. Photo submitted in Robert L. Allen's Declaration (Sub #64, CP 518)
8. Photo submitted in Robert L. Allen's Declaration (Sub #64, CP 520)
9. Photo submitted in Robert L. Allen's Declaration (Sub #64, CP 522)
10. Photo submitted in Robert L. Allen's Declaration (Sub #64, CP 524)
11. Photo submitted in Robert L. Allen's Declaration (Sub #64, CP 526)
12. Photo submitted in Robert L. Allen's Declaration (Sub #64, CP 528)

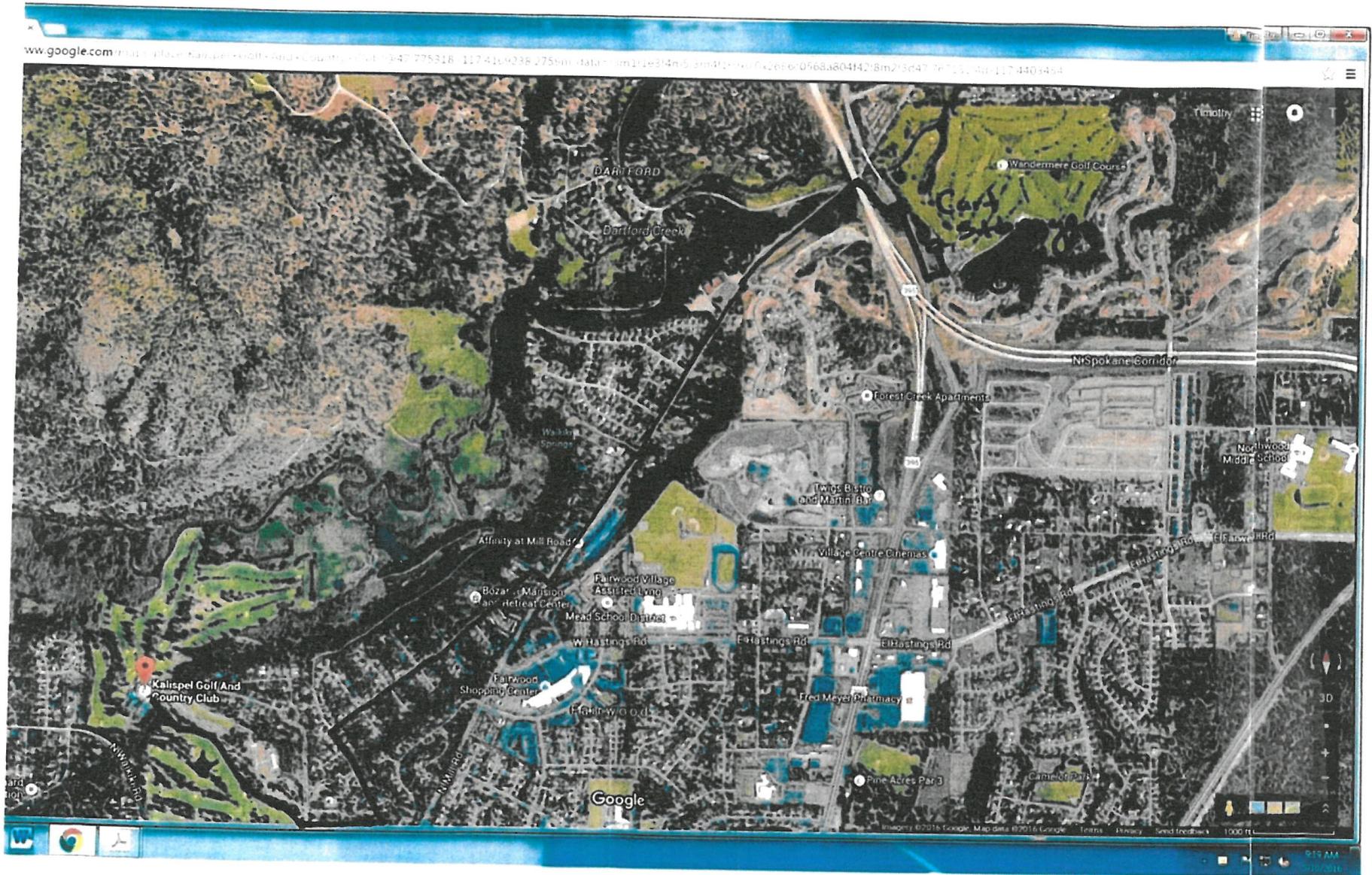


EXHIBIT  
21  
J. Wheat

PERGAD 800-631-4303



EXHIBIT  
22  
Z. [unclear]

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  
ENROLLED BY  
SPOKANE COUNTY SHERIFFS DEPT.  
APPROVED BY  
NATIONAL SIGN MANUFACTURING ASSOCIATION

EXHIBIT  
23  
wheat

PCN0000 600-601-0020  
EXHIBIT  
4  
Allan

Produced by Security Sign  
**CLOSED FOR THE SEASON**  
**PRIVATE PROPERTY**  
**HOMEOWNERS ONLY**  
NO TRESPASSING  
NO LOITERING  
NO ENTRANCE WHEN  
FLAG IS CLOSED  
UNAUTHORIZED USE  
IS PROHIBITED  
VIOLATION  
IS A CRIMINAL OFFENSE

ACW6D78



EXHIBIT  
14  
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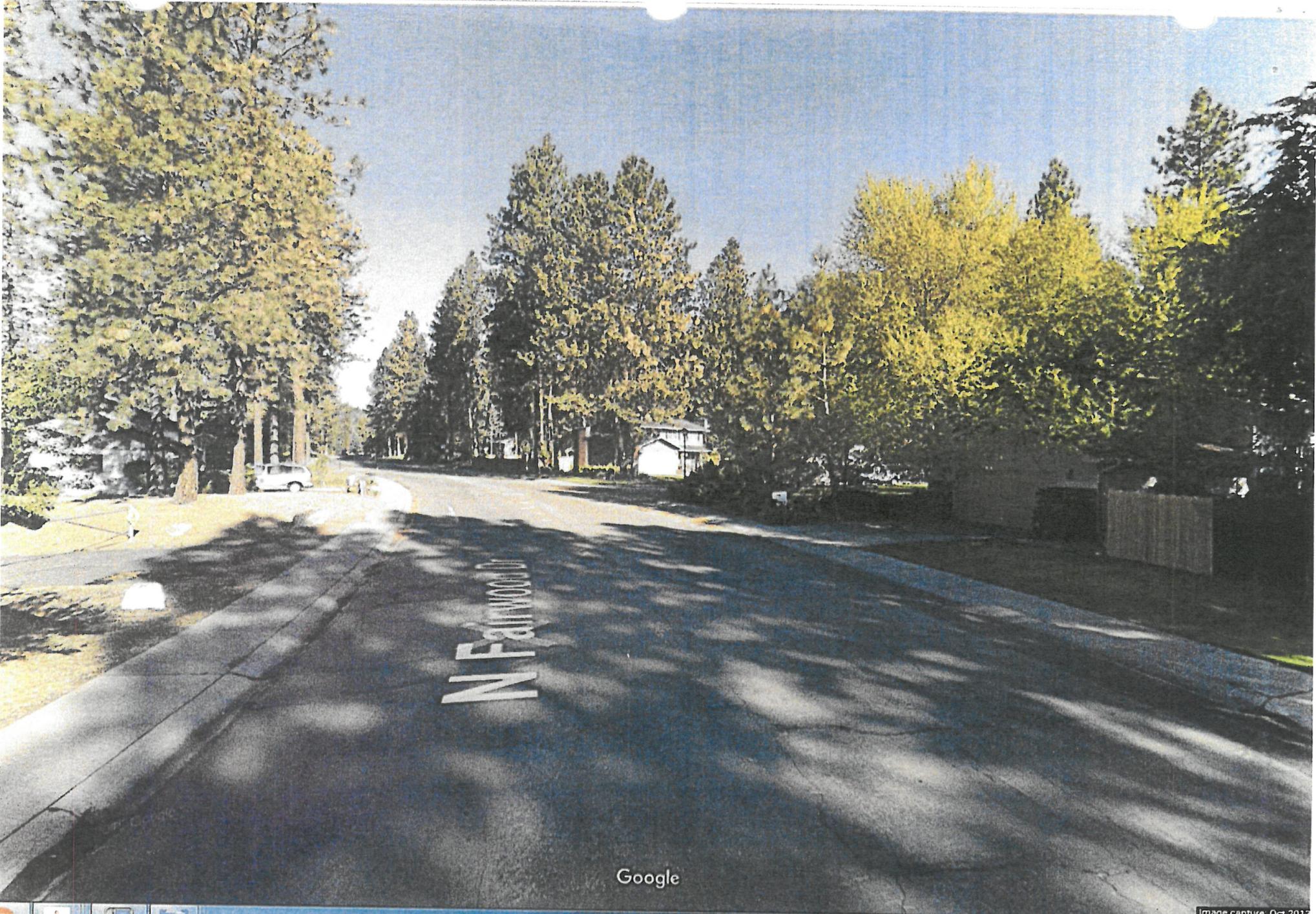


APR 20 2006

CRIME SCENE DO NOT CROSS

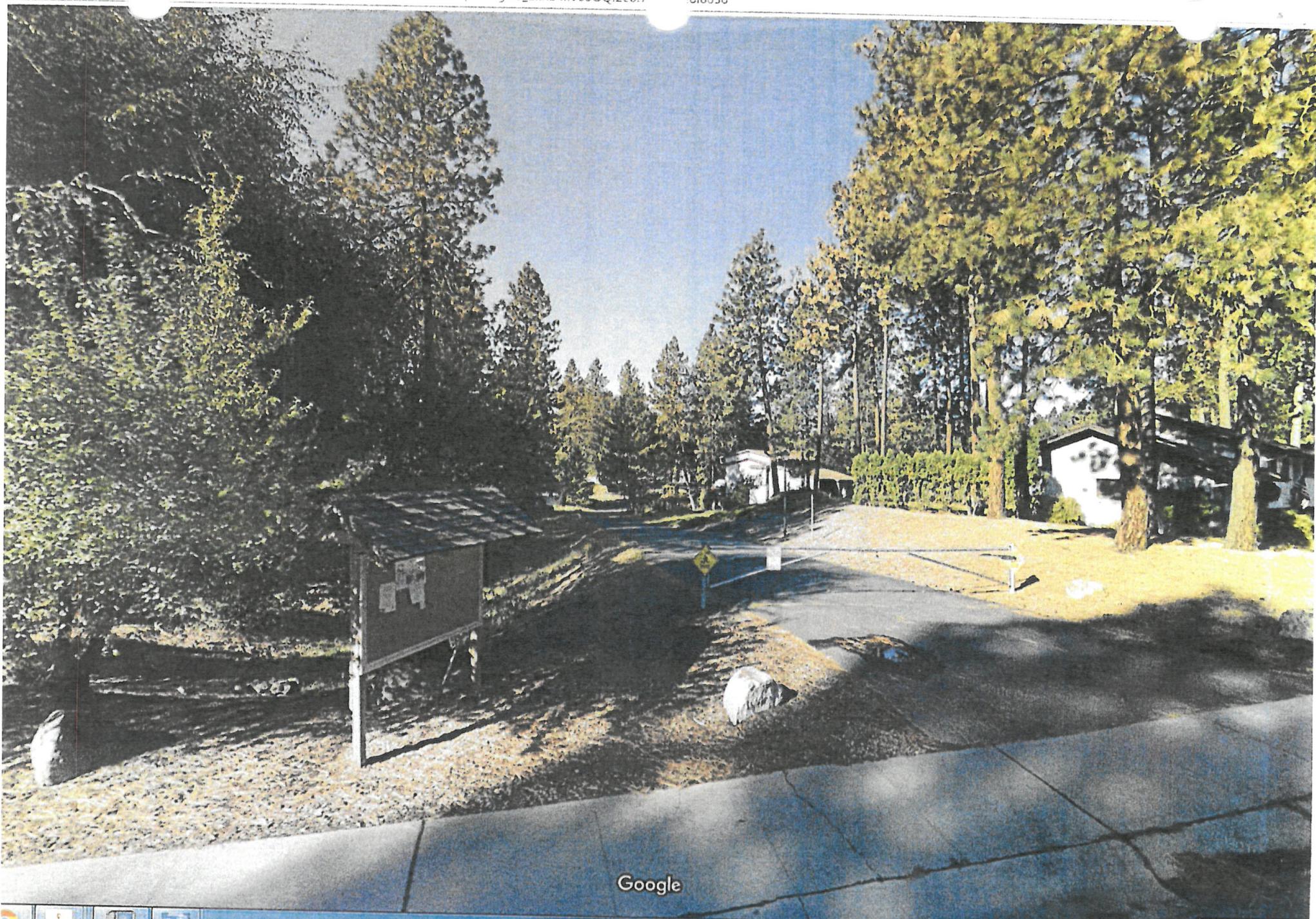
CLOSED

PRIVATE PROPERTY  
NO TRESPASSING



Google





Google











**NO**  
\*CROSS COUNTRY SKIING  
\*SLEDDING  
\*SKATING  
\*THERAPY SETS WILL BE  
PROHIBITED

**SPOKANE  
COUNTRY  
CLUB**  
**PRIVATE CLUB**  
Spokane and District  
Country Club Association  
1800 West 1st Avenue  
Spokane, Washington 99201  
All members are required to be accompanied

