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NO. 35541-1-III

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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BRANDON BETHAY, individually, KYRA STONE, individually,  
and THE ESTATE OF CHRISTINE BETHAY, by and through its Personal  
Representative, Lorraine Bethay,  
Appellants,

v.

SHAWN PARKER and JANE DOE PARKER,  
and the marital community thereof, and KBSM LLC,  
a Hawaii limited liability company doing business in Washington.

Respondents.

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BRIEF OF APPELLANTS

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Jonathan Nolley  
Emerald Law Group, PLLC  
811 First Ave., Suite 510  
Seattle, WA 98104  
Tel. (206) 826-5160  
Fax (206) 922-5598  
Attorney for Appellants

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## **I. ASSIGNMENTS OF ERROR**

### ***Assignments of Error***

1. The Superior Court erred in granting summary judgment to Respondents.

### ***Issues Pertaining to Assignments of Error***

1. Did the Superior Court err in dismissing Appellants' (The Bethays') negligence claim against Respondents when Respondents breached their duty to Appellants (The Bethays)?

## **II. STATEMENT OF THE CASE**

### **A. Facts**

This is a wrongful death claim arising from the drowning death of Christine Bethay that occurred on July 27, 2015. CP 3. At the time of her death, Christine, a minor, was attending a children's camp on property owned by Shawn Parker. CP 2. The camp attendees included approximately fifteen (15) children. CP 16. The parcel of land owned by Parker is waterfront property adjacent to Lake Cle Elum, and Parker permitted the camp to make use of the property. CP 7, CP 27. The summer of 2015 marked the fifth summer that Parker hosted the camp on his waterfront property abutting Lake Cle Elum. CP 108. Parker was aware that access to the lake is what drew people to the property. CP 104. Parker states that he can easily back a boat into the lake from his property, a fact that speaks to the waterfront nature of the property. CP 149. He

was also aware from the preceding summers that children would swim in the lake when staying on the property. CP 110.

The Lake Cle Elum property owned by Parker has a steep, rocky incline on its south side that leads into Morgan Creek Cove. CP 114. It is in this cove that Christine drowned and where her body was recovered the following day.

Parker owned the property for a number of years and regularly went onto the property with his children, dogs and friends. CP 114. He was aware of the steep, rocky incline that leads to Morgan Creek Cove, an area that he described as “terrible.” CP 114. Photographs of the area reveal rocky areas where elevations quickly change and in which a person can quickly go from a few feet of water to a large drop off with little warning. CP 119.

Despite knowing that people use the property due to its access to the lake for swimming and recreation, Parker never provided any warnings to the camp or its attendees about the dangers on the south side of the property. CP 29. No signs are posted. CP 111. Parker never offered any information to any of the camp attendees or counselors about the dangers in swimming on the south side of the property. CP 29. The only rules that Parker imposes upon persons making use of the property is “no glass and no mean dogs.” CP 104. No other written or verbal rules or policies exist regarding the use of the property. CP 154.

## **B. Procedural History**

The Bethays filed their complaint in this matter on December 16, 2016. CP 1-5. After limited discovery, Respondents moved for summary judgment. The Superior Court granted Respondents' motion on August 21, 2017. CP 162-164. This appeal followed.

## **III. ARGUMENT**

### **A. The Superior Court Erred in Granting the Respondents' Motion for Summary Judgment When There Are Genuine Issues of Material Fact.**

#### **1. Standard of Review.**

The standard for appellate review of an order of summary judgment is well established. The appellate court is to "engage in the same inquiry as the trial court considering all facts and reasonable inferences which can be drawn from such facts in the light most favorable to the nonmoving party." *Schumacher Painting Co. v. First Union Mgmt., Inc.*, 69 Wn. App. 693, 698, 850 P.2d 1361 (1993). The appellate court's review is, thus, "de novo," *DeWater v. State*, 130 Wn.2d 128, 133, 921 P. 2d 1059 (1996). The appellate court may uphold an order granting summary judgment only if, from all the evidence, reasonable persons could reach only one conclusion. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

#### **2. Factual Discrepancies Must Be Construed in the Light Most Favorable to Appellant.**

CR 56 requires that all facts and inferences from such facts be construed in a light most favorable to the non-moving party. CR 56(c).

The trial court, however, construed the facts in a light most favorable to Parker.

The trial court took much umbrage with the Bethays' assertion that Parker had knowledge of the dangerous conditions along the waterfront. As the trial judge stated, "[Parker]'s not going to know exactly what the bottom of the surface is like in the lake, because every year it's going to be a different number of yards away from where his property line ends." RP 22. The trial judge went on to say "I don't think there were any facts that at least were made aware of to the attention of this court, that showed that [Parker] knew specifically how dangerous it would be." RP 24. Similarly and without any evidence to support its supposition, the trial court opined that there was no evidence that Parker had been into the area in years. RP 26.

Parker's deposition, however, established that he was very familiar with the area and had walked in the area where Christine drowned on a regular basis. Parker states in his deposition that he had walked in the same rocky area of Morgan Creek Cove where Christine drowned "many times" and regularly takes his dogs into that area. CP 155.

Parker's description of the incline down from the south side of his property shows that he knows it is dangerous. According to Parker, "It's terrible. Yeah, it's not – it's very steep embankment, reservoir, lots of rocks. It's all rock." CP 155. On several occasions in his deposition, Parker specifically references how steep the area is, including describing it as a "steep edge." CP 154.

When asked if, prior to July 27, 2015, he had any worries about children swimming in Morgan Creek Cove, Parker claimed, “I would say not; but, you know, it is a reservoir. It’s deep. It’s steep. It could happen.” CP 155. Parker also admits that his own children swim in the area but only at a different beach and never “down by where they (the camp attendees) were at, where they went.” CP 149. Parker was also aware that other areas of the lake, specifically a boat ramp three miles south of his property, had warning signs that warned against swimming in the reservoir. CP 153. A photograph of such a sign was included in the Bethays’ response to the motion for summary judgment. CP 121.

The trial court, however, took these facts and statements in a light most favorable to Parker, even going so far as to suggest that Parker’s knowledge of the area was only acquired after-the-fact when he went to the property upon hearing that Christine was missing. RP 22, RP 29. According to the trial judge, “I agree he indicated at the end – because he knows what happened, he indicated at the end he wouldn’t swim there. And this was a specific spot.” RP 22. Despite Parker having testified that he regularly goes down into this area and knows that it is steep and “terrible,” the trial judge construed Parker’s testimony in the light most favorable to Parker, not the Bethays. This violates the trial court’s duty in a summary judgment analysis, and is error.

**B. There Are Genuine Issues of Material Fact that Preclude Dismissal of Appellants’ Case on Summary Judgment.**

**1. Parker Owed a Duty to Christine Bethay To Warn Her of Known Hazards.**

The Washington Supreme Court's holding in *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn. 2d 43, 914 P.2d 728 (1996) controls the question of duty in this matter. Similar to the area that Parker opened up for camping and the construction of teepees, the *Degel* defendant had a "grassy areas for tents and picnics, as well as a steep embankment leading to Clark's Creek." *Id.* at 47. The creek in *Degel* was not located on the defendant's property but was beyond the perimeter road around a mobile home park. *Id.* The embankment was described as slippery, much like the dangerous and steep embankment that Parker describes on the south side of his property. *Id.* The creek in *Degel* was also dangerous due to the fast-flowing nature of the creek and its proximity to an area where children were known to play. *Id.*

In *Degel*, the creek in question was described as "slow-moving" during summer months but would turn into a "swift and murky" creek during winter months. *Id.* at 46. This naturally flowing creek flowed close to an area where up to twenty children were known to play at a time. *Id.*

The defendant in *Degel* argued that it had no duty to take measures to prevent harm posed by the natural body of water – the creek, or to warn persons of the danger. *Id.* at 52. The court held that, despite the fact that

the body of water was natural, the landowner has invited children onto the property and that the landowner's duty is "not disproportionately heavy ... where the child's presence has been invited or encouraged." *Id* at 54. Having invited children onto the land, Parker assumed a duty to keep the premises safe, including warning of conditions that Christine and other campers had no knowledge.

In moving for summary judgment, Parker relied on *McMann v. Benton County, Angeles Park Communities*, 88 Wn. App. 737, 946 P.2d 1183 (1997) to argue that he was not liable for conditions beyond the boundary of his property. The *McMann* decision – an appellate decision unlike the more broadly controlling Supreme Court decision in *Degel* – centers upon a man-made canal that was not protected by the owners of the canal from access by an abutting property owner.

According to the court in *McMann*, the critical difference between the facts in *McMann* and *Degel* is that one involves a natural body of water and the other a man-made irrigation canal. As the *McMann* court states:

Here, we are dealing with a canal, which is clearly on adjacent property beyond the control of Angeles Park, as compared to the natural body of water in *Degel* where it may be expected that a person might go to enjoy its natural characteristics. There are significant differences between the two

cases, which distinguish them for the purposes of a summary judgment analysis.

*Id.* at 744. (Emphasis added).

The *McMann* court found a lack of duty largely because of the lack of control that a defendant can exercise over other property owners. The court held that the mobile home park lacked any ability to exercise control over the hazard or otherwise take measures to correct it. *Id.* at 743.

In this instance, Parker owed a duty to Bethay to warn her of conditions on the property of which Parker was aware but that the decedent was unaware, specifically, the uneven bottom of the lake that could cause a child to suddenly go from a few feet of water to a level well beyond where she could safely stand or wade. Parker was aware of these conditions and had seen signs warning as much in other areas of the lake. Despite this knowledge, he did nothing while inviting children onto his property for the specific purpose of swimming and recreating on lakefront property.

**2. The Trial Judge Wrongly Decided Issues That Should Be Left to the Trier of Fact.**

**a. Whether Parker Had Knowledge About the Dangerous Condition Is for the Jury to Decide.**

Summary judgment is inappropriate when material issues of fact exist regarding whether or not a party has knowledge of a matter. *See Michelbrink v. Washington State Patrol*, 191 Wn.App. 414, 363 P.3d 6

(2015) (holding that summary judgment is inappropriate regarding a police officer's knowledge that an injury could result from the use of a taser). *See also Hillhaven Properties Ltd. v. Sellen Const. Co., Inc.*, 133 Wn.2d 751, 948 P.2d 796 (1997) (holding that an insurer's knowledge of a condition is a question of fact).

The degree to which a party is aware of or has knowledge of a dangerous condition is similarly a question of fact. *Huston v. First Church of God of Vancouver*, 46 Wn.App. 740, 746, 732 P.2d 173 (1987). Similarly, issues such as the state of mind, intent or motivation of a party are not subject to summary judgment. *See Haubry v. Snow*, 105 Wn. App. 666, 31 P.3d 1186 (2001).

In this instance, it is the role of the jury, not the trial judge, to determine whether or not Parker had actual or constructive knowledge of the dangerous condition. Parker owned the property and knew about the rocky, steep area going to Morgan Creek Cove. Even if Parker were to testify that he had no knowledge that the area was dangerous, a jury could choose to believe or not believe such self-serving testimony.

**b. Whether a Warning Would Have Been Effective Is a Question Left to the Jury.**

Though this issue was not before the trial court, the trial judge placed much emphasis on her opinion that any warning signage would be ineffective. According to the trial judge, a sign in the area would sometimes be underwater or would be impractical on lakefront property.

Again, this is an issue for the jury to resolve. The Bethays' position is that Parker had a duty to warn of the condition and failed to do

so. Whether that warning should have been verbal or through a warning sign was never before the court and should not have been a consideration in determining the question presented by Parker's motion, which was solely the issue of duty. Even if the court were to entertain this issue of signage, it is certainly a question that must be answered by a jury.

#### IV. CONCLUSION

The Bethays presented sufficient evidence to create triable questions of fact for the jury on their negligence claims against Respondents. Accordingly, the Bethays respectfully submit that the trial court erred in entering summary judgment in favor of Respondents, and that the order dismissing this action should be reversed and this action be remanded to the trial court for further proceedings.

DATED this 16<sup>th</sup> day of January 2017.

EMERALD LAW GROUP, PLLC



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Jonathan Nolley, WSBA #35850  
Attorneys for Appellant

I certify under penalty of perjury under the laws of the State of Washington, that on this date I sent via E-mail and U.S. Mail a copy of the document to which this certificate is attached, for delivery to Steve Stocker, counsel for the Respondents.:

DATED: 01/16/2018

  
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McKaylin Hughes

**EMERALD LAW GROUP**

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