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NO. 355411

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON
SPOKANE

**BRANDON BETHAY, KYRA STONE,
and THE ESTATE OF CHRISTINE BETHAY,
by and through its Personal Representative, LORRAINE BETHAY**

Appellants,

vs.

**SHAWN PARKER and JANE DOE PARKER, and KBSM LLC, a
Hawaii limited liability company doing business in Washington,**

Respondents.

RESPONDENTS' BRIEF

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I. INTRODUCTION

The facts of this case are very sad. On July 27, 2015, an eight-year-old girl named Christine Bethay was attending a weekend summer camp for low-income children known as Kids Rock Happy Heart Camp. The camp was being held on unimproved property owned by the Defendants Shawn Parker and KBSM, LLC adjacent to Lake Cle Elum reservoir in Kittitas County, which is part of the Columbia Basin Irrigation Project. Christine and fourteen other children of various ages participated in a swimming excursion along the shoreline of the reservoir, which was drawn down from its normal Spring high-water mark due to summer farm irrigation requirements. The children were being supervised by four adult counselors who accompanied them out to the water's edge in the reservoir. Christine did not know how to swim, but somehow that fact was overlooked and the adult camp counselors watching over her allowed her to wade into Lake Cle Elum without wearing a life jacket. Christine unfortunately slipped or slid under the water without anyone noticing and drowned. Her body was not recovered until the next day when the Sheriff's Department found it on the bottom of the reservoir, in about six feet of water.

While incredibly tragic, the case is straightforward as it pertains to the alleged liability of the Defendants, who did not participate in operating the camp, did not oversee or supervise its activities, and did not own or control the reservoir shoreline where Christine drowned. The undisputed facts cited below will demonstrate the trial court correctly ruled that Defendants Shawn Parker and KBSM, LLC (“Defendants”) owed no duty of care to Christine Bethay to protect her, or warn her adult custodians, of potential hazards in or upon the Lake Cle Elum reservoir adjacent to their property. This court should affirm the trial court’s order of summary judgment dismissing Plaintiffs’ complaint against the Defendants.

II. STATEMENT OF THE CASE

This wrongful death lawsuit arises out of the drowning of Christine Bethay (“Christine”), an eight-year-old girl, at the Lake Cle Elum reservoir on July 27, 2015. Complaint at ¶ 3.7, CP 3. At the time of her death, Christine was attending a Yakima-based summer youth camp known as “Kids Rock Happy Heart Camp” (“the Camp”). See *Id.* at ¶ 3.4; see also Kittitas County Sherriff’s Office Uniform Incident Report, CP 63-64. Christine was in a group of 15 children campers playing and swimming in the Lake Cle Elum reservoir near an area known as Morgan Creek Cove; they were being supervised by four adult Camp counselors. *Id.*; see also Camp Counselor Witness Statements, CP 72, 74, 76, 80;

Kittitas County Fire Department Incident Report, CP 83. Christine disappeared from the group and could not be found in or around the Camp, despite an extensive search by the Camp counselors and police; her body was discovered the next day in six feet of water about 40 feet from the shoreline by the Kittitas County Sheriff's Department Dive Team. See Pltf. Interrogatory Resp. No. 38, CP 58; Kittitas County Sheriff's Office Suppl. Incident Report, CP 65-66. This lawsuit was filed by the estate of Christine, by and through its personal representative Lorraine Bethay, Christine's grandmother and legal guardian, and by her biological parents, Kyra Stone and Brandon Bethay (hereinafter collectively "Plaintiffs"). See Complaint at ¶¶ 1.1-1.3, CP 1-2.

Defendants KBSM LLC ("KBSM") and Shawn Parker ("Parker") are tenants in common, each holding a 50% interest of a 3.62-acre parcel of land located adjacent to the Lake Cle Elum reservoir in Kittitas County ("Subject Property"). Dec. Shawn Parker, CP 27; Tenancy in Common Agreement Dated August 21, 2014, CP 32-46. The Subject Property is unimproved private property that is used by Defendants for their personal use and is not open to the general public. Dec. Shawn Parker., CP 27-28.

Dan J. Stadler is the director/operator Kids Rock Happy Heart Camp. Kittitas County Sheriff's Office Uniform Incident Report, Stadler Statement Form dated July 27, 2015, CP 71. In May 2015, Mr. Stadler

approached Shawn Parker and requested permission to use the Subject Property for setting up the Camp during the last week of July 2015, which consisted of 6-8 tipis and several RVs. Dec. Parker, CP 28. Parker agreed to the request, as he had done for several years prior. Id. Parker did not charge a monetary fee or accept any other type of consideration in exchange for allowing the Camp to utilize the Subject Property. Id. Other than allowing Mr. Stadler to use Defendants' land to set up a weekend camp once a year for disadvantaged youth, Shawn Parker was not an employee, volunteer, supervisor, director or officer of the Camp and had never held any formal or informal position related to the Camp. Id. Mr. Parker did not direct the Camp as to what recreational activities it could engage in while using the Subject Property and he did not monitor or supervise any of the Camp's activities. Id. Mr. Parker was not asked to and did not furnish the Camp life jackets or other safety equipment/gear for use by the Camp during their stay. Id. at CP 28-29.

Mr. Parker's residence is located approximately 4.5 miles away from the Subject Property in Roland, Washington. Id. at CP 28. Mr. Parker was not present at the Subject Property the afternoon the Camp counselors took the children swimming and Christine drowned. Id. Defendant KBSM LLC had no knowledge that the Subject Property was being utilized as a campground by the Camp, as permission had been

given by its co-owner Shawn Parker without consulting anyone at KBSM LLC. Id.; see also CP 150.

Lake Cle Elum reservoir is a natural mountain lake whose water level and flow are controlled by a dam as part of the Columbia Basin Reclamation Project, which is owned and operated by the United States Bureau of Reclamation. CP 88-96. During July of 2015, the level of the reservoir was drawn down approximately 20-30 feet in elevation as a result of farming irrigation operations; to reach the water shoreline of the reservoir, a person had to climb down the steep embankment edge of the reservoir and then walk several hundred feet or more along the bottom of the reservoir to the water's shoreline. CP 28. To access the reservoir from the Subject Property/Camp, a person needed to first walk across a strip of land owned by the United States Forest Service that bordered the reservoir, then climb down the reservoir embankment into Morgan Creek Cove, then walk out to the current summer water level. Id. In other words, the site of the drowning was not on Defendants' property but rather upon land owned and controlled by the United States Bureau of Reclamation. Id. In addition, the area of Lake Cle Elum known as Morgan Creek Cove does not physically border the Defendants' property; rather, it is separated from the reservoir by a strip of land owned by the United States Forest Service. Id.

At the time of her drowning, Christine was in the company of four adult camp counselors and approximately 14 other children in an area of Lake Cle Elum reservoir known as Morgan Creek Cove. Kittitas County Sherriff's Office Uniform Incident Report, CP 63-64; Camp Counselor Witness Statements attached to Incident Report, CP 72, 74, 76, 80; Kittitas County Fire Department Incident Report, CP 83. Also present at the Camp was Christine's grandmother, legal guardian and the personal representative of her estate, Lorraine Bethay, who was volunteering as a nurse at the Camp that week. Lorraine Bethay was not present at the swimming excursion, but instead was resting at the campsite when the counselors took the children down to the reservoir to swim. Pltf. Interrogatory Response Nos. 33 and 34, CP 57; Kittitas County Sheriff's Office Uniform Incident Report, Statement Form of Lorraine Bethay, CP 70. Lorraine Bethay had been at the Subject Property prior to July 2015 as she had served as the Camp nurse in previous years. Pltf. Interrogatory Response Nos. 35, CP 57.

At the time of her drowning, Christine Bethay did not know how to swim, and she was not wearing a life jacket or any other form of personal flotation device. Pltf. Interrogatory Response No. 36, CP 58; Kittitas County Sheriff's Office Uniform Incident Report, 63; Kittitas County Fire Department Incident Report, CP 83. There is no evidence that Lorraine

Bethay told the Camp director Dan Stadler, or the other adult Camp counselors responsible for supervising Christine, that Christine could not swim and had to have a life jacket on to go play in the water. Pltf. Interrogatory Response No. 37, CP 58.

III. ARGUMENT

A. Standard of Review

An appellate court reviews a ruling granting a motion for summary judgment on a *de novo* basis, engaging in the same analysis as the trial court. Mahoney v. Shinpoch, 107 Wash. 2d 679, 732 P.2d 510 (1987); Highline School Dist. No. 401, King County v. Port of Seattle, 87 Wash. 2d 6, 15, 548 P.2d 1085 (1976). To carry forth such review, the appellate court evaluates both the law and the facts in the trial court record. Brouillet v. Cowles Pub. Co., 114 Wash. 2d 788, 791 P.2d 526 (1990). However, when engaging in *de novo* review, the appellate court considers only the evidence and arguments that were presented and asserted before the trial court. Riojas v. Grant County Public Utility Dist., 117 Wash. App. 694, 72 P.3d 1093 (2003); Sneed v. Barna, 80 Wash. App. 843, 912 P.2d 1035 (1996).

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show 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). In a summary judgment proceeding, the moving party bears the initial burden of showing the absence of an issue of material fact. Young v. Key Pharmaceuticals, 112 Wn.2d 216, 770 P.2d 182 (1989); Celotext Corp. vs. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Where the moving party is a defendant and makes this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at that time, the plaintiff “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,” then the trial court should grant the motion. Celotext, at 322. In Celotext, the United States Supreme Court explained this result: in such a situation, there can be “no genuine issue as to any material fact,” since a complete failure of proof concerning an initial element of the non-moving party’s case necessarily renders all other facts immaterial. Celotext, at 322-23. Young v. Key Pharmaceuticals expressly adopted the Celotext reasoning and procedure. Young, at 225-26. “Bare assertions of ultimate facts and conclusions of fact are alone insufficient to defeat summary judgment.” Saluteen–Maschersky v. Countrywide Funding Corp., 105 Wash. App. 846, 852, 22 P.3d 804 (2001).

B. Defendants Owed No Duty of Care to Prevent Plaintiffs' Decedent's Injuries

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. Tincani v. Inland Empire Zoological Soc., 124 Wn.2d 121, 127–28, 875 P.2d 621, 624 (1994). Whether a party owes a duty of care to the complaining party is a question of law which may be adjudicated at the summary judgment stage. Pedroza v. Bryant, 101 Wash.2d 226, 228, 677 P.2d 166 (1984); McMann v. Benton County, Angeles Park Communities, Ltd., 88 Wash. App. 737, 946 P.2d 1183. As will be shown below, Plaintiffs cannot meet their burden of establishing that the Defendants owed Christine a duty of care under the facts presented in this case.

1. A Landowner Owes No Duty to Prevent Injuries to Licensees from Dangers on Land or Waterways the Landowner Does Not Own or Control

In Washington State, the measure of a landowner's duty of care to persons entering their land is governed by the entrant's status as an invitee, licensee, or trespasser. Degel v. Majestic Mobile Manor, Inc., 129 Wash.2d 43, 49, 914 P.2d 728 (1996). Of the three classifications, the highest duty of care is owed to invitees, who may be either business visitors or public invitees. Johnson v. State, 77 Wash. App. at 934, 940,

894 P.2d 1366 (1995); Younce v. Ferguson, 106 Wash.2d 658, 667, 724 P.2d 991 (1986) (a business invitee is one who is invited to enter or remain on land for the purpose directly or indirectly connected with **business dealings with the possessor of the land**); McKinnon v. Washington Fed. Sav. & Loan Ass'n, 68 Wn.2d 644, 650, 414 P.2d 773, 777 (1966) (a public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held **open to the public**.) “The duty owed to an invitee is that of reasonable care for the invitee’s personal safety.” Johnson, 77 Wash. App. at 941, 894 P.2d 1366. “The land possessor must exercise reasonable care with respect to conditions on the premises which pose an unreasonable risk of harm.” Id. A possessor of land has a duty to protect an invitee against dangerous conditions of the premises, even known or obvious dangers, if the possessor should anticipate harm to the invitee. Kinney v. Space Needle Corp., 121 Wash. App. 242, 85 P.3d 918 (2004).

In contrast to an invitee, a licensee is defined as “a person who is privileged to enter or remain on land only **by virtue of the possessor’s consent**.” Tincani, 124 Wn.2d at 133, 875 P.2d at 628 (citing the Restatement (Second) of Torts § 300 (1965)). The term “licensee” may include (1) persons who come on the land solely for purposes of their own, (2) members of the occupier’s household (except a boarder, servant or

other person whose relationship with the occupier is primarily economic), and (3) social guests. Home v. N. Kitsap Sch. Dist., 92 Wash. App. 709, 718, 965 P.2d 1112, 1117-118 (1998); see also 16A Wash. Prac., Tort Law and Practice § 18:8 (4th ed.) (licensee enters real property with the possessor's permission, or tolerance, for the licensee's **own purpose or business** rather than for the possessor's benefit).

In Memel v. Reimer, 85 Wash.2d 685, 538 P.2d 517 (1975), the Washington Supreme Court adopted the Restatement (Second) of Torts rule with respect to a landowner's responsibility to licensees for dangerous conditions on the land. Section 342 of the Restatement (Second) provides as follows:

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

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

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

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

The possessor fulfills his duty by making the condition safe or warning of its existence. Younce, 106 Wn.2d at 668, 724 P.2d at 996.

In McMann v. Benton County, Angeles Park Communities, Ltd., a Division III court applied the Restatement rules governing a landowner's duty of care, and soundly rejected the same legal theory being advanced by the Plaintiffs in this case. McMann, 88 Wash. App. at 743, 946 P.2d at 1186-87. In McMann, the court affirmed the summary judgment in favor of a landlord sued by tenants whose son drowned in an irrigation canal adjacent to the mobile home park where the tenants lived. Id. at 739. The canal was located 100-150 yards from the mobile home park, down a gradual slope; the undeveloped slope was owned by Angeles Park Communities, an entity which owned the mobile home park. Id. The trial court granted defendants' motion for summary judgment finding there was no duty of care owed to the plaintiffs based on owner/occupier law to fence the canal, or any assumed duty based on a claim of notice on the part of the landowner. Id. at 740.

First, the court emphasized that the Restatement (Second) of Torts only "imposes liability upon a landowner for harm caused "by a condition *on the land.*" Id. (citing to Restatement (Second) Torts at § 342) (emphasis in the original). As it presented an issue of first impression, the court noted that "the majority of jurisdictions do not impose a duty upon

landowners to protect people on their land from dangers on adjacent land.” Id. (emphasis added). Adopting the majority rule, the court relied upon the reasoning in Re v. Tenney, 56 Wash. App. 394, 396-97 (1989), a case involving alleged negligence against the operator of a grain elevator for an accident occurring on a roadway which drivers were using as a “staging area” for loading grain. The court noted that while “an abutting property owner must use and keep his premises in a condition so that adjacent public ways are not rendered unsafe for ordinary travel,” the duty is “imposed only when correction of the unsafe condition is within the owner’s control...or responsibility.” Id. at 743. The condition in McMann, however, was outside of the mobile home park owner’s control.

As explained by the Court:

“There is no claim or fact issue presented that Angeles Park used or failed to use its property in any way, so as to render the adjacent property more unsafe or to increase any risk posed by the canal to its invitees. Furthermore, there is no inference which can be drawn from this record that Angeles Park was in any position to correct the hazardous condition of the canal or control it. We consider the principles of *Tenney* helpful in deciding Angeles Park had no legal duty to the McMann’s in the context of these facts.

...

“In summary, Angeles Park did not create any common area or maintain a condition on its land, which can be questioned as not being reasonably safe for tenant use. There is no affirmative obligation on Angeles Park, as landlord, to this tenant, Devin McMann, as invitee, because there is no common area on its premises or other condition

on its land which can be claimed to be unreasonably unsafe due to the proximity of the canal on adjacent property.” Id. at 743-744.

Division III has continued to apply the reasoning set forth in the McMann decision in more recent case law. In Smith v. Stockdale, 166 Wash. App. 557, 271 P.3d 917 (2012), the court rejected the plaintiff’s contention that she was owed a duty of care by an operator of a waterfront resort that charged a fee to enter onto its land, where the plaintiff was injured after engaging in cliff jumping at an adjacent parcel of land that was privately owned. Echoing the McMann court, the Smith court reasoned as follows:

“While on Vantage's property, Ms. Smith was a business visitor. Vantage owed Ms. Smith a duty of care as an invitee **while she was inside the fee area. However, Vantage did not owe a duty of care to Ms. Smith to warn her of the dangers at the cliff. And Vantage did not have a duty to protect visitors from the dangers on the adjacent PUD property.** See *McMann*, 88 Wash. App. at 742, 946 P.2d 1183.”

Smith, 166 Wash. App. at 569, 271 P.3d at 924 (emphasis added). As will be shown below, these cases are directly on point with the instant matter and should dictate its result.

2. Christine Was a Licensee and Was Not Owed a Duty of Care by the Defendants for Conditions Existing at Morgan Creek Cove

As a threshold matter, it must be emphasized that under the premises liability principles set forth in the Restatement provisions above, Christine was a licensee, which delineates the applicable duty of care.¹ To reiterate, before the Camp was to set to begin, the Camp director Mr. Stadler approached Parker and requested permission to utilize the Subject Property for purposes of setting up a campground in July 2015. Parker agreed to the request and did not charge a monetary fee, or any other consideration in exchange for allowing the Camp to set up their campground on the Subject Property. The Camp entered upon Defendants' property for its own purpose: to allow a group of disadvantaged youth an opportunity to engage in rustic camping and outdoors activities. As such, the Restatement makes clear that the Defendants' duty of care is dependent upon whether (1) there was a **known** dangerous condition on the property, and (2) the Defendants

¹ Other than juxtaposing the term "licensee" for "invitee," whether by artifice or mistake, Plaintiffs have assigned no error to, and at no time have disputed Christine's legal status as a licensee. This critical issue was determined by the trial court below. See CP 173, 174. Any argument to the contrary in Plaintiffs' reply or at oral argument should not be tolerated. See Ang v. Martin, 154 Wash.2d 477, 114 P.3d 637 (2005) (issues not assigned error to or argued by appellant on appeal are not to be considered by the reviewing court).

could reasonably anticipate the Camp attendees **would not** discover the dangerous condition, or realize the risks, that the known condition imposed. Restatement (Second) Torts §342; 16A Wash. Prac., Tort Law and Practice § 18:8, Licensees and Social Guests (4th ed.); see also WPI 120.02.01 (landowner owes a duty of ordinary care in connection with dangerous conditions **of the premises** of which the owner has knowledge or should have knowledge and of which the licensee cannot be expected to have knowledge).

Here, it has never been asserted, nor is there a scintilla of evidence in the record to suggest that the location where Christine Bethay perished was property owned by the Defendants or was property over which the Defendants exercised control. To the contrary, the evidence before the trial court showed that to reach the Morgan Creek Cove swimming area where Christine drowned, an individual had to exit the Defendants' property, cross over a "buffer" strip of land owned by the United States Forest Service before reaching the edge of the reservoir, climb down a steep embankment into the reservoir and then walk several hundred feet along the bottom of the reservoir to reach the water shoreline.² Plaintiffs

² Plaintiffs blatantly mischaracterize the record by asserting that Defendants' property is "waterfront property adjacent to Lake Cle Elum." See Plaintiffs' Opening Brief at p. 1. Notably, the very evidence Plaintiffs cite to in support of this contention in fact states the exact opposite. See

have presented no evidence, nor do they even appear to speculate, that Defendants had ownership of, or control over, this area within the reservoir. Nor do Plaintiffs contend that the Defendants had any control over the water level of Lake Cle Elum, which instead is controlled by a dam owned and operated by the United States Bureau of Reclamation.

In order for this Court to even consider the Plaintiffs' contention regarding Defendants' breach of a duty owed to a Licensee, **the Court would first have to craft a new decision expanding a Landowner's duty of ordinary care to protect a Licensee from known hazardous conditions on its property to encompass unknown hazardous conditions existing on remote property owned and controlled by others.** Doing so would create a conflict of authority within Division III and would violate the well-established rule of *stare decisis*. As discussed in the section below, such a decision would unreasonably expand the scope of liability for landowners in situations where the landowner has no ability to identify, ameliorate or control the hazardous condition.

Answer at ¶ 3.2, CP 7 (Defendants “**deny** that the subject property they own abuts Lake Cle Elum.”); see also Parker Decl. at ¶ 2, CP 28 (“The parcels boundary lines do **not** physically touch the high-water line of Lake Cle Elum.”). Plaintiffs prove no contrary evidence to counter the Defendants' evidence, and instead knowingly misstate the record in an effort to mislead the Court.

This Court should follow in the footsteps of the Courts in McMann and Smith and affirm the lower court's summary judgment. Just as the defendants in those cases, the Defendants here were not in a position to correct the allegedly hazardous condition of Lake Cle Elum. A warning of the hazards of swimming in a natural body of water did not need to be given to Christine's adult custodians as they had utilized the Subject Property and used the adjacent reservoir for swimming on previous occasions; indeed, those potential hazards were recognized by the Camp directors when they had four adult counselors supervise and accompany the children to the lake. Furthermore, warning an eight-year-old child (who would not appreciate the risks) of the hazards of swimming in a natural body would serve no purpose.

This Court should reject Plaintiffs' attempt to impose a duty to warn upon the Defendants under this factual scenario. As noted by the McMann court, there is nothing about the Defendants' land itself, or the Defendants' use of the land, that makes the condition existing within the adjacent Lake Cle Elum reservoir any more or less dangerous. McMann, 88 Wash. App. at 744, 946 P.2d at 1187 ("There is no affirmative obligation on Angeles Park, as landlord, to this tenant, Devin McMann, as invitee, **because there is no common area on its premises or other condition on its land which can be claimed to be unreasonably unsafe**

due to the proximity of the canal on adjacent property.”) The same is true here, as there is no allegation that Defendants used or failed to use *their property* in any way, so as to render the adjacent property more unsafe or to increase any risk posed by the reservoir to Defendants’ licensee. The law is clear that a duty to warn is only applicable to those cases where the dangerous condition is found upon the property owner’s land, not where the dangerous condition is located upon another piece of property located separate from the defendants’ land.

The case at bar provides even stronger grounds to rule in Defendants’ favor than the McMann and Smith decisions. Whereas in McMann, the area over which decedent walked before drowning *was* in fact owned by the same corporation that owned the mobile home park, here, to even reach the Morgan Creek Cove swimming area, the campers had to cross over a strip of land that itself was not owned or controlled by the Defendants, and then additionally travel down an embankment consisting of Bureau of Reclamation land. If a landowner owes no duty to an invitee where the dangerous condition is found on immediately adjacent land (as in McMann and Smith), then there certainly can be no duty where there is a buffer strip of land separating the condition from the landowner’s property (as in this case).

To further bolster the Defendants' position, it should be noted that McMann and Smith both dealt with a **landowner/invitee relationship**, as the injured parties stood in a *business relationship* with the defendant (mobile home park tenants in McMann, and recreational fee users in Smith). Here, in contrast, the decedent and other campers were using the Defendants' unimproved property free of charge and thus, were licensees subject to a lesser standard of care, as discussed above. Accordingly, McMann and Smith mandate that the Court affirm.

3. Plaintiffs Mischaracterize the Supreme Court's Holding In *Degel*

Plaintiffs' argument relies heavily upon the Supreme Court decision in Degel v. Majestic Mobile Manor, Inc., 129 Wash.2d 43, 49, 914 P.2d 728 (1996). Unfortunately, Plaintiffs incorrectly characterize the scope of the holding in that case.

In Degel, the Supreme Court held that "a landowner is not exempt from the duty to exercise reasonable care to protect invitees against potentially dangerous conditions **on the land** solely because the potential danger includes risks which are inherent in a natural body of water." Id. at 45-46 (emphasis added). Notably, the Degel decision is completely silent on whether a landowner owes a duty of care to a licensee for harm occurring on an adjacent parcel of land, but this issue was decided the

following year in McMann, a holding which has never been questioned by an appellate or Supreme Court decision and which has been solidified in the 2012 Smith decision. In addition, the facts which underlie the Degel court's analysis stand in sharp contrast to the instant matter and comparing them to this case demonstrates that the Plaintiffs' arguments lack merit.

Degel's holding and rationale stem from the fact that the plaintiffs in Degel were **tenants who paid to use the subject land, and whose activities were closely controlled by their landlord.** As the Court observed:

“[A] landowner's duty of care to persons on the land is governed by the entrant's common law status as an invitee, licensee or trespasser. *Tincani*, 124 Wash.2d at 128, 875 P.2d 621; *Ertl v. Parks & Recreation Comm'n*, 76 Wash. App. 110, 113, 882 P.2d 1185 (1994), *review denied*, 126 Wash.2d 1009, 892 P.2d 1088 (1995)). **The parties involved in the present case agree, for purposes of the motion for summary judgment, that Jason was an invitee at the time he was injured. Generally, a landowner owes trespassers and licensees only the duty to refrain from willfully or wantonly injuring them, whereas to invitees the landowner owes an affirmative duty to use ordinary care to keep the premises in a reasonably safe condition.** *Ertl*, 76 Wash. App. at 113, 882 P.2d 1185; *Van Dinter v. City of Kennewick*, 121 Wash.2d at 41–42, 846 P.2d 522.

In the context of landlords and tenants, this means that a landlord has an affirmative obligation to maintain the common areas of the premises in a reasonably safe condition for the tenants' use.” Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 49, 914 P.2d 728, 731 (1996)(emphasis added).

Notwithstanding Plaintiffs' misleading statement that Defendants "hosted" the Camp (implying there was an invitation or outreach by the Defendants, or any affirmative oversight, which is not the case), there is no evidence or argument that Christine, or the other campers, fall into the category of invitees under the common law, as discussed in detail above. As Christine is indisputably a licensee, Degel does not provide a basis to support Plaintiffs' contention that Defendants owed her a duty of care with respect to conditions found along or under the shoreline of a water reservoir located several hundreds of feet from their property.

In addition, the landlord's liability in Degel was dependent in large part upon numerous affirmative acts performed by landlord which increased the danger to the Plaintiff; these critical facts were summarized by the court in McMann as follows:

"The McManns contend that *Degel* supports their claim of liability against Angeles Park. We disagree. The facts of this case are distinguishable from *Degel*. Here, **no additional charge is made for the children to reside on Angeles Park's premises compared to the special fee charged in *Degel*.** The creek in *Degel* was only 10 feet below the level of the perimeter road around the mobile home park and just 20 feet from the road, compared to 100 to 150 yards from the closest edge of Angeles Park's mobile home development. In *Degel*, the slope to the creek was described as steep compared to the gradual slope in this case, which leveled as it approached the canal. The landlord in *Degel* **required families with children to live closest to the creek, but here there was no special**

placement of families with children nearest the canal. In *Degel* the landlord developed a grassy area beyond the perimeter road nearest the creek as a play area for children. **Here, the area between the mobile home park and the canal was not developed or used as a play area, but was left largely in its natural state and for the most part was undeveloped.** In *Degel*, the landlord had fenced other portions of the premises but had not placed a fence between the play area and the creek. Here, there is no record of any fencing. The embankment in *Degel* was described as slippery, a condition not found in this case. McMann, 88 Wash. App. at 743–44 (internal citations omitted, emphasis added).

Applying the law to the facts of this case shows that the Court should follow the same analytical approach employed by McMann. Like the McMann case (and unlike the Degel case), the location in the reservoir where Christine drowned was several hundred feet from Defendants' property. Unlike the Degel case where the landlord charged a special fee for families with children and segregated them to a specific area of the mobile home park located closest to the creek, no fee was charged for the Camp's presence on the Subject Property. Another significant distinction in Degel is the fact the landlord played an active role in managing the living arrangements and activities of its tenants, delineating where they could recreate; whereas here, the Defendants had absolutely no involvement in deciding how the Camp would spend its time; whether they would swim, and if so, where to swim; or whether the campers

should engage in hiking, bike-riding, kite-flying, or any other outdoor activities.

In sum, it is telling that Plaintiffs have not identified a single case from any jurisdiction or any statutory authority to support their contention that a landowner owes duty of care to a licensee for conditions existing off of the premises. The case law which does exist, however, makes clear that Defendants were under no duty to protect or warn Christine, or her adult camp counselors, from any danger presented by the drawn down reservoir of Lake Cle Elum. As such, the Court should affirm.

C. **Plaintiffs Cannot Meet Their Burden of Proving Defendants Proximately Caused the Plaintiffs' Damages**

Although the issue of lack of a legal duty is dispositive in this case and mandates that the court affirm the summary judgment in Defendants' favor, the court should also recognize that a second element of Plaintiffs' negligence claim also fails: causation. However, before addressing this issue on its merits, the Court should observe that the **Plaintiffs have not assigned error to, nor have they presented any legal authority or argument with respect to, the proximate cause of the decedent's death.** Although causation of the decedent's death was a critical issue briefed by the defense and decided by the lower court (see CP 24, 25, 169), Plaintiffs appear to concede the issue. And issues to which the

appellant does not assign error are not to be considered by the Court on appeal. See Ang, 154 Wash.2d 477, 114 P.3d 637; 3 Wash. Prac., Rules Practice RAP 10.3 (8th ed.). Nonetheless, to the extent the Court will be addressing or considering this important part of the underlying claim against the Defendants, the following authorities are set forth for the Court's consideration.

Proximate cause contains two separate elements: cause in fact and legal causation. Cho v. City of Seattle, 185 Wash. App. 10, 16, 341 P.3d 309, 312–13 (2014). Cause in fact refers to the “but for” consequences of an act—“the physical connection between an act and an injury.” Hartley v. State, 103 Wn.2d 768, 778, 698 P.2d 77, 83 (1985). “Legal causation, on the other hand, rests on policy considerations as to how far the consequences of defendant’s acts should extend. It involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact. If the factual elements of the tort are proved, determination of legal liability will be dependent on “mixed considerations of logic, common sense, justice, policy, and precedent.” Id. Like duty, both types of proximate cause may be determined as a matter of law. N.L. v. Bethel Sch. Dist., 186 Wn.2d 422, 436–37, 378 P.3d 162, 169–70 (2016) (when the facts are not in dispute, legal causation is for the court to decide as a matter of law); Cho, 185 Wash. App. at 16, 341 P.3d

at 312–13 (cause-in-fact “may be decided as a matter of law if the causal connection between the act and the injury is so speculative and indirect that reasonable minds could not differ”).

1. Plaintiffs Cannot Show That, But-For the Defendants’ Conduct, the Harm Would Not Have Occurred

Here, there is no evidence in support of Plaintiffs’ claim that Defendants caused their injuries, and Plaintiffs cannot show any “but-for” relationship that would establish Defendants’ responsibility for Christine’s death. Other than allowing the Camp to use their property and construct a campsite, Defendants had absolutely no involvement in the Camp’s activities, did not supervise the campers, did not instruct anyone regarding water safety practices, and did not exercise control over the beach area where Christine drowned. Short of perhaps not letting the Camp use the Defendants’ property for their campsite in the first place, there is simply no “but-for” event triggered or caused by the Defendants that resulted in the circumstances giving rise to Christine’s death.

Further, Plaintiffs’ insinuation that Christine’s death would have been avoided if Defendants had warned the Camp directors and counselors of potential hazards posed by swimming in the reservoir is not supported by the facts of the case. No declaration, affidavit or deposition testimony was offered by Plaintiffs in this case to show that the directors and

counselors of the Camp would have done anything different in response to a warning by the Defendants.

2. Plaintiffs Also Cannot Meet Their Burden of Demonstrating Legal Causation

Plaintiffs also fail to establish legal causation, as “considerations of logic, common sense, justice, policy, and precedent” dictate that Defendants cannot be held responsible for Christine’s death, however tragic it may have been. Not only do Plaintiffs fail to even argue that there was indeed “legal cause” attributable to Defendants, but the public policy and common sense involved in such a calculation strongly favor the Defendants. As a matter of policy, if Defendants are found to have proximately caused the drowning death, this would result in an extremely unfair burden on the Defendants who would be disinclined to ever offer their acreage to people like the Camp. Further, well-established public policy in this State is that the Defendants are not insurers of the safety of their licensees. See Daly v. Lynch, 24 Wash. App. 69, 73, 600 P.2d 592, 595 (1979). Plaintiffs have presented no contrary public policy argument.

A ruling adverse to the Defendants on legal causation would also make little sense given the hazard involved in this case—a large body of water whose risks could not be more obvious to the directors and counselors of the Camp charged with supervising the children under their

guidance and protection. Particularly since the Camp had previously used the Subject Project during five previous summers and the directors of the Camp had used the reservoir for swimming in those years as well. To find proximate cause against the Defendants would also offend basic notions of common sense and would be akin to imposing a duty of care to warn of hazardous curves in the roadway leading to Defendants' land, or of the dangers of hiking alone in the forests, encounters with wild animals, falling down the rock embankment into the reservoir, etc., etc., etc. The uncertainty of such a ruling is plain, not to mention the obvious problem in defining its scope (i.e., if a landowner can be found legally responsible for failing to warn of dangers existing several hundred feet from the property, then what about dangers existing on land that is *several thousand feet away*?)

In short, Plaintiffs cannot meet their burden of demonstrating proximate causation, which provides additional ground for affirming the trial court's order.

3. Reasonable Minds Could Not Differ on What Proximately Caused the Plaintiffs' Loss

The cause of this unfortunate tragedy is clearly demonstrated in the evidence before the Court; Christine did not know how to swim, yet she was mistakenly allowed to participate in the swimming excursion without

wearing a life jacket, even though four adult camp counselors stood nearby, and her grandmother was present in the campground. The Sherriff's Deputy's incident report³ is to the point:

At around 1630 hours, there were approximately 15 kids in the water in the beach area. **The camp did not have life-jackets or any water safety equipment in the area. Christine reportedly did not know how to swim.** Christine's cousin had a "near drowning" incident near Christine. The camp counselors had to pull her cousin out of the water, which is right around the time that Christine disappeared.

CP 63 (emphasis added).

The lack of oversight by Christine's legal guardian and the Camp director and counselors is underscored when reading the "real-time" dispatch notes found in the Fire Department Incident Report, a portion of which is excerpted below:

"Narrative from dispatch:

8 YOF MISSING, WAS LAST SEEN SWIMMING IN THE LAKE WITH OTHER JUVENILES. 17:09:34
07/27/2015 - 015 CHRISTINE BETHAY DOB/03112007.
4 FT TALL, VERY THIN, LT BRO LONG HAIR, BLU EYES, LSW/PINK& BLK BATHING SUIT 17:10:02
07/27/2015 - 015 JUVENILES WERE SWIMMING IN APPROX 4FT OF WATER, **NO PFD'S** 17:10:12
07/27/2015 - 015 **DID NOT KNOW HOW TO SWIM**
17:10:27 07/27/2015 - 015 JUVENILE HAS BEEN MISSING FOR PAST 30-45 MINUTES 17:11:25

³ Notably, Plaintiffs concede that "Defendants' account of Christine's drowning is largely correct and *supported by the Kittitas County Sherriff's Report.*" CP 123.

07/27/2015 – 015 NO OTHER JUVENILES CLAIM TO HAVE SEEN HER GO UNDER OR COME OUT OF THE WATER. **4 ADULTS AND 15 JUVENILES AGES 7-12 YOA WERE SWIMMING AT THE TIME** 17:13:46 07/27/2015 – 015...FROM THE ADDRESS, THERE IS A TRAIL DOWN TO THE LAKE WHERE THEY WERE SWIMMING IN A COVE ON THE LAKE...”

CP 83 (emphasis added).

Allowing an eight-year-old child—who did not know how to swim—to go into Lake Cle Elum to play in the water without a lifejacket is the proximate cause in fact of this accident, not an alleged failure by Defendants to warn of potential hidden hazards under the water of the adjacent Lake Cle Elum reservoir.

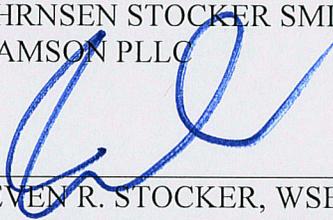
Defendants submit that based upon the evidence filed of record before the Court, reasonable minds could not differ in reaching the conclusion that Defendants’ actions did not proximately cause Christine Bethay’s death. See, Hertog, ex rel. S.A.H. v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400, 406 (1999) (“Breach and proximate cause are generally fact questions for the trier of fact. However, if reasonable minds could not differ, these factual questions may be determined as a matter of law.”) Plaintiffs’ failure to present any proof of proximate causation, failure to present any briefing in this regard, or even assign error to the proximate cause issue in their opening brief mandates that the Court affirm the trial court’s order of dismissal.

IV. CONCLUSION

Based on the foregoing, Defendants respectfully request that the Court affirm the Kittitas County Superior Court's order granting summary judgment in Defendants' favor and dismissing Plaintiffs' complaint.

DATED this 12th day of February, 2018.

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