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No. 360962

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

MARIA GUADALUPE GOMEZ MEDINA and FREDERICO
GOMEZ, individually and MARIA GUADALUPE GOMEZ MEDINA
as guardian of BRENDA M. HERNANDEZ, a minor,
Appellants,

v.

CITY OF WAPATO, a Washington municipality, and EVA CORTEZ
and JOHN DOE CORTEZ, wife and husband and JOHN DOE and
JANE DOE SMITH 1-10,
Respondents.

APPELLANTS' REPLY BRIEF

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ARGUMENT

1. Respondent mischaracterizes the dangerous condition.

The Respondent contends the “Court must define the dangerous condition as one installed by the Defendant, i.e., the gate.” (R.B., Page 7) Respondent further contends “the Plaintiff has insufficient evidence to establish that the gate in and of itself is a dangerous condition.” (R.B., Page 8)

Identifying the injury-causing condition is a factual determination. A “dangerous condition” is defined as one that poses an unreasonable risk of harm. *Tabak v. State*, 73 Wash. App. 691, 870 P.2d 1014 (1994). The injury-causing condition must be analyzed in the context of other factors and not the condition in isolation. *Cultee v. City of Tacoma*, 95 Wn.App. 505, 516-17, 977 P.2d 15 (1999). To view the condition alone “as having been the injury-causing condition would be to artificially isolate some particular aspect of the total condition that caused [plaintiff’s] injury.” *Van Dinter v. City of Kennewick*, 121 Wash. 2d 38, 44, 846 P.2d 522 (1993).

For example, a stump is not just a stump but can be a dangerous condition when the stump is submerged in a lake and

struck by a boater. *Ravenscroft v. Washington Water Power Co.*, 136 Wash. 2d 911, 969 P.2d 75 (1998). In *Ravenscroft*, the Washington Supreme Court reversed Division Three holding the injury-causing condition was not the stump in itself, but rather the stump in combination with other factors, such as the location of the stump in a channel and the water obscuring it. *Ravenscroft*, at 921-22.

Another case illustrative of this principle of “looking beyond” the obvious condition is *Cultee v. City of Tacoma*, 95, Wn.App. 505, 977 P.2d 15 (1999). In *Cultee*, several children were riding bikes and stopped riding when the road was covered by two to four inches of muddy water. While mounting her bike to turn around, Reabecka Cultee was too close to the edge of the road and fell into the water flooding adjacent fields that were several feet deep with water. Reabecka drowned not knowing how to swim. The City argued the condition that resulted in Reabecka’s death was merely water on the road and that this condition was not “dangerous,” “artificial,” or “latent.” Cultee responded that the “condition” that resulted in Reabecka’s death was the muddy water on the road, hiding the eroded road edge and steep drop off into deep adjacent water, in combination with the deterioration of the raised road. The

Court of Appeals reversed the summary judgment concluding reasonable minds could differ as to the “condition” that caused her death. Thus, as a matter of law, the court could not say that the condition that killed Reabecka was merely water on the road. *Cultee*, at 517.

In the instant case, the lower court and this Court cannot say, as a matter of law, that it was merely a gate that severely injured four year old Brenda Hernandez. It is for a jury to determine whether the gate, manipulated by the weight of the girls swinging on it, was a dangerous condition.

2. The gate, when manipulated, by being left unsecured with children hanging and swinging on it, is a latent condition.

Respondent correctly notes the standard set forth in *Jewels v. City of Bellingham*, 183 Wn.2d 388, 353 P.3d 204 (2015) for determining whether a condition is latent.

The relevant inquiry is whether an ordinary recreational user standing near the injury-causing condition “could see it by observation, **without the need to uncover or manipulate the surrounding area.**” *Jewels*, 183 Wn.2d at 400 (Emphasis added). Citing *Swinehart v. City of Bellingham*, 145 Wn.App. 836, 187 P.3d

345 (2008), the court in *Jewels* recognized “the fact that the condition can be easily photographed is an acknowledgment that the condition is obvious.” *Jewels*, 183 Wn.2d at 401.

Here, the injury-causing condition was an unlocked gate whose hinge became dangerous **only** when it was left unlocked and was swung back and forth with a weight attached to it (ie., kids hanging on the gate). **This injury-causing condition in this case is not observable or readily apparent to a recreational user and cannot be photographed unless it is manipulated.** While it is true that Brenda Hernandez might have known the hinge would move, there was nothing about the hinge that would necessarily have put her on notice, as she stuck her hand into the hinge opening, that it would suddenly raise up beneath the weight of her sister and friend swinging on the gate. The upward movement of the hinge was certainly not obvious as a matter of law. Because the City of Wapato moved for summary judgment, all facts and reasonable inferences therefrom must be construed in the light most favorable to four year old Brenda Hernandez. *Swinehart*, 145 Wn.App. at 846. Reasonable persons could differ in concluding the unsecured gate hinge with a weight pulling on the gate was a latent condition.

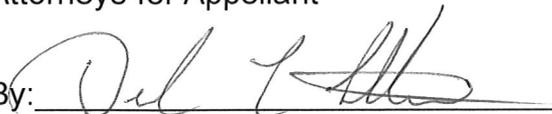
Respondent's reliance upon *Van Dinter* is misplaced. In *Van Dinter*, the plaintiff was injured when a playground contained a five-foot-high caterpillar-shaped climbing toy that had an "antennae" sticking out. The plaintiff, playing on the caterpillar, turned his head and the obvious antennae that was sticking out struck the plaintiff's eye causing serious injury. It is hard to imagine such circumstances this "antennae" could be construed as latent when it was sticking out and didn't have to be manipulated and could be photographed exactly as it always appeared when it caused the plaintiff injury.

CONCLUSION

Based on the facts of this case and the law in this state, the Court should reverse the lower court's ruling granting the City of Wapato's motion for summary judgment. Because the City of Wapato moved for summary judgment, all facts and reasonable inferences must be construed in the light most favorable to four year old Brenda Hernandez. Reasonable persons could differ in concluding the unsecured gate hinge with a weight pulling on the gate was a dangerous and latent condition.

Respectfully submitted this 13th day of December, 2018.

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