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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.

AMENDED APPELLANTS' BRIEF

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I. ASSIGNMENT OF ERROR

The lower court erred by applying the wrong standard for determining whether a condition was obvious (not latent) as a matter of law under Washington's Recreational Land Use Immunity Statute, RCW 4.24.210(4).

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Whether the lower court erred in ruling a condition was not latent under Washington's Recreational Land Use Immunity Statute simply because the gate hinge could be photographed ignoring the gate needed to be manipulated to create the injury-causing condition?

III. STATEMENT OF THE CASE

On August 25, 2011, plaintiff Brenda M. Hernandez had several fingers on her left hand partially amputated as a result of an incident that occurred at the Wapato Athletic Complex in Wapato. (CP 4 - Plaintiff's Complaint, Paragraph 7.)

Brenda Hernandez was born on October 19, 2006. At the time of this incident, she was only four years old. (CP 56 - Exhibit 1 to the Sworn Statement of Derek Sutton).

It is undisputed that Brenda, her sister Selena, and a friend, Estrellita, went from their apartment complex across the street to go play on a park gate at the Wapato Athletic Complex. While hanging and playing on the gate, with the gate being swung open and shut, Brenda got her fingers caught in the hinge where the park gate swings open and shut. (CP 61-62 - Exhibit 2 to the Sworn Statement of Derek Sutton) A couple of close up photographs of this hinge and the gate is attached as part of Exhibit 4 to the Sworn Statement of Derek Sutton. (CP 69-72) Copies of these photographs are attached to this Brief in the Appendix pursuant to the lower court judge's recommendation since the scanned photos in the court record are not clear. (RP Page 28, line 13 – Page 29, line 3)

Photos showing the gate at night after this injury occurred are attached as Exhibit 3 to the Sworn Statement of Derek Sutton. (CP 66) According to the Declaration of Jeff Schumacker, Public Works Director for the City of Wapato, dated February 27, 2018, the gate was installed in approximately 2006 and the gate and its hinges have never been modified since it was installed. (CP 47)

A drawing by Brenda showing her position playing on the gate is attached as Exhibit 5 to the Sworn Statement of Derek Sutton. (CP 74) A drawing showing the position of the other children at the gate when Brenda was injured is attached as Exhibit 6 to the Sworn Statement of Derek Sutton. (CP 76)

Other children had played on this gate before Brenda was injured. The gate was not secured when Brenda was injured. See Exhibit 7 to the Sworn Statement of Derek Sutton. (CP 82-84)

In granting the City of Wapato's motion for summary judgment, the Honorable Blaine Gibson ruled:

Well, I think that it is patently obvious that if this thing moves around, if you stick fingers in there, there is a risk of injury. Because depending upon how far the gate rotates, you could get a sideways pinching as opposed to the vertical pinching you're talking about. I just don't think that the plaintiff has proffered enough to raise a – an inference here that there is a genuine issue of material fact on the question of whether the condition itself is latent. Because it's – it is what it is. You can take a picture of it. And you can also see how it works in terms of how things rotate around. And I

think it's obvious enough that if you stick your fingers in there, there is a risk that somehow they would be injured. Whether you could anticipate exactly what the injury process would be, I'm not sure. But I think it's obvious enough that there would be a risk to you if you stuck your fingers in there. So I am going to grant the motion.

(RP Page 27, line 11 – Page 28, line 6.)

IV. ARGUMENT

A. Standard of Review

A summary judgment order is reviewed by the Court of Appeals de novo and the Court is to perform the same inquiry as the trial court. *Kofmehl v. Baseline Lake, LLC*, 111 Wn.2d 584, 594, 305 P.3d 230 (2013). A motion for summary judgment accepts all facts and reasonable inferences in the light most favorable to the nonmoving party. *Kofmehl v. Baseline Lake, LLC*, 177 Wn.2d 584, 594, 305 P.3d 230 (2013). Considering the facts in the light most favorable to the nonmoving party, the motion for summary judgment should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Failla v.*

FixtureOne Corp, 181 Wn.2d 642, 649, 336 P.3d 1112 (2014) (quoting *Lewis v. Bours*, 119 Wn.2d 667, 669, 835 P.2d 221 (1992)), *cert. denied*, *Schutz v. Failla*, 135 S.Ct. 1904 (2015).

B. Washington’s Recreational Land Use Statute

In Washington, the duties and liabilities of an owner or occupier of land, when it is held open to the public for recreational use, are established by statute. 16 *Washington Tort Law and Practice* § 17.14 (2000). Washington’s Recreational Land Use Statute supersedes the common law status and categories and defines the legal duty owed to visitors to recreational properties. See *Ravenscroft vs. Washington Water Power Co.*, 87 Wn. App. 402, 417-418, 942 P.2d 91 (1997), *aff’d in part, rev’d in part on other grounds*, *Ravenscroft vs. Water Power Co.*, 136 Wn.2d 911, 969 P.2d 75 (1998). Thus, Brenda Hernandez’ status under common law principles is irrelevant because both her status as a “recreational user” and the City of Wapato’s duty to such user are defined by the statute. *Bernstein vs. State*, 53 Wn. App. 456, 767 P.2d 958 (1989).

Generally, a landowner who has made his land available for recreational users free of charge cannot be held liable for unintentional injuries. See RCW 4.24.210. However, “[a] landowner who has failed to post conspicuous signs warning of a “known dangerous artificial latent condition” enjoys no recreational statutory immunity for injuries caused by such condition.” *Cultee vs. City of Tacoma*, 95 Wn. App. 505, 515, 977 P.2d 15 (1999).

RCW 4.24.210 provides in pertinent part:

Liability of owners or others in possession of land and water areas for injuries to recreational users – Limitation

(1) Except as otherwise provided in subsections (3) or (4) of this section, any public or private landowners . . . , who allow members of the public to use them for the purposes of outdoor recreation . . . without charging a fee of any kind therefore, shall not be liable for unintentional injuries to such users.

. . .

(4) Nothing in this section shall prevent the liability of a landowner or others in lawful possession and control for injuries sustained to users by reason of a known dangerous, artificial, latent condition for which warning signs have not been conspicuously posted....

(Emphasis added)

The four terms – ‘known,’ ‘dangerous,’ ‘artificial,’ and ‘latent’ – modify ‘condition’ not one another. *Jewels v. City of Bellingham*, 183 Wn.2d 388, 397, 353 P.3d 204 (2015). The “determination of whether a condition is dangerous, artificial and latent is often fact specific.” *Ravenscroft vs. Washington Water Power Co.*, 136 Wn.2d 911, 923, 969 P.2d 75 (1998).

The City of Wapato is not immune from suit under the statute because Brenda Hernandez’ injuries were due to a known, dangerous, artificial, latent condition for which warning signs were not posted. **The only issue in dispute here is whether the injury-causing condition was latent.**

1. Injury-Causing Condition

The first step in the court's analysis is to identify the injury-causing condition. *Davis v. State*, 102 Wn.App. 177, 185, 6 P.3d 1191 (2000). Under the recreational land use statute, the injury-causing condition is defined as "the specific object or instrumentality that caused the injury, viewed in relation to other external circumstances in which the instrumentality is situated or operates." *Swinehart v. City of Spokane*, 145 Wn.App. 836, 846, 187 P.3d 345 (2008) (quoting *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 921, 969 P.2d 75 (1998)). Identifying the injury-causing condition is a factual determination. 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).

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).

2. A Latent Condition

A condition is latent when it is not readily-apparent to the recreational user of the land. *Jewels*, 183 Wn.2d at 398. Whether a particular recreational user sees the injury-causing condition is irrelevant, but rather the focus is on whether the condition itself is readily apparent to the general class of recreational users. *Jewels*, 183 Wn.2d at 398. 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*, 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. Whether a condition is “latent” or “patent” can present a factual question. *Tabak vs. State*, 73 Wn. App. 691, 698, 870 P.2d 1014 (1994).

In the present case, the injury-causing condition, the unsecured gate hinge with a weight attached to the gate, was a latent condition. As evidenced from the photographs attached as Exhibit

4 to the Sworn Statement of Derek Sutton (CP 68-72), this injury-causing condition is not evident in the photographs. The photographs reveal the gate hinge moves back and forward when the gate is opened and shut. If the gate has a weight on it, as it did with the two girls hanging on it when Brenda was injured, the gate hinge will also move up and down. A recreational user of the park (and gate) such as Brenda Hernandez would not know of this condition. The hinge was the same color as the gate. Any person not familiar with the gate and its hinge, as well as Brenda Hernandez, wouldn't have any reason to anticipate this hinge could go up or down because it could only do this if the gate was unsecured and a weight was pulling the gate down. At the very least, it is a jury question to determine whether the injury-causing condition in this case was latent.

This injury-causing condition in this case was not observable or readily apparent to a recreational user and cannot be photographed. 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.

V. CONCLUSION

Based on the facts of this case and the above authorities, Brenda Hernandez respectfully requests the Court reverse the lower court's order granting defendant City of Wapato's motion for summary judgment. It is a jury issue whether reasonable persons could differ in concluding the unsecured gate hinge with a weight pulling on the gate was a latent condition.

Respectfully submitted this 12th day of October, 2018.

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VI. APPENDIX

A1 – Four photographs showing the gate and hinge close up.

DOT-C2





NO
TRESPASSING
VIOLATORS
WILL BE
PROSECUTED

ROAD
CLOSED





PREDILETTO, HALPIN

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Comments:

Appellants Amended Brief with correct CP citations

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