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

No. 360962

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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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, et al.

Respondents.

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RESPONDENT'S BRIEF

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## TABLE OF CONTENTS

	<u>Pages</u>
I. INTRODUCTION .....	1
II. STATEMENT OF THE CASE .....	1
III. ARGUMENT.....	2
A. Summary Judgment Standard .....	2
B. Recreational Use Statute Shields Defendant City Of Wapato From Liability .....	4
1. Alleged Danger Condition .....	6
2. The Gate is Not a Latent Condition .....	8
IV. CONCLUSION .....	10

## TABLE OF CASES

	<u>Pages</u>
<b><u>STATE</u></b>	
<u>Anderson v. Akzo Noble Coatings, Inc.</u> , 172 Wn.2d 593 (2011) .	2
<u>Barber v. Bankers Life &amp; Cas. Co.</u> , 81 Wn.2d 140 (1971).....	3
<u>Better Fin. Solutions, Inc. v. Trans Tech Elec., Inc.</u> , 112 Wn.App. 697 (2002).....	3
<u>Greta v. Seattle City Light</u> , 54 Wn. App. 603 (1989) .....	6
<u>Grimwood v. Univ. of Puget Sound, Inc.</u> , 110 Wn.2d 355 (1988)..	3
<u>Iwai v. State</u> , 129 Wn.2d 84, (2001) .....	4
<u>Jewels v. City of Bellingham</u> , 183 Wn.2d 388 (2015) .....	8, 9
<u>Marshall v. Bally’s Pacwest, Inc.</u> , 94 Wn.App. 372 (1999).....	4
<u>McKinnon v. Washington Fed. Savings &amp; Loan Ass’n</u> , 68 Wn.2d 644 (1966) .....	5
<u>Roger Crain &amp; Assocs., Inc. v. Felice</u> , 74 Wn.App. 769 (1994)....	3
<u>Seven Gables Corp. v. MGM/UA Entm’t, Co.</u> , 106 Wn.2d 1 (1986).....	3
<u>Van Dinter v. City of Kennewick</u> , 121 Wn.2d 38 (1993).....	4, 6, 9
<u>Young v. Key Pharm., Inc.</u> , 112 Wn.2d 216 (1989) .....	3

STATE STATUTES

	<u>Pages</u>
RCW 4.24.200.....	5
RCW 4.24.210 .....	2, 5, 6, 7, 8, 9

RULES

	<u>Pages</u>
CR 56.....	3

## **I. INTRODUCTION**

The Plaintiff before the Superior Court failed to produce sufficient evidence to overcome the Recreational Land Use of Statute immunity provided to the Defendant City of Wapato. This Court should affirm the Superior Court's Dismissal of the Plaintiff's Complaint.

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

This action stems from the unfortunate accident where Plaintiff Brenda M. Hernandez permanently injured fingers on her left hand when they were crushed on a metal gate she was playing on with her friend and her older sister. (CP 4, Paragraph No. 7.)

On the morning of the accident, Plaintiff Hernandez was playing with her older sister Selena and her friend Estrellita on a metal gate that controlled an access road into a City of Wapato park. (CP 31-32 and 35). Plaintiff Hernandez had previously not played on the gate, but had seen other children play on the same gate. (CP 32, lns. 21, 24-25, and CP 33), lns. 1-5). While the three girls were playing on the gate, Plaintiff Hernandez's fingers on her left hand (through a mechanism that is factually unclear) became pinched or crushed to a degree of permanent impairment. (CP 33-34). Plaintiff Hernandez was airlifted to Harborview, but the

surgeons were unable to restore blood flow to the tips of her 3rd, 4th, and 5th digits of her left hand and those fingers' injuries lead to the partial amputation of those fingers. (CP 34, Ins. 7-11). Other than the three girls that morning, there were no other witnesses to the events.

The City of Wapato controls access to its parks with metal gates to prevent unauthorized vehicles from access the parks. The City has not modified these gates at any time since they were installed. (CP 45-47). Further, the City have never received any complaints regarding injuries occurring because of the gate-design. (CP 46-47).

### **III. ARGUMENT**

This Court should affirm the Superior Court's Dismissal of the Plaintiffs' Complaint as the Plaintiff has produced insufficient evidence to overcome the Recreational Use Statute, RCW 4.24.210.

#### **A. Summary Judgment Standard.**

Since the Superior Court Dismissed the Plaintiffs' Complaint on Summary Judgment, this Court reviews that Decision De Novo. Anderson v. Akzo Noble Coatings, Inc., 172 Wn.2d 593, 600 (2011).

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact.

Young v. Key Pharm., Inc., 112 Wn.2d 216, 225 (1989). The burden is on the moving party for summary judgment to demonstrate that there is no genuine dispute as to any material fact and all reasonable inferences from the evidence must be resolved against him. Barber v. Bankers Life & Cas. Co., 81 Wn.2d 140, 142 (1971). The facts required by CR 56(e) are evidentiary in nature, and ultimate facts or conclusions of facts are insufficient. Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-60 (1988).

A non-moving party in a summary judgment cannot rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, the non-moving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists. Seven Gables Corp. v. MGM/UA Entm't, Co., 106 Wn.2d, 1, 13 (1986). Summary judgment is proper when the only question before the Court is one of law. Better Fin. Solutions, Inc. v. Trans Tech Elec., Inc., 112 Wn. App. 697, 702-03 (2002).

To raise a genuine issue of material fact, the nonmoving party must allege evidentiary facts as to "what took place, an act, an incident, a reality as distinguished from supposition or opinion". Roger Crain & Assocs., Inc. v. Felice, 74 Wn. App. 769, 778-79,

875 P.2d 705 (1994). The non-moving party must provide more than uncorroborated statements in a complaint. See, e.g., Iwai v. State, 129 Wn.2d 84, 88, 915 P.2d 1089 (2001). “A claim of liability resting only on a speculative theory will not survive summary judgment.” Marshall v. Bally’s Pacwest, Inc., 94 Wn. App. 372, 381, 972 P.2d 475, 479 (1999). Non-moving parties will not withstand summary judgment should they fail to produce evidence “explaining how the accident occurred.” Id. at 381. Here, Plaintiffs have provided no evidence that the City is liable in this matter.

**B. Recreational Use Statute Shields Defendant City of Wapato From Liability.**

Property owners, including municipalities, are immune from liability for all injuries occurring on their property to recreational users except those injuries resulting from a “known dangerous artificial latent condition.” Van Dinter v. City of Kennewick, 121 Wn.2d 38, 41 (1993). Under common law, landowners’ duty to persons entering their land was governed by whether that person was a trespasser, a licensee, or an invitee. Van Dinter, 121 Wn.2d at 41 (citing W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keon on Torts* §§ 58-61 (5th ed. 1984)). Trespasser and licensees are only owed a duty from a landowner to refrain from willfully or wantonly injuring them, whereas to

invitees, landowners are required to use ordinary care to keep the premise in a reasonably safe condition. McKinnon v. Washington Fed. Savings & Loan Ass'n, 68 Wn.2d 644, 648 (1966). Historically, an invitee was traditionally a person whose presence was of potential economic benefit to the landowner, however, this narrow classification created a harsh result for many persons that were injured upon the land of another. See McKinnon, 68 Wn.2d at 650-51. Therefore, many jurisdictions, including Washington, have adopted a more inclusive definition of invitee. Id.

In response to the more expansive definition, state legislators enacted RCW 4.24.210, Washington's recreation use statute. This statute was enacted "to encourage owners or others in lawful possession and control of land and water areas . . . to make them available to the public for recreational purposes by limiting their liability toward persons entering thereon." RCW 4.24.200. In the recreational use context, landowner liability is eliminated except in three situations: "(1) when the entrant is charged a fee of any kind; (2) when the entrant is injured by an intentional act; or (3) when the entrant sustains injuries by reason of a known artificial latent condition for which warning signs have not been conspicuously posted." RCW 4.24.210.

Predictably, the juxtapositions of the terms “known” and “latent” can cause confusion in determining whether this exception applies in preventing a landowner from being shielded from liability. See Van Dinter, 121 Wn.2d at 44. Nonetheless, this incongruity was recognized by the legislature and was explained during the law’s passage “by reference to what is *known to the landowner* but *latent as regards to the recreational user*.” Van Dinter, 121 Wn.2d at 44 (citing Senate Journal, 40<sup>th</sup> Legislature (1967) at 875) (emphasis in the original).

Accordingly, a landowner’s liability arises under RCW 4.24.210 only if the *landowner* knows about the condition and the conditions is not readily apparent to the *recreational user*. For a landowner to be liable under the recreational land use statute, a plaintiff must prove that a landowner (1) knew of the condition; (2) the condition was dangerous; (3) the condition was artificial; and (4) the condition was latent to the user. Van Dinter, 121 Wn.2d at 46 (citing Greta v. Seattle City Light, 54 Wn. App. 603, 610 (1989)). There is no dispute that the park in this case is recreational land.

### **1. Alleged Dangerous Condition.**

The Plaintiff improperly attempts to define the dangerous condition in this case. The Plaintiff alleges that:

**“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 weight attached to it (i.e., kids hanging on the gate).”**

However, RCW 4.24.210 requires that the condition be artificial and placed upon the land by the owner of the property. In this case, the City of Wapato installed the gate to restrict access to the park. This Court must define the dangerous condition as one installed by the Defendant, *i.e.*, the gate.

The Plaintiff attempts to argue that the gate only becomes dangerous when weight is placed upon the gate such as children. Plaintiff further attempts to confuse the issue of dangerousness and latent conditions when she attempts to define the dangerous condition. The element of a dangerous condition upon the land must be defined by what the landowner places on the property. In this case, it was the gate. Therefore, the Plaintiff must provide evidence that the gate, as constructed and placed in the park, was a dangerous condition.

No evidence or argument has been submitted that the gate in and of itself is a dangerous condition on the land. The Plaintiff concedes as much, by alleging that it only becomes allegedly dangerous when it was unlocked and there was some weight placed upon the gate. By defining the injury-causing condition, this Court should look at what the Defendant placed upon the land, not what

somebody else placed upon the land.

As such, the Plaintiff has insufficient evidence to establish that the gate in and of itself is a dangerous condition. Therefore, the Plaintiff has failed to establish a necessary element under RCW 4.24.210 and this Court should affirm the Dismissal of the Plaintiffs' Complaint.

## **2. The Gate is Not a Latent Condition.**

The Supreme Court in Jewels v. City of Bellingham, 183 Wn.2d 388 (2015) discusses at length “latent” conditions under the recreational use statute. The Jewels Court held:

**An injury-causing condition is “latent” if it is “not readily apparent to the recreational user.” The condition itself, not the danger it possesses, must be latent. The dispositive question is whether the condition is readily apparent to the general class of recreational users, not whether one user might fail to discover it. In other words, what one “particular user sees or does not see is immaterial.” This is an objective inquiry.** Jewels, 183 Wn.2d at 398 (citations omitted).

The Jewels Court went on to hold:

**If 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, the condition is obvious (not latent) as a matter of law. The latency of the condition is not based on the particular activity of the recreational user is engaged in or the particular user’s experience with the area from earlier visits or expertise in a specific recreational activity.** Jewels, 183 Wn.2d at 400.

Here, the Plaintiffs allege the dangerousness of the gate was latent. This is the improper inquiry. This logic was rejected by the Court in Van Dinter v. Kennewick, 121 Wn.2d 38 (1983).

The Van Dinter Court held:

**The Caterpillar as well as its injury-causing aspect – its proximity to the grassy area – were obvious. The condition that caused Van Dinter’s injury was not latent. Admittedly, it may not have occurred to Van Dinter that he could injury himself in the way that he did, but this does not show the injury-causing condition – the Caterpillar’s placement – was latent. At most, it shows the present situation is one in which a patent condition posed a latent, or, unobvious danger. RCW 4.24.210 does not hold landowners potentially liable for patent conditions with latent dangers. The condition itself must be latent.**

Van Dinter, 121 Wn.2d at 46.

In the case at bar, the photographs of the gate are more than sufficient evidence to establish that the condition was not latent, as a matter of law. “The fact that a condition can easily be photographed is an acknowledgment that the condition is obvious.” Jewels, 183 Wn.2d at 401. The hinge and gate could be seen by any individual entering the park. The gate and the hinge are obvious without any need to uncover or manipulate the surrounding areas. In fact, the Plaintiffs conceded that, as a four year old, the Plaintiff knew about the hinge as she explained that is why she was playing on the gate.

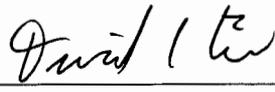
Since the photographs establish that the gate and the hinge are obvious to any visitor in the park, the condition is obvious and not latent. As such, the Plaintiffs have produced insufficient evidence to preclude summary judgment dismissal, and this Court should affirm the Superior court Dismissal of the Plaintiff's Complaint.

#### IV. CONCLUSION

In this case, the Plaintiff's Complaint was properly Dismissed by the Superior Court as she failed to produce evidence that the gate in question was a dangerous condition and that the gate was a latent condition as it was obviously observable. For those reasons, this Court should affirm the Dismissal of the Plaintiffs' Complaint

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of November, 2018.

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I hereby certify that on the **9th** day of **November, 2018**, I caused to be served via U.S. Mail a true and correct copy of **RESPONDENT'S BRIEF** upon counsel of record at the following address:

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by depositing the same in envelopes and addressing the envelopes to the stated addresses, shipping prepaid, and shipping the same via U.S. Postal Service at Wenatchee, Washington.

  
CARRIE M. FRANKLIN