No. 44346-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TORRE J. WOODS, individually,

Appellant,

v.

HO SPORTS COMPANY, INC., a for-profit Washington corporation,

Respondent,

and

MICHAEL E. WOODS, individually,

Respondent.

# BRIEF OF APPELLANT

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## A. INTRODUCTION

The sphere of the parental immunity doctrine as described by our Supreme Court in *Zellmer v. Zellmer*, 164 Wn.2d 147, 188 P.3d 497 (2008), is very limited. This case does not implicate that doctrine because nothing central to the parent-child relationship such as education, supervision, or child rearing is involved here. Rather, this case is a straight forward application of the Supreme Court's opinion in *Merrick v. Sutterlin*, 93 Wn.2d 411, 610 P.2d 891 (1980) where the court held that the parental immunity doctrine was inapplicable where the parent acted outside his parental capacity in a case involving negligent operation of an automobile.

Here, Michael Woods negligently operated a powerful motorized watercraft, rendering his son, Torre Woods, a quadriplegic. The trial court erred when it applied the parental immunity doctrine, immunizing Michael[1] from responsibility for his negligence. Moreover, the doctrine would not immunize Michael from wanton conduct in any event, so at the very least a fact question exists regarding Michael's reckless operation of the watercraft rendering summary judgment unavailable to him.

## B. ASSIGNMENTS OF ERROR

### (1) Assignments of Error

1. The trial court erred in entering its December 7, 2012 order granting partial summary judgment to Michael on parental immunity.

2. The trial court erred in entering its December 21, 2012 order denying Torre's motion for reconsideration and in striking certain evidence.

(2) Issue Pertaining to Assignments of Error

Where a parent negligently or wantonly operates a motorized watercraft resulting in severe personal injuries to his or her child, is that parent immune from an action for negligence under Washington law? (Assignments of Error Numbers 1, 2).

C. STATEMENT OF THE CASE

This case arises from a boating accident that occurred on Tiger Lake in Mason County in July 2010. CP 4-5, 11, 188. The facts are not in dispute. Michael Woods was operating his 240-horsepower SugarSand® jet boat on the lake, towing his son Torre and two other teenage boys behind the jet boat in an inflatable tube designed and manufactured by HO Sports Company ("HO Sports"). CP 4-5, 11, 29, 188-89. Michael Woods was towing the tube at a speed of 30 miles per hour. That speed greatly exceeded the limits imposed by its manufacturer; HO Sports advised users that the tube should not be used at any speed greater than 15 m.p.h. for

[1] The parties were referenced by their first names for ease of identification.

kids ("Boat speeds should never exceed . . . 15 m.p.h. for children."). CP 3, 42, 168, 183.

HO Sports also advised users: "Watercraft driver should avoid excessive speed or sharp turns which might cause the tube to flip over abruptly resulting in serious injury to the rider."). CP 183. Michael acknowledged that he cut across the Jet Boat wake when Torre was injured. CP 42, 44. The tube crossed the wake ejecting all three boys from the tube. CP 189. One of Torre's companions landed on Torre. CP 189. The impact broke Torre's neck, rendering him a quadriplegic. CP 1, 5, 23, 189. Michael Woods later admitted that the accident would have been avoided had he been operating the boat at a slower speed:

> Q. Do you think you could have prevented this incident by operating the boat at a lower speed?
>
> A. Probably. Yes.

CP 43-44.

Michael was not supervising, disciplining or otherwise engaging in Torre's upbringing when Torre was injured.

Torre filed suit in the Pierce County Superior Court against his father, in part to trigger coverage by his father's insurance carrier, Safeco.

CP 1, 8, 34; RP (12-7-12) at 8, 13-14.[2] The case was assigned to the Honorable John R. Hickman. *See* RP (12-7-12) at 1. Safeco appointed counsel for Michael. CP 35.[3] Michael filed a motion for summary judgment in the trial court on the basis of parental immunity. CP 21-27. The trial court granted Michael's motion, CP 164, and denied Torre's subsequent motion for reconsideration. CP 234-35. The court certified its parental immunity rulings under RAP 2.3(b)(4) and struck certain evidence[4] that Torre presented with his motion for reconsideration. CP 235. Torre filed a timely notice for discretionary review, CP 236, and, upon the filing of Torre's motion for discretionary review, this Court's Commissioner granted review.

D. SUMMARY OF ARGUMENT

The parental immunity doctrine is discredited in courts around the United States, but has limited vitality in Washington, confined to situations involving the actual supervision or upbringing of a child. Washington recognizes numerous exceptions to the doctrine.

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[2] Torre's reference to his father's insurer is appropriate because some courts have found the presence of liability insurance to negate the need for parental immunity. *See infra.*

[3] Safeco's appointed counsel for Michael has since withdrawn.

[4] The court struck the 12-13-12 declaration of Logan Earles and Ex. 3 to Torre's counsel's declaration, which contained the declarations pages from Michael's homeowner's policy with Safeco Insurance Co. CP 185-89, 235.

This case, like *Borst v. Borst*, 41 Wn.2d 642, 251 P.2d 149 (1952) or *Merrick*, involves nothing more than parental negligence in the operation of a motorized craft. Just like the operation of a truck in *Borst* or a car in *Merrick*, the negligent operation of a watercraft subjects a parent to liability of a child. That Michael's conduct bore no relationship to the core parental-child relationship is evidenced by the fact that it was a tragic fortuity that Torre was injured by Michael's negligence instead of his two friends who accompanied him on the tube; there is little question that Michael would have been liable to either of those boys, had they been injured, for his negligence.

Alternatively, even if Michael's operation of the watercraft were in his parental capacity, his conduct was arguably wanton and the immunity is unavailable to him.

The trial court abused its discretion in denying the admission of evidence on reconsideration, evidence that clarified information submitted on summary judgment.

E. ARGUMENT[5]

(1) The Parental Immunity Doctrine

[5] As the parental immunity issue was resolved on summary judgment, the trial court was obligated to consider the facts, and reasonable inferences from those facts, in a light most favorable to Torre as the non-moving party. *Elcon Constr., Inc. v. Eastern Wash. Univ.*, 174 Wn.2d 157, 164, 273 P.3d 965 (2012). This Court reviews the trial court's decision de novo. *Id.*

The parental immunity doctrine did not exist at common law. It is a judicially-created doctrine that got its impetus from several state court decisions including an 1891 Mississippi Supreme Court decision, *Hewellette v. George*, 9 So. 885 (Miss. 1891) where, without any analysis, the court held that a parent was immune to a false imprisonment claim brought by a child placed in an insane asylum.[6] Numerous courts around the United States have abrogated the doctrine entirely in recent years. Indeed, the *Restatement (Second) of Torts* § 895G (1), rejects the doctrine, stating: "A parent or child is not immune from tort liability to the other solely by reason of that relationship." The *Restatement's* Reporter's Notes indicates that 17 jurisdictions adhere to this view. Similarly, many of the states recognizing the doctrine have also recognized exceptions to it. A number of courts have held that the parental immunity doctrine does not prevent an action by a child against a representative of a deceased parent. *See Jilani By and Through Jilani v. Jilani*, 767 S.W.2d 671, 672 (Tex. 1988) (collecting cases so stating). Another exception to the doctrine recognized by some courts arises when the parent's actions constitute an intentional tort. *Id.* Also, parental immunity does not bar claims predicated on legal duties other than negligence duties, such as contract or

[6] The Mississippi Supreme Court subsequently abandoned the parental immunity doctrine in *Glaskox By and Through Denton v. Glaskox*, 614 So.2d 906, 907 (Miss. 1992).

property rights. *Id.*, *Sepaugh v. LaGrone*, 300 S.W.3d 328, 334 (Tex. App. 2009), *review denied* (2011). *See Ascuitto v. Farricielli*, 711 A.2d 708, 719-20 (Conn. 1998) (detailing treatment of parental immunity doctrine by the states); *Szollosy v. Hyatt Corp.*, 396 F. Supp.2d 147, 155-57 (D. Conn. 2005) (detailing treatment of the doctrine, asserting that 27 jurisdictions have abolished the doctrine and that the doctrine is "edging toward disrespute."); *Frye v. Frye*, 505 A.2d 826, 840-49 (Md. 1986) (appendix discussing how each of the 50 states treats parental immunity).

Many states besides Washington recognize an exception for parental operation of a motor vehicle. *See Jilani*, 767 S.W.2d at 673 n.1 (listing 30 states that allow a suit by an unemancipated child against a parent for automobile negligence); *Allstate Ins. Co. v. Kim*, 829 A.2d 611 (Md. 2003) (noting that by 1994 the parental immunity doctrine had either been abrogated altogether or made inapplicable to motor torts in most of the States that had ever adopted it, and thus 43 jurisdictions permitted suits between parents and children for motor torts).

The parental immunity doctrine was adopted in Washington over one hundred years ago in *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905), *overruled by Borst v. Borst*, 41 Wn.2d 642, 251 P.2d 149 (1952).[7] The

[7] The doctrine was established on utterly outrageous facts in *Roller* where the Court immunized from liability a parent who incestuously attacked his daughter.

doctrine barred suits by minor children against their parents, in deference to the "interest that society has in preserving harmony in the domestic relations[.]" *Roller*, 37 Wash. at 243. Thus, the core of the doctrine centers on parental supervision and upbringing of a child.

Our Supreme Court has retreated from a universal rule, allowing suits where the parent is acting outside of his or her parental capacity, or where there is liability insurance. In *Borst,* for example, the parent was using a truck and trailer for a business purpose when he ran over his son who was playing in the street. The court concluded the parent was not immune because any immunity disappeared when the parent was "dealing with the child in a nonparental transaction." *Id.* at 657. Recently, our Supreme Court in *Zellmer* specifically noted that the doctrine was inapplicable to intentional wrongful conduct. 164 Wn.2d at 155, 157.

Washington courts continue to recognize parental immunity only in cases involving parental supervision or upbringing of the child. *See, e.g., Jenkins v. Snohomish County P.U.D. No. 1,* 105 Wn.2d 99, 713 P.2d 79 (1986) (disallowing contribution claim where parents allowed child to wander free in neighborhood; child electrocuted at utility power station); *Talarico v. Foremost Ins. Co.,* 105 Wn.2d 114, 712 P.2d 294 (1986) (disallowing negligent supervision claim where parent started backyard fire then left three-year-old son unattended, resulting in severe burns to

child); *Zellmer*, *supra* (minor child drowned while the stepfather negligently supervised her).[8] But this is not a case involving improper supervision or the disciplining or upbringing of a child. It is a straightforward case of a parent acting in a nonparental capacity, negligently operating a motorized craft.

Our Supreme Court in *Merrick* recognized an explicit exception to the doctrine when the parent is negligently operating a motor vehicle, stating:

> An absolute abrogation of the doctrine of parent-child immunity is not before the court. We have examined every case dealing with the issue. We recognize that there may be situations of parental authority and discretion which should not lead to liability. Several courts, such as Wisconsin and California, have attempted to put forth an all-encompassing rule to deal with these situations. We believe that the better approach is to develop the details of any portions of the immunity that should be retained by a case-to-case determination.
>
> In this case we simply hold that a minor child injured by the negligence of a parent in an automobile accident has a cause of action against that parent. The other issues of parent-child immunity are reserved for further determination.

93 Wn.2d at 416. *See generally,* Frederick W. Grimm, *Tort-Parental Immunity-Merrick v. Sutterlin*, 93 Wn.2d 411, 610 P.2d 891 (1980), 56

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[8] Although the *Zellmer* majority declined to overrule the doctrine, *id.* at 159, a three-justice concurrence urged a narrow interpretation of the rule: "We should recognize the weak rationale underlying the doctrine and the trend here and in other jurisdictions to limit its application." *Id.* at 172.

Wash. L. Rev. 319 (1981) (advocating abrogation of parental immunity doctrine in light of *Merrick*).

(2) The Parental Immunity Doctrine Does Not Apply Here

(a) Michael Acted in a Nonparental Capacity in Negligently Operating a Motorized Watercraft

The trial court here erred in applying the parental immunity doctrine on these facts because this is decidedly not a parental supervision case. In this case, none of the ostensible public policy reasons underlying the parental immunity doctrine apply because Michael was not in the process of "disciplining," "educating," or "supervising" Torre. Michael was acting in a nonparental capacity when he was driving a power boat at the time of the collision. Driving is not parenting any more than operating a motor vehicle was parenting in *Merrick*, and Michael therefore owed the same legal duty to Torre *that he owed to the other two occupants of the tube*. When driving, whether it be a car or a boat, a parent "owes a child the same duty of reasonable care applicable to the world at large, and may be held liable notwithstanding the parent/child relationship." *Zellmer*, 164 Wn.2d at 155; *see also*, *Merrick*, *supra*.

Moreover, the trial court erroneously concluded that the failure to apply the doctrine would be an "extension" of the motor vehicle exception:

> The question really is whether or not the motor vehicle extension—or motor vehicle exception should be extended to a boat or some other type of watercraft, and I am not going to do that. I'm going to – despite the sympathy that I have for this family, there's no case precedent that I know of that would extend the definition of a motor vehicle out into a recreational activity, commonly called "tubing," behind a boat. And I could be absolutely wrong on this, but because of the lack of any case law that would extend that definition to a boat or a watercraft, I feel compelled to – I don't feel I have sufficient grounds to extend it. And maybe the Court of Appeals or some other higher court will disagree with me, but with all due respect, I'm not going to make that extension of the definition of a motor vehicle and will grant the summary judgment.

RP (12-7-12) at 17. The trial court was simply wrong in its assertion that an "extension" of the doctrine is implicated on these facts.[9]

Negligent operation of a motorized watercraft is no different than negligent operation of other motorized vehicles such as a truck (*Borst*) or a car (*Merrick*). Operation of a motorized watercraft is subject to rules that have a direct counterpart to rules governing the operation of motor vehicles. For example, just to itemize a few of the parallel requirements, a person operating a motorized watercraft must have a "boater education card" that is akin to a driver's license. RCW 79A.60.630. Rules of the road are akin to the rules for safe operation of a motorized watercraft. RCW 79A.60.190. Operators of motorized watercraft are subject to

[9] *Winn v. Gilroy*, 681 P.2d 776, 785 (Or. 1984) (noting that automobile accidents are no different than "mishaps involving boats, tractors, motorcycles,

penalties for their negligent operation. RCW 79A.60.030. The law punishes "boating under the influence" as it does DUI and related offenses. RCW 79A.60.040, .050, and .060. A watercraft operator must stop for law enforcement officers, RCW 79A.60.070, and is guilty of eluding if it does not. RCW 79A.60.080. An operator of a motorized watercraft must file an accident report if a boating accident occurs. RCW 79A.60.200-.210. *See also,* WAC 352-70. Water skiing is specifically regulated. RCW 79A.60.170.

Michael strove below to contrive a recreational activity aspect to parental immunity when *no such basis* to the rule is present. Our Supreme Court in *Borst, Merrick,* and *Zellmer* clearly indicated that the doctrine protects core parental functions of supervision and upbringing of a child. Such activities as discipline, education, or supervision of a child come within the doctrine's ambit. While a parent would be immune from a child's suit complaining that the parent deprived him of an opportunity to have a certain recreational opportunity, the parent is not immune from suit for injuring a child while driving a power boat any more than a parent is

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machinery, or other instruments if the manner of their use would be negligent by the standards a person is bound to maintain toward the world at large").

immune from injuring a child while operating a motor vehicle. *Merrick; Borst.*[10]

Bluntly put, Michael hopes to persuade this Court that the only exception to the parental immunity is for negligent automobile operation or that there is a "recreational exception" to *Merrick. Neither* is true. The *Merrick* court stated that parental immunity should be evaluated on a case-by-case basis. 93 Wn.2d at 416. Recreational activities should be evaluated in the proper context: does the action involve core parental child-rearing responsibilities? *See Borst*, 41 Wn.2d at 656. Here, Michael's activities were straightforward negligence, as in *Borst* or *Merrick*, that would have subjected him to liability to Torre's companions had they been injured instead of Torre. This is why our Supreme Court in *Zellmer* noted that while driving, making no distinction as to whether it was a car, truck, or power boat, a parent "owes a child the same duty of reasonable care applicable to the world at large, and may be held liable notwithstanding the parent/child relationship." 164 Wn.2d at 155.

(b) Michael's Conduct Was Wanton

[10] To adopt Michael's position on this issue would mean that a child as in *Merrick*, injured by parental negligence in the operation of a car, would have no claim merely if the parent were driving the child to a Mariners' game or on a trip. *Merrick* recognized no such limit.

Alternatively, even if Michael's conduct can be properly characterized as engaging in a "family recreational activity," and the Court determines it is part of the core parental function, summary judgment was still improperly granted in this case. Our Supreme Court has held, "Even when acting in a parental capacity, a parent who abdicates his or her parental responsibilities by engaging in willful or wanton misconduct is not immune from suit." *Id.* at 155. Whether a defendant's conduct is "wanton" is "a question of fact to be submitted to the jury under proper instructions." *Adkisson v. City of Seattle*, 42 Wn.2d 676, 688, 258 P.2d 461 (1953).[11]

Our Supreme Court has defined "wanton misconduct" as "the intentional doing of an act . . . in reckless disregard of the consequences, and under such surrounding circumstances and conditions that a reasonable man would know, or have reason to know, that such conduct would, in a high degree of probability, result in substantial harm to another." *Adkisson,* 42 Wn.2d at 687. Further, in describing recklessness, for purposes of the wantonness inquiry, our Supreme Court quoted the *Restatement of Torts*, explaining:

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[11] *See also, Rodriguez v. City of Moses Lake*, 158 Wn. App. 724, 731, 243 P.3d 552 (2010), *review denied*, 171 Wn.2d 1025 (2011) (willful or wanton conduct is not a separate cause of action, but a level of intent which negates certain defenses which might be available in a negligence action).

> In order that the actor's conduct may be reckless, it is not necessary that he himself recognize it as being extremely dangerous. His inability to realize the danger may be due to his own reckless temperament *or to the abnormally favorable results of previous conduct of the same sort.* It is enough that he knows or has reason to know of circumstances which would bring home to the realization of the ordinary, reasonable man the highly dangerous character of his conduct.

*Adkisson*, 42 Wn.2d at 686 (emphasis added; quotation marks omitted).

Here, in denying Torre's motion for reconsideration, the trial court ruled, "The court does not find that the father's conduct was willful or wanton, as the courts have found in other cases that have allowed this immunity to be pierced." RP (12-21-12) at 15. But the evidence before the court, taken in the light most favorable to Torre as the nonmoving party, was that Michael was towing the inflatable across a wake at 30 miles an hour and the warning affixed to the inflatable directed the user "Do not use at speeds that exceed the skills of the rider. Boat speed should never exceed 20 mph for adults and 15 mph for children." CP at 179, 183. The affixed warning further stated, "Use of this product . . . involves inherent risks of injury or death." CP at 183. The trial court observed that this is the type of recreational activity that is "done every day in the Northwest by families with their children under the supervision of their adults." RP (12-21-12) at 15. But that does not negate the fact question at issue. Even if Michael's conduct can be viewed as engaging in

a family recreational activity and as encompassed within his parental capacity, whether his actions amounted to wanton misconduct was a jury question and the trial court erred in ruling otherwise. *See Zellmer*, 164 Wn.2d at 155; *Adkisson*, 42 Wn.2d at 686-88.

In sum, the trial court's decision was error in light of *Merrick* and *Zellmer*. Its rationale does not hold in light of the authorities addressing parental immunity and the statutes establishing analogous standards for operation of motorized watercraft and motor vehicles. Further, even if Michael's conduct may be characterized as parental supervision of a recreational activity, a fact question is present as to whether Michael acted recklessly resulting in injury to Torre. Reversal of the trial court's summary judgment order is required.

(3) The Trial Court Abused Its Discretion in Excluding Evidence

At the hearing on Torre's motion for reconsideration, the trial court struck the 12-13-12 declaration of Logan Earles, and Exhibit 3[12] attached to the declaration of Torre's trial counsel. CP 184-96, 234-35. The court struck the additional evidence proffered with Torre's motion for reconsideration without permitting any argument on the matter, stating only that it was doing so "for the reasons stated by defense counsel" in

[12] Exhibit 3 was a copy of the declarations pages from Michael's Safeco homeowners insurance policy. CP 185-86.

counsel's response to Torre's motion for reconsideration. RP (12-21-12) at 2.

This Court reviews a trial court's decisions regarding the admission of evidence and whether to grant a motion for reconsideration for abuse of discretion. *McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 758, 260 P.3d 967 (2011), *review denied*, 173 Wn.2d 1029 (2012). A trial court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Id.* A discretionary decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *Id.*

"In the context of summary judgment, unlike in a trial, there is no prejudice if the court considers additional facts on reconsideration." *Chen v. State*, 86 Wn. App. 183, 192, 937 P.2d 612, *review denied*, 133 Wn.2d 1020 (1997). Further, "nothing in CR 59 prohibits the submission of new or additional materials on reconsideration." *Id.* Accordingly, motions for reconsideration and the taking of additional evidence in this context are within the discretion of the trial court. *Id.*

(a) Earle Declaration

Here, the rejection of the Earle declaration and the evidence concerning Michael's insurance was an abuse of discretion in the context

of Torre's reconsideration motion. As noted, the trial court summarily rejected the additional evidence "for the reasons stated by defense counsel." RP (12-21-12) at 2. Michael's response to Torre's reconsideration motion urged the trial court to strike the Earle declaration and Exhibit 3 contending that they were "[i]rrelevant and [i]nappropriate." CP 197. Neither assertion is valid. The Earle declaration described the accident in question in detail from the point of view of one of the children riding the inner tube at the time. That evidence not only provided context, but also demonstrated the excessive speed at which the inner tube was towed, how the passengers had no control over the tube, and how all three boys were violently thrown off when the tube was pulled across a large wake. CP 187-89. In granting summary judgment, the trial court described the event as "a recreational activity, commonly called 'tubing' behind a boat." RP (12-7-12) at 17; CP 225. The trial court opined, "I don't think there's any question that this was a recreational activity that they were engaged in. It's very common. Families use all sorts of devices in order to do this, and I think it's probably been going on as long as someone has put a motor behind a boat." RP (12-7-12) at 16-17; CP 224-25. But the Earle declaration demonstrates why this allegedly common "family recreational activity" resulted in tragic consequences for Torre—Michael's reckless speed and operation of the jet boat. Because the Earle

declaration bolstered the notion that Michael's reckless and wanton conduct resulted in Torre's injuries, the declaration was relevant, raised an important question of fact, and should have been considered by the trial court.[13] In this context it was an abuse of discretion not to admit and consider Earle's declaration.

(b) Michael's Insurance Coverage

The evidence of Michael's insurance coverage also should have been admitted and considered by the trial court on reconsideration.[14] Though not called upon to decide this issue, our Supreme Court nevertheless recognized in *Borst*, 41 Wn.2d at 653, that "[a] number of courts have held the immunity rule inapplicable where public liability or indemnity insurance was present." As explained by the concurrence in *Jilani*, *supra*, one of the bases for upholding the parental immunity doctrine, preservation of the domestic peace, harmony, and tranquility of the family unit, does not apply where insurance is involved. "[I]f a defendant has purchased liability insurance and a child sues to collect such insurance, there is little possibility of any disruption of family harmony if

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[13] Torre argued at the summary judgment hearing that no immunity applied "where the operator is endangering the lives of the children in a tube." RP (12-7-12) at 13.

[14] Torre argued at the summary judgment hearing that since the court was looking at out-of-state case law for guidance, "there are jurisdictions that have said when there's liability insurance, we're not going to apply the doctrine because that doesn't serve its purpose." RP (12-7-12) at 13.

the child is allowed recovery." 767 S.W.2d at 674 (Mauzy, J., concurring).

> When insurance is involved, the action between parent and child is not truly adversary; both parties seek recovery from the insurance carrier to create a fund for the child's medical care and support without depleting the family's other assets. Far from being a potential source of disharmony, the action is more likely to preserve the family unit in pursuit of a common goal—the easing of family financial difficulties stemming from the child's injuries.

*Id.* (quoting *Sorensen v. Sorensen*, 339 N.E.2d 907, 914 (Mass. 1975)). *See also*, *Ard v. Ard*, 414 So.2d 1066, 1068 (Fla. 1982); *Streenz v. Streenz*, 471 P.2d 282, 284 (Ariz. 1970), *overruled on other grounds* by *Broadbent v. Broadbent*, 907 P.2d 43, 50 (Ariz. 1995); *Goller v. White*, 122 N.W.2d 193, 197 (Wis. 1963) (all similarly so stating).

Here, in addressing the applicability of the parental immunity doctrine in this context, an issue of first impression, consideration of the existence of Michael's insurance coverage was relevant, appropriate, and in accord with the noted foreign cases that have addressed the issue. Thus, in this context, it was an abuse of discretion for the trial court to not admit and consider such evidence.

## F. CONCLUSION

Michael Woods was acting outside his parental capacity when he negligently operated a powerful motorized watercraft and injured Torre.

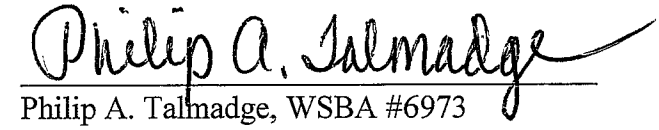
That negligence might have hurt two other boys, but instead it hurt Torre. Michael should not be immunized from liability for his negligence by mere fortuity that his victim was his own son.

Alternatively, even if Michael was acting in a parental capacity in operating the watercraft, there is a fact question as to whether his conduct was wanton.

This Court should reverse the trial court's summary judgment order and order denying reconsideration, allowing Torre Woods' claim against Michael Woods to proceed to trial on the merits. Costs on appeal should be awarded to Torre.

DATED this 15th day of April, 2013.

Respectfully submitted,



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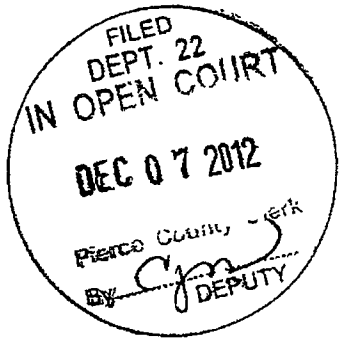
# APPENDIX

ORIGINAL


Hon. John R Hickman

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

TORRE J WOODS, individually,

Plaintiff,

v.

HO SPORTS COMPANY, INC., a for-profit Washington corporation; and MICHAEL E. WOODS, individually,

Defendants

No. 12-2-08809-3

ORDER GRANTING DEFENDANT MICHAEL WOODS'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court on defendant Michael Woods's motion for summary judgment. The Court heard oral argument from counsel and considered the following pleadings:

1 Defendant Woods's Motion for Summary Judgment;

2. Declaration of Michael Woods;

3. Defendant H O Sports's Joinder in Michael Woods's Motion for Summary Judgment;



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4. Plaintiff's Response and Declaration in Opposition to Motion for Summary Judgment (with exhibits); and

5 Defendant Michael Woods's Reply Memorandum in Support of Summary Judgment

Based on the oral argument of counsel and the above-referenced pleadings, it is hereby ORDERED, ADJUDGED, AND DECREED that defendant Michael Woods's motion for

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summary judgment is **granted** on the grounds of parental immunity All claims against Michael Woods in this action are dismissed with prejudice and without costs

DONE IN OPEN COURT this 7 day of December, 2012.

THE HONORABLE JOHN R. HICKMAN

Presented by:

STONE | NOVASKY, LLC

Jill Haavig Stone, WSBA No. 24256
Attorneys for defendant Michael Woods

FILED
DEPT. 22
IN OPEN COURT
DEC 07 2012
Pierce County Clerk
By: DEPUTY

Approved as to form, copy received:

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Hon. John R. Hickman

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

TORRE J. WOODS, individually,

Plaintiff,

v.

HO SPORTS COMPANY, INC., a for-profit Washington corporation; and MICHAEL E. WOODS, individually,

Defendants.

No. 12-2-08809-3

ORDER DENYING MOTION FOR RECONSIDERATION, GRANTING CERTIFICATION, AND STRIKING EVIDENCE

**THIS MATTER** came before the Court on "Plaintiff's Motion for Reconsideration on Summary Judgment (and Alternative Request for RAP 2.3(b)(4) Certification)." The Court considered the pleadings filed in support of and in opposition to the motion (with the exception of the evidence identified below as stricken) and heard oral argument from counsel.

The Court being fully advised, it is hereby ORDERED, ADJUDGED, AND DECREED that:



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1. Plaintiff's motion for reconsideration of the Court's December 7, 2012 order granting defendant Michael Woods's motion for summary judgment is **denied**.

2. Plaintiff's request for certification of the Court's December 7, 2012 order granting defendant Michael Woods's motion for summary judgment under RAP 2.3(b)(4) is **granted**. That order involves a controlling question of law as to which there is substantial ground for a difference of opinion and immediate review of that order may materially advance the ultimate termination of the litigation.

3. The Declaration of Logan Earles (dated December 13, 2012) and Exhibit 3 to the Declaration of Counsel (dated December 13, 2012) filed in support of plaintiff's motion for reconsideration are **stricken** from the record and were not considered by the Court in ruling on plaintiff's motion for reconsideration.

DONE IN OPEN COURT this 21 day of December, 2012.

THE HONORABLE JOHN R. HICKMAN

FILED
DEPT. 22
IN OPEN COURT
DEC 21 2012
Pierce County Clerk
By DEPUTY

Presented by:

STONE | NOVASKY, LLC

Jill Haavig Stone, WSBA No. 24256
Attorneys for defendant Michael Woods

Approved as to form, copy received:

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# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

TORRE J. WOODS, individually,

Petitioner,

v.

HO SPORTS COMPANY, INC., a for-profit Washington Corporation; and MICHAEL E. WOODS, individually,

Respondents.

No. 44346-5-II

RULING GRANTING REVIEW



Torre Woods seeks discretionary review of the trial court's order granting summary judgment in favor of his father, Michael Woods, on the basis of parental immunity. Concluding that the trial court appropriately certified the issue for review, this court grants discretionary review.

Torre[1] was seriously injured in a boating accident on Tiger Lake near Belfair when he was 17 years old. The Woods family owns a SugarSand jet boat which they keep at a cabin near Tiger lake. They have gone to the cabin for about 20 years and often go out on the lake in boats and engage in waterskiing and similar activities.

[1] This court refers to the parties by their first names for the sake of clarity. No disrespect is intended.

On July 24, 2010, the family, along with three of Torre's classmates, were at the cabin. Michael and the four teenagers took the boat on the lake. One of the friends rode in the boat with Michael, while Torre and the other two friends rode in a HO Sports GTX tube pulled behind the boat. Michael operated the boat, driving 30 miles per hour, which is 10 miles per hour faster than the speed at which the GTX tube can safely operate. The boat came across the wake, sending the GTX tube, along with the three boys, into the air. One of Torre's friends landed on him, breaking his neck and rendering him quadriplegic. Michael recognized that the accident could likely have been prevented had he operated the boat at a lesser speed.

Torre sued Michael and HO Sports, alleging a claim of negligence against Michael and a defective product claim against HO Sports. Michael moved for summary judgment dismissal of Torre's claim against him, contending that it is barred by the doctrine of parental immunity. Torre filed a cross-motion for summary judgment, asking the court to dismiss Michael's affirmative defense of parental immunity. On December 7, 2012, the trial court granted Michael's motion for summary judgment. On December 21, the trial court denied Torre's motion for reconsideration and certified the order granting Michael's motion for summary judgment to this court.

Torre seeks discretionary review under RAP 2.3(b)(1), (2) and (4). Discretionary review is appropriate under RAP 2.3(b)(4) when:

> The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion

> and that immediate review of the order may materially advance the ultimate termination of the litigation.

Torre contends that the trial court properly certified the issue to this court. Michael and HO Sports respond that discretionary review is not appropriate because there lacks a "substantial ground for a difference of opinion" and review at this juncture will not "advance the ultimate termination of the litigation." RAP 2.3(b)(4).

Traditionally, under the doctrine of parental immunity, a parent was immune from suit by his or her child for personal injuries. *See Roller v. Roller*, 37 Wn. 242, 79 P. 788 (1905). Several states have abolished or limited the doctrine of parental immunity. *See Merrick v. Sutterlin*, 93 Wn.2d 411, 415, 610 P.2d 891 (1980) (collecting cases). The doctrine still exists in Washington law "for ordinary negligence in the performance of parental responsibilities." *Zellmer v. Zellmer*, 164 Wn.2d 147, 155, 188 P.3d 497 (2008). Our State Supreme court has carved out a few exceptions in instances where a parent, "acting outside of his or her parental capacity," causes his or her child injury. *Zellmer*, 164 Wn.2d at 155. Where a child is injured by a parent's negligence in an automobile accident, *Merrick*, 93 Wn.2d at 416, or where a parent is engaging in business at the time of the incident, *Borst v. Borst*, 41 Wn.2d 642, 251 P.2d 149 (1952), the doctrine of parental immunity will not bar the child's suit. Further, if a parent's willful or wanton misconduct results in the child's injuries, the parent may be liable. *See Jenkins v. Snohomish County PUD 1*, 105 Wn.2d 99, 104, 713 P.2d 79 (1986). The doctrine still clearly exists, however, to preclude a child's claim against his or her parent for negligent supervision. *See Carey v. Reeve*, 56 Wn. App. 18, 20,

781 P.2d 904 (1989); *Talarico v. Foremost Ins. Co.*, 105 Wn.2d 114, 712 P.2d 294 (1986); *Baughn v. Honda Motor Co.*, 105 Wn.2d 118, 712 P.2d 293 (1986).

Whether parental immunity applies to situations in which a child is injured by a parent's negligence in operating a watercraft is an issue where there is a substantial ground for difference of opinion. HO Sports and Michael frame the accident as one occurring during a "family recreational activity" and contend that this case is more akin to parental supervision cases, while Torre argues that this case involves an extension of the automobile exception to the parental immunity doctrine. Michael Wood's Resp. to Mot. for Disc. Rev. at 2. But no court of this state has ever squarely placed "family recreational activities" under the umbrella of parental immunity, and none of the cases on which HO Sports and Michael rely involves negligence in the course of a recreational activity.

Further, the cases HO Sports and Michael claim support application of the doctrine here involve a parent's failure to supervise, while this case involves an affirmative act on Michael's part. *See Jenkins*, 105 Wn.2d at 100, 106 (parent failed to supervise and, as a result, child climbed fence to an electrical substation and was shocked); *Zellmer*, 164 Wn.2d at 151, 161 (stepfather failed to supervise toddler, who left house through sliding glass door and drowned in backyard pool). This distinction further calls into question whether Michael's actions constituted "ordinary negligence in the performance of parental responsibilities" and is therefore like the negligent supervision cases, or whether Michael was "acting outside of his . . . parental capacity." *Zellmer*, 164 Wn.2d at 155.

This court agrees with the trial court and with Torre that whether the parental immunity doctrine should be applied to the facts of this case involves "a controlling question of law as to which there is substantial ground for a difference of opinion." RAP 2.3(b)(4). And because discretionary review will also advance the ultimate termination of the litigation by preventing the possibility of two trials, discretionary review is appropriate.

Torre also argues that the trial court committed obvious or probable error when it dismissed his claims against Michael on the basis of parental immunity. Because this court concludes that the trial court properly certified that issue, it is unnecessary to evaluate Torre's argument that review is warranted under RAP 2.3(b)(1) and (b)(2). Accordingly, it is hereby

ORDERED that Torre's motion for discretionary review is granted. The Clerk will issue a perfection schedule. Discovery as to Torre's claim against HO Sports may continue while this appeal is pending.

DATED this 4th day of March, 2013.

Eric B. Schmidt
Court Commissioner

cc: Philip Albert Talmadge
John Robert Connelly, Jr.
Nathan Paul Roberts
Thomas Raymond Merrick
Nicholas Thomas
David S. Cottnair
Jill Haavig Stone
Melanie T. Stella
Hon. John R. Hickman

DECLARATION OF SERVICE

On said day below I emailed a true and accurate copy of the Brief of Appellant in Court of Appeals Cause No. 44346-5-II to the following parties:

| | |
|---|---|
| John R. Connelly, Jr.<br>Nathan Roberts<br>Connelly Law Offices<br>2301 N. 30th Street<br>Tacoma, WA 98403-3322<br>Email addresses:<br>jconnelly@connelly-law.com<br>nroberts@connelly-law.com<br>pwells@connelly-law.com | Thomas R. Merrick<br>Nicholas Thomas<br>Merrick Hofstedt & Lindsey PS<br>3101 Western Avenue, Suite 200<br>Seattle, WA 98121-3017<br>Email addresses:<br>tmerrick@mhlseattle.com<br>nthomas@mhlseattle.com<br>mbrandt@mhlseattle.com<br>jballard@mhlseattle.com<br>pchandler@mhlseattle.com |
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Original efiled with:

Court of Appeals, Division II
Clerk's Office
950 Broadway, Suite 300
Tacoma, WA 98402-4427

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED this 15 day of ~~April,~~ 2013, at Tukwila, Washington.

Paula Chapler
Talmadge/Fitzpatrick

# TALMADGE FITZPATRICK LAW

## May 09, 2013 - 9:22 AM

**Transmittal Letter**

Document Uploaded: 443465-Appellant's Brief.pdf

Case Name: Torre J. Woods v. HO Sports Company, Inc.

Court of Appeals Case Number: 44346-5

**Is this a Personal Restraint Petition?** Yes ■ No

**The document being Filed is:**

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

**Comments:**

No Comments were entered.

Sender Name: Paula Chapler - Email: **paula@tal-fitzlaw.com**