44346-5-II
NO. ~~44346-II~~
(Pierce County Cause No. 12-2-08809-3)

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 RESPONDENT HO SPORTS COMPANY, INC.

Thomas R. Merrick, WSBA #10945
David S. Cottnair, WSBA #28206
Nicholas G. Thomas, WSBA #42154
Attorneys for Respondent HO Sports Company, Inc.

MERRICK, HOFSTEDT & LINDSEY, P.S.
3101 Western Ave., Suite 200
Seattle, WA 98121
Telephone: (206) 682-0610
Facsimile: (206) 467-2689

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Case Law

Washington Cases

Other Jurisdictions

Statutes

Regulations and Rules

Other Authorities

APPENDIX

I. INTRODUCTION

The contours of the parental immunity doctrine were clearly described by our Supreme Court in *Zellmer v. Zellmer*: a parent is not liable to his or her child for negligence if the child sustains an injury while the parent acts within his or her "parental capacity." 164 Wn.2d 147, 155, 188 P.3d 497 (2008). Washington courts have recognized limited exceptions to immunity where: (1) the child's injury occurs because the parent engages in willful or wanton misconduct; (2) the child's injury occurs while the parent is acting in a business capacity; (3) the child's injury results from an automobile accident caused by the parent. *Id.*

Here, Michael Woods and his son, Appellant Torre Woods, were engaged in the recreational activity of "tubing." While engaged in such recreation, a parent falls within the protection of the doctrine because a parent unquestionably acts in "his or her parental capacity" when engaging in parent-child recreation. *See id.* There is no basis for determining the parental immunity doctrine does not apply to the facts presented here. Appellant attempts an end-run around this fact by alternatively arguing a fact question exists concerning Michael Woods' "wanton misconduct." Aside from lacking factual support, this issue is raised for the first time on appeal and, thus, should not be considered by this Court.

II. STATEMENT OF THE ISSUES

1. Whether a minor child's tort claim against his father is properly dismissed on the grounds of parental immunity when the child was injured while participating in a family recreational activity that necessarily involved the father's exercise of parental discretion, authority, and responsibility?

2. Whether, on review of an order granting a motion for summary judgment based on the parental immunity doctrine, a party may raise the issue of "wanton misconduct" for the first time on appeal?

3. Whether the trial court abused its discretion when it excluded untimely evidence that was not relevant to Appellant's Motion for Reconsideration?

III. STATEMENT OF THE CASE

On July 24, 2010, Torre Woods sustained severe injuries while inner-tubing on Tiger Lake – a recreational activity Torre Woods and his parents had enjoyed for many years while visiting the family's Tiger Lake cottage.

Torre Woods is Michael Woods' son. CP 2, 28 (¶ 4). Michael Woods and his wife, Torre's mother, own a cabin on Tiger Lake near Belfair, where the family keeps a SugarSand jet boat and various watersports equipment. CP 29 (¶ 5). The Woods family has owned the

cabin for approximately 20 years and have engaged in watersports as a family, including Torre Woods. CP 29 (¶¶ 4-5). Nearly every summer weekend, the Woods family has gone to the cabin for family vacation and recreation time. CP 29 (¶ 4).

Michael Woods is experienced with boats and watersports equipment. CP 29 (¶ 7). He has operated boats since he was about ten or twelve years old, and has owned various boats over the years. CP 29 (¶ 6). After purchasing the Tiger Lake cabin, the Woods family used their boats for waterskiing and pulling watersport tubes. CP 29 (¶ 6). As Torre Woods grew up, he enjoyed recreating at the family's Tiger Lake cabin by, among other things, going tubing with his parents. CP 29 (¶ 5).

Michael Woods purchased a GTX, a towable inflatable, in the summer of 2010 to engage in the recreational activity commonly known as "tubing" with his family, including his minor son Torre Woods. CP 29 (¶ 7). After purchasing the GTX inflatable and prior to the accident, the Woods family used the GTX nearly every time they were at Tiger Lake. CP 29 (¶ 7). Torre Woods had ridden on the GTX tube a number of times prior to the accident. CP 29 (¶ 7). While Michael Woods admits he did not read the product literature (warnings), he testified in deposition that, "[w]hile pulling the GTX, I was always careful to operate the boat at a speed Torre was comfortable with." CP 29 (¶ 7).

On the day of the accident, Michael Woods and Torre Woods went to Tiger Lake to spend the weekend and be on the water. CP 29 (¶ 8). The Woods were joined by three of Torre Woods' friends. CP 29, 187 The four minors – including Torre Woods – were under Michael Woods' supervision while staying at the Woods family's Tiger Lake property. At the time of the accident, Torre Woods was engaged in the recreation of tubing; Michael Woods was pulling Torre Woods and Torre's friends in the GTX tube behind the SugarSand boat when the tube hit a wake and the occupants were thrown. CP 4-5, 189. One of the riders allegedly struck Torre Woods' head, breaking his neck. CP 5.

Torre Woods, who was seventeen years old at the time of the accident but has since reached the age of majority, filed suit on May 8, 2012, against his father and HO Sports. CP 1-8. Torre Woods' complaint alleges negligence by Michael Woods. CP 7 (¶ VI). The Complaint makes no assertion that Michael Woods' conduct constituted willful or wanton misconduct in causing the accident. *See generally*, CP 1-8. Torre Woods' claim against the manufacturer of the GTX tube, HO Sports, is a products liability claim. CP 5.

On November 2, 2012, Michael Woods moved for summary judgment on the basis of parental immunity. CP 21. HO Sports joined in this motion. CP 32. In resisting the motion, Torre Woods never raised in

briefing or at oral the argument that Michael Woods' conduct was willful or wanton misconduct. *See* CP 34-38, 216-23. Rather, Appellant argued that "[u]nder Washington law, the antiquated doctrine of 'parental immunity' is not available when injury is cause by the parent's negligent operation of a motor vehicle." CP 34; *see also* CP 216-23.

The trial court granted Michael Woods' motion, CP 164-66, and denied Torre Woods' subsequent motion for reconsideration. CP 234-35. In asking the trial court to reconsider its December 7, 2012 order, Appellant again failed to argue – in his briefs or at oral argument – that Michael Woods' conduct constituted willful and/or wanton misconduct. *See* CP 167-174, 228-233; RP 12-21-12 at 2-7.

On his motion for reconsideration, Appellant did attempt to provide the court with new information: (1) a declaration from Logan Earles, and (2) declaration pages from Michael Woods' homeowner's policy with Safeco Insurance Co. CP 185-89, 235. The trial court struck these submissions (without any objection from Appellant), RP 12-21-12 at 2, as they had no bearing on the issue before the Court on reconsideration. *Id*; CP 197-199. The court certified its summary judgment ruling, RP 12-21-12 at 15, and this Court granted review.

In addition to now raising a new argument regarding willful or wanton misconduct, Appellant also suggests the existence of insurance has

a bearing on parental immunity. *See* Brief of Appellant at 19-20. Notably, there is no insurance coverage for the benefit of Michael Woods. On January 28, 2013, the U.S. District Court for the Western District of Washington granted the Safeco Insurance Company of America's Motion for Summary Judgment, concluding Safeco has "no duty to indemnify/defend Michael [Woods] in *Woods v. HO Sports Co., Inc., et al.*, Pierce County, Washington Superior Court No. 12-2-08809-3." *Safeco Ins. Co. v. Woods*, 2013 U.S. Dist. LEXIS 11254 *16, 3:12-cv-05915-RJB, (W.D. Wash. Jan. 28, 2013).[1] Counsel for Mr. Woods subsequently withdrew as counsel. Michael Woods is unrepresented.

IV. SUMMARY OF ARGUMENT

Our Supreme Court has confirmed application of the parental immunity doctrine:

> Parents should be free to determine how the physical, moral, emotional, and intellectual growth of their children can best be promoted. Parents should not routinely have to defend their child-rearing practices where their behavior does not rise to the level of wanton misconduct. There is no

[1] A true and correct copy of The Honorable Robert J. Bryan's Order on Plaintiff Safeco Insurance Company of America's Motion for Summary Judgment is attached as "Appendix 1" to this brief. HO Sports requests this Court take judicial notice of that order. Judicial notice may be taken at any stage of a proceeding. ER 201(f). A court shall take judicial notice if requested by a party and supplied with the necessary information. ER 201(d). A judicially noted fact must be one not subject to reasonable dispute in that it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. ER 201(b)(2).

> correct formula for how much supervision a child should receive at a given age.
>
> ...
>
> [T]he primary objective of the modern parental immunity doctrine is to avoid undue judicial interference with the exercise of parental discipline and parental discretion. This rationale remains as vital today as it was in 1986. Parents have a right to raise their children without undue state interference. In exercising that right, parents are in need of a wide sphere of discretion.

Zellmer v. Zellmer, 164 Wn.2d 147, 158-59, 188 P.3d 497 (2008) (internal citations and quotations omitted). This is why Washington courts continue to recognize parental immunity in cases where one acts in his or her parental capacity, including parental supervision and 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). The parental immunity doctrine applies in this case because Michael Woods was engaged in a family recreational activity with his son, Torre Woods, and thus acting within his parental capacity when Torre Woods sustained his injury. Applying the doctrine to this case fully comports with the doctrine's development and policy underpinnings.

There is no basis for extending to this case the parental immunity exception created by *Merrick v. Sutterlin*, 93 Wn.2d 411, 610 P.2d 891 (1980), which has been properly limited to automobile accidents for thirty-three years. HO Sports does not agree with Torre Woods' representation,

see Appellant Brief at 20, that whether to so extend the exception to family activities that necessarily involve a motorized vehicle constitutes an issue of first impression for Washington Courts; HO Sports has not, however, located a published decision directly on point.

With regard to Torre Woods' contention that Michael Woods' conduct was "wanton," this issue is raised for the first time on appeal and should not be considered pursuant to RAP 9.12 and 2.5(a). Moreover, the facts and evidence presented to the trial court support only that Michael Woods was negligent; no evidence exists for suggesting a higher degree of misconduct.

The trial court's striking of untimely and irrelevant evidence that Torre Woods presented with his motion for reconsideration was proper and well within the trial court's discretion. Further, arguments concerning Michael Woods' liability insurance policy are now moot as declination of coverage has been confirmed.

V. ARGUMENT

A. Scope of Review.

This court engages in the same inquiry as the trial court when reviewing a summary judgment order. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate if the pleadings, affidavits, depositions, and admissions on file demonstrate the

absence of any genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. CR 56(c). However, "[a] trial court's decision will be affirmed on appeal if it is sustainable on any theory within the pleadings and the proof." Tegland, 2A Wash. Prac., Rules Practice RAP 2.5 (7th ed. 2011); *see also Gross v. City of Lynnwood*, 90 Wn.2d 395, 401, 583 P.2d 1197 (1978) (Appellate courts "are committed to the rule that [they] will sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof.").

B. The Parental Immunity Doctrine.

The United States Supreme Court has supported the right of a parent to raise a child as the parent sees fit. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (noting that "the history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children" and that "this primary role of the parents in the upbringing of their children is now established beyond debate"). In *Wisconsin v. Yoder*, the Supreme Court determined that the role of a parent in child-rearing is "an enduring American tradition" and a "fundamental interest." *Id.* at 232. The parental immunity doctrine – designed to protect parents from litigation over their supervisory decisions and actions – is necessary to effectuate this interest.

An overwhelming majority of the fifty states, including Washington, uphold and apply the doctrine in some form.[2] Recognizing parental immunity's underpinnings in common law, Washington first adopted the doctrine in 1905. *Roller v. Roller*, 37 Wash. 242, 245, 79 P. 788 (1905) ("At common law it is well established that a minor child cannot sue a parent for a tort."). In 2008, the Washington Supreme Court, in *Zellmer v. Zellmer*, 164 Wn.2d 147, made clear that the parental immunity doctrine continues in this state, rejecting arguments to abrogate the doctrine and/or adopt the Restatement (Second) of Torts § 895G(1).[3]

Washington courts have recognized three situations in which a parent acts outside his or her "parental capacity" and is, thus, not protected by the parental immunity doctrine: (1) willful and wanton misconduct; (2) parental actions for a business purpose; and (3) automobile accidents caused by the parent. *Zellmer*, 164 Wn.2d at 155. "But [our Supreme Court] has consistently held a parent is not liable for ordinary negligence" when acting within his or her "parental capacity." *Id.* Here, the trial court

---

[2] *Frye v. Frye*, 505 A.2d 826-appendix (MD 1986) (detailing jurisdictions that have retained the immunity; abrogated the immunity totally; never adopted the immunity; and those that have partially abrogated the immunity).

[3] Section 895G was expressly adopted by the Oregon Supreme Court in *Winn v. Gilroy*, 681 P.2d 776, 785 (Or. 1984), a case involving an automobile accident. Because Washington has not similarly adopted this section and because the instant matter does not involve a collision between vehicles, the dicta Appellant provides from *Winn* is completely inapposite to the issues before this court.

properly rejected arguments to create a new exception for recreational activities.

(1) The exception created by Merrick v. Sutterlin is restricted to automobiles and should remain so.

In *Merrick v. Sutterlin*, 93 Wn.2d 411, a two-year old child was injured when his mother rear-ended another automobile. 93 Wn.2d at 412. After reviewing the history and evolution of the parental immunity doctrine, the court stated: "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." *Id.* at 416.

Petitioner's argument that this is a case of "straightforward negligence" in the operation of a motorized craft, Appellant Brief at 13, fails to acknowledge that the exception created in *Merrick* remains restricted to automobiles. A number of considerations support this limited exception.

As a practical matter, automobile use is far more pervasive. In apparent recognition of this fact, Washington requires anyone who drives an automobile in this state to carry liability insurance, *see* RCW 46.30.010–.020; there exist no similar requirements in this state concerning recreational boats.

In this case, the Woods were engaged in a recreational activity. Torre Woods' injury arise from water tubing.[4] The activity is not in any manner analogous to the operation of an automobile.

Appellant's efforts to draw a parallel between "tubing" and operating an automobile fail.[5] The statute to which Petitioner analogizes the "rules of the road," RCW 79A.60.190, governs *only* personalized watercrafts (jet skis) – which are purely recreational. And unlike roads, open waters typically do not have speed limits. The regulation of boating addresses recreational activities such as water skiing, RCW 79A.60.170, teak surfing, RCW 79A.60.660, and whitewater rafting, RCW 79A.60.400–495, and underscores the recreational nature of boating.

In sum, because automobiles are distinctly common and utilitarian vehicles, there exists no legitimate basis for extending the *Merrick* exception beyond automobile accidents caused by the parent.

(2) The parental immunity doctrine applies to the present matter because the family was engaged in recreational activities.

---

[4] Appellant's hypothetical involving a Mariners game wildly misses the mark for this reason. Commuting to an event – albeit one many consider enjoyable – cannot be properly analogized to actively engaging in a recreational activity like tubing, which happens to involve a driver and a tube passenger.

[5] Notably, the boating statutes to which Petitioner points arise under Chapter 79A.60 RCW: "Regulation of ***recreational*** vehicles." (emphasis added). These statutes apply to motorized and non-motorized watercraft alike. *See* RCW 79A.60.010(29).

In arguing *Merrick* controls here, Torre Woods misapprehends the basis of the court's decision. As the Washington Supreme Court made clear, it is not the fact that the parent was operating a vehicle (whether, as Torre Woods suggests, that vehicle is an automobile or a boat) that is dispositive. Rather, it is the nature of the relationship between the parent and child at the time of injury: "A parent is not immune when acting outside his or her parental capacity." *Zellmer*, 164 Wn. 2d at 155.[6] The *Merrick* court merely determined that a parent does not act in a "parental capacity" when operating an automobile. Mr. Michael Woods was clearly acting within his parental capacity at the time of Torre Woods' accident. Mr. Woods purchased the GTX tube for the purpose of family recreation and for the pleasure of and use by the Woods family. CP 29. The Woods were engaged in a recreational activity that they had long enjoyed as a family. Michael Woods exercised parental judgment and control and discretion in this recreational activity.

[6] Torre Woods attempts to artificially limit the scope of parental immunity by arguing that it applies only in cases of negligent supervision. Brief of Appellant at 10. A parent's supervision of his child is only one of the many parental rights and responsibilities that are entitled to protection from state interference via parental immunity. *See, e.g., Borst v. Borst*, 41 Wn.2d 642, 656, 251 P.2d 149 (1952) (referencing the needs, comforts, and pleasures of the family"); *Jenkins*, 105 Wn.2d at 105 (referencing "the physical, moral, emotional, and intellectual growth" of children).

By way of analogy, if Michael Woods had hit Torre Woods with an errantly thrown fastball while the two were playing catch at the house on Tiger Lake, Appellant would argue that a game of father-son catch is not "parenting" because it does not involve "disciplin[e]," educati[on]," or supervisi[on]." Appellant Brief at 10. Beyond the fact that case law draws no such bright line as to what constitutes parenting, an unemancipated minor like Torre Woods is unquestionably under his father's care and supervision when engaged in such recreational activities. Further, engaging in recreation with one's child is a fundamental part of being a parent; hence, there can be little doubt that a parent is acting within "his or her parental capacity" when playing catch, tubing, or engaging in countless other recreational activities with his or her child. *Zellmer*, 164 Wn.2d at 155.

Not surprisingly, courts throughout the country have recognized recreating with one's child as being a parental activity that triggers immunity. *See, e.g., Setinc v. Masny*, 185 Ill. App. 3d 15, 19 (Ill. App. Ct. 3d Dist. 1989) (concluding parent immune where injuries caused by model airplane fuel were "were necessary and adjunct" to "recreational activity" of flying model air planes – "plainly a family recreational activity"); *Sepaugh v. LaGrone*, 300 S.W.3d 328, 334 (Tex. App. Austin 2009) (parental immunity applies in "matters of (1) supervision, (2) discipline,

(3) provision of a home, (4) provision of food, (5) schooling, (6) medical care, (7) ***recreation***, and (8) family chores") (emphasis added); *McCullough v. Godwin*, 214 S.W.3d 793, 801 (2007) (father immune where child drowned in lake during recreational boating trip at "Jet Boat Cove"); *Pravato v. Pravato*, 175 A.D.2d 116, 571 N.Y.S.2d 811 (App. Div., 1991) (child injured falling from pony that father had her ride at stable; father had immunity from suit).

The presence of a motorized craft makes tubing no less a recreational activity between Michael Woods and Torre Woods and, thus, no less within Michael Woods' "parental capacity" at the time of Torre's accident. *Zellmer*, 164 Wn.2d at 155. Extending the *Merrick* exception to this recreational activity, or any other, regardless of whether a motor is involved,[7] simply cannot be reconciled with the "maintaining family tranquility" policy underlying the parental immunity doctrine, *Jenkins*, 105 Wn.2d at 104 – a policy as relevant today as it was when Washington first adopted the doctrine.

Finally, our Supreme Court recognized in *Zellmer* that "[t]he primary purpose of the doctrine is to avoid the chilling effect tort liability

[7] It is unclear how far Petitioner asks this Court to extend the exception. For example, if Michael Woods had negligently injured Torre Woods by *rowing* a boat into a hazard while the two of them were fishing, would *Merrick* apply? Or did the injury now occur during a recreational activity because the boat contained no motor?

would have on a parent's exercise of parental discipline and parental discretion." 164 Wn.2d at 162 (citing *Borst*, 41 Wn.2d at 656 ("If such suits were common-place, or even possible, the freedom and willingness of the father and mother to provide for the needs, comforts and pleasures of the family would be seriously impaired. Public policy therefore demands that parents be given immunity from such suits while in the discharge of parental duties.")). While necessary for a sound family environment and relationships therein, engaging in recreational activities with one's child is discretionary. Courts should not place a parent in the quandary of having to choose between providing something desirable for the development or recreation of his or her child or consistently avoiding potential tort liability. Placing parents in such a quandary is precisely what Torre Woods requests. The trial court recognized this when it declined to extend *Merrick* to the recreational activity commonly known as "tubing." RP 12-7-12 at 17:9-13. That ruling should be affirmed.

C. "Wanton" Misconduct.

(1) Torre Woods' argument that Michael Woods' conduct was "wanton" should not be considered on appeal because Torre Woods failed to plead or otherwise provide notice that he intended to assert this higher order of misconduct.

In *Ranniger v. Bryce*, our Supreme Court clarified:

> Wanton misconduct is not negligence. It requires the intentional doing of an act or the intentional failure to do an

> act, as distinguished from negligence which is predicated upon the wrongdoer's carelessness, recklessness or inadvertence.

51 Wn.2d 383, 385 (1957) (citing *Adkisson v. Seattle*, 42 Wn.2d 676, 258 P.2d 461 (1953)). The court then held that "if wanton misconduct is relied upon, it must be pleaded." *Id.* [8] In 1986, our Supreme Court recognized this requirement in the parental immunity context:

> In order for the conduct of parents in supervising their child to be actionable in tort, such conduct must rise to the level of willful and wanton misconduct; if it does not, then the doctrine of parental immunity precludes liability. The complaint filed by the guardian ad litem specifically pleads only "negligent supervision", and the facts further pleaded therein establish that in fact the claimed parental misconduct was negligence rather than willful and wanton misconduct. The trial court did not err in dismissing the minor plaintiff's action against his parents.

Talarico v. Foremost Ins. Co., 105 Wn.2d 114, 116 (1986) (citing *Jenkins*, 105 Wn.2d at 105; *Baughn v. Honda Motor Co.*, 105 Wn.2d 118, 119, 712 P.2d 293 (1986)); *see also Ranniger*, 51 Wn.2d. at 384 ("Negligence is not converted into wanton misconduct by the use of the word 'wantonly' in connection with the specifications of negligence."). Per *Ranniger* and *Talarico*, in order for Torre Woods to legitimately maintain Michael

---

[8] *Rodriguez v. City of Moses Lake*, 158 Wn. App. 724 (2010), relied on by Appellant, is not to the contrary. In *Rodriguez*, the plaintiff sued the City of Moses Lake for, *inter alia*, "willful and wanton misconduct." *Id.* at 728. Division Three held that such misconduct did not constitute a separate cause of action but was silent as to the Supreme Court's requirement that this higher degree of fault be pled.

Woods' actions constituted wanton misconduct under the parental immunity doctrine, he needed to provide notice of his intentions to proceed against his father via this higher order of misconduct. However, as in *Talirico*, Torre Woods' complaint "pleads only [Negligence]." *Id*; CP 7. And like *Talarico*, the record makes clear (discussed *infra*) that the *only* parental misconduct before the trial court "was negligence rather than willful and wanton misconduct." *Talarico*, *supra* at 116. Thus, because Appellant failed to plead "wanton misconduct" or provide any notice of his intent to assert this higher order of misconduct against his father, the issue is not now properly before this court. *Ranniger*, *supra* at 385.

(2) Torre Woods' argument that Michael Woods' conduct was "wanton" should not be considered on appeal because Torre Woods failed to raise or argue this issue before the trial court.

The fact that Torre Woods raises his "wanton misconduct" argument for the first time on appeal further warrants preclusion of his negligence-based case against his father. RAP 9.12 provides: "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." *See also*, *Manor v. Nestle Food Co.*, 78 Wn. App. 5, 895 P.2d 27 (1995), *rev'd on other grounds*, 131 Wn.2d 439, 932

P.2d 628 (1997) ("Under RAP 9.12, only the ... issues called to the attention of the trial court may be considered on appeal.").

Nowhere in his briefing or oral argument to the trial Court[9] did Torre Woods present the issue that his father's conduct in the moments preceding the incident constituted willful or wanton misconduct.[10] Rather, Torre Woods' opposition to his father's motion turned entirely on his assertion that – consistent with what was pled in his Complaint (discussed *supra*) – Michael Woods was negligent, and that his purported negligence fits the present case within the automobile exception provided by *Merrick*. *See* CP 34-38, 216-223. Torre Woods likewise failed to raise the issue in

---

[9] Washington and out of state jurisdictions are consistent in noting that the obligation to find and properly cite the relevant legal authorities is squarely on counsel, and not the court. The Washington State Supreme Court has noted on more than one occasion that "[w]here no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (citing *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 372 P.2d 193 (1962)). *See also State v. Logan*, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000) (citation omitted); *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn. App. 125, 134, 896 P.2d 66 (1995). Out of state jurisdictions have echoed this principle. *See, e.g., Redondo-Borges v. U.S. Dept. of Housing & Urban Dev.*, 421 F.3d 1, 6 (1st Cir. 2005) ("[T]he reviewing court cannot be expected to 'do counsel's work, create the ossature for argument, and put flesh on its bones.'") (citation omitted). A related principle is that "[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Edwards v. Le Duc*, 157 Wn. App. 455, 459 n.5, 238 P.3d 1187 (2010).

[10] Accordingly, pursuant to RAP 9.12, Respondent HO Sports hereby moves to strike argument Section "E.(2)(b)" from Appellant's brief.

his motion for reconsideration;[11] instead, he clarified the three bases on which that motion hinged had nothing to do with whether Michael Woods' actions rose to the level of willful or wanton misconduct under the parental immunity doctrine. RP 12-21-12 at 2-3; CP 167-174, 228-233. The issue is not properly before this Court and should not be considered. RAP 9.12.

Additionally, "RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them." *State v. Scotte*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Entertaining issues and arguments for the first time on appeal is strongly disfavored because, *inter alia*, "opposing parties should have an opportunity ... to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted error or new theories and issues for the first time on appeal." Tegland, 2A Wash. Prac., Rules Practice RAP 2.5 (7th ed. 2011). As shown above, Petitioner simply did not provide the trial court with legitimate notice, facts, or argument concerning the purported "wanton

[11] HO Sports notes the trial court's statement that: "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. However, a simple review of the December 21, 2012 transcript reveals that this statement was dicta and not a finding pursuant to any argument or issue raised as to whether Michael Woods' misconduct was "willful or wanton," as Torre Woods did not raise any such issue or argument.

misconduct" issue he now asserts. Accordingly, the issue could not be part of the trial court's ruling on Michael Woods' motion or its certification to this Court pursuant to RAP 2.3(b)(4).

In sum, a review of the record relevant to the summary judgment order shows that, prior to this appeal, Torre Woods did not argue nor did he have any intention of arguing that Michael Woods' conduct constituted "wanton misconduct" under the parental immunity doctrine. This is confirmed by Torre Woods' Complaint, which establishes the only species of parental misconduct advanced against his father is "Negligence." Thus, the trial court did not commit reversible error in failing to find sufficient facts supporting "wanton misconduct" when Appellant put nothing concerning that issue before it. *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 684 P.2d 692 (1984) ("A party cannot properly seek review of an alleged error which the party invited."). Indeed, based on the foregoing, Appellant's argument that Michael Woods' conduct was "wanton" should not be considered as part of this appeal. RAP 9.12; *see also* RAP 2.5(a).

(3) No jury issue exists as to whether Michael Woods' actions constitute "wanton misconduct."

Because "[t]here is nothing in law so elusive as defining and applying degrees of fault, whether the doctrine of wanton misconduct does

or does not apply is a question of law for the court." *Mendenhall v. Siegel*, 1 Wn. App. 263, 267 (1969). Whether a jury question exists on the question of wanton misconduct depends on the record, *Evans v. Miller*, 8 Wn. App. 364, 367-368 (1973), and Appellant flatly misstates the law in arguing "whether a defendant's conduct is 'wanton' is 'a question of fact to be submitted to the jury under proper instructions.'" Brief of Appellant at 14. Indeed, reading in context the language from *Adkisson* that Appellant provides shows the court found a jury question in that case *because of the record before it.*[12] The issue of wanton misconduct does not go to the jury simply because it is raised.

Despite failing to brief or argue the "wanton misconduct" issue for the trial court's consideration, Appellant contends the trial court erred in granting summary judgment because there were facts before it that

---

[12] The quote on which Appellant relies comes from the following discussion:

> When we consider, from plaintiffs' testimony, that west Roxbury was the most heavily traveled arterial in that area; that westbound traffic proceeded over the blacktop; that there was a long downgrade in approaching the obstruction from the east; that the north lane of the road between Thirty-first southwest and Thirty-second southwest was completely obstructed to travelers going westerly; and that, during the very evening after the work was completed, several drivers, headed westward, narrowly escaped running into the obstruction and were required to swerve to the left onto the concrete, ***we feel that whether or not the conduct of the defendants was wanton was a question of fact to be submitted to the jury under proper instructions***."

Adkisson, 42 Wn.2d at 688 (emphasis added).

Michael Woods exceeded the GTX's on-product warnings concerning tow speed. *See* Appellant Brief at 14-16. Ironically, these are the same warnings that form the basis of Appellant's WPLA failure to warn claim against Respondent HO Sports. CP 6 (¶ 23). Petitioner's inherently conflicting positions notwithstanding, the facts and evidence before the trial court were not sufficient to create a jury issue on whether Michael Woods' conduct was "wanton" under relevant Washington law.

"[A] parent who abdicates his or her parental responsibilities by engaging in willful or wanton misconduct is not immune from suit" via the parental immunity doctrine. *Zellmer*, 164 Wn.2d at 155. Recently, and in the context of the parental immunity doctrine, our Supreme Court defined "willful and wanton misconduct" in the following way: "'[w]illful [misconduct]' requires a showing of actual intent to harm, while 'wanton' infers such intent from reckless conduct." *Id.* at 155 n.2.[13]

The definition Appellant provides from *Adkisson v. City of Seattle*, is but a snapshot of the definition set forth our Supreme Court in that case. The *Adkisson* court's full definition provides:

---

[13] While providing the operative definition in the parental immunity context, our Supreme Court cited to two cases. One, *Hoffman v. Tracy*, involved an injury resulting from the parent's driving while intoxicated. 67 Wn.2d 31, 406 P.2d 323 (1965). The other, *Livingston v. Everett*, involved a parent leaving her small child unattended in a small room with two "large and active" Doberman pinschers. 50 Wn. App. 655, 660, 751 P.2d 1199 (1988).

> Wanton misconduct is not negligence, since it involves intent rather than inadvertence, and is positive rather than negative. It is the intentional doing of an act, or intentional failure to do 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 v. Seattle, 42 Wn.2d 676, 682-83, 687 (1953). Thus, to establish an issue as to "wanton misconduct," there must be sufficient evidence supporting that Michael Woods intentionally acted with such reckless disregard for the consequences that one may fairly infer the intent to harm from his conduct. *See Zellmer*, 164 Wn.2d at 155 n.2; *Adkisson*, 42 Wn.2d 676, 687.

Here, the facts and evidence are insufficient to create any jury issue concerning "wanton misconduct" on Michael Woods' part. While HO Sports does not condone failures to follow its on-product warnings, Mr. Woods' failure to do so here is nothing beyond ordinary negligence of which his son's injury was a foreseeable – rather than an inferably intended – result.[14] *Zellmer*, at 155 n.2. Notably, there are no facts or evidence in the record suggesting Michael Woods intentionally exceeded the warning speed. Further, Michael Woods testified he had previously

[14] In his brief, Appellant appears to agree with this assessment. *See* Brief of Appellant at 5 ("This case ... involves nothing more than parental negligence"), and 13 ("Here, Michael's activities were straightforward negligence").

taken Torre Woods tubing on numerous occasions. *See* CP 29. Thus, Michael Woods knew well Torre Woods' comfort-level as a rider and presented uncontroverted testimony that he "was ***always*** careful to operate the boat at a speed Torre was comfortable with." CP 29 (emphasis added). The trial court was not presented with facts or evidence distinguishing this tube ride, in the moments leading up to the accident, from previous rides Michael Woods gave his son. Accordingly, there was nothing before the trial court indicating "Michael kn[e]w, or ha[d] reason to know, that [his] conduct would, in a high degree of probability, result in substantial harm to another." *Adkisson v. City of Seattle*, 42 Wn.2d 676, 688, 258 P.2d 461 (1953).

Evidence that the tube traveled over a wake likewise does nothing to take this case outside the ambit of simple negligence. Wakes have existed on bodies of water for as long as people have been tubing; the risk of traveling over a wake is inherent in the activity. The trial court was not presented facts or evidence that Michael Woods sought to enhance these risks by intentionally directing the boys at the wake in an attempt to provide a rough ride and shake them off the tube (a common practice in tubing). And unlike the intoxicated parent in *Hoffman*, there is no evidence that Michael Woods was under the influence of any substance while towing the boys on the tube. *See* footnote # 13, *supra*.

Finally, that Woods' conduct was not wanton is further supported by the fact that Washington courts have found parental immunity in cases involving conduct far more egregious. *See, e.g., Talarico*, 105 Wn.2d 114 (parental immunity doctrine applied where parent started backyard fire then left three-year-old son unattended, resulting in severe burns); *Baughn*, 105 Wn.2d at 119 (disallowing manufacturer's contribution claim because of parental immunity where parents allowed sight-impaired child to ride motorbike resulting in fatal crash); *Delay v. Delay*, 54 Wn.2d 63, 337 P.2d 1057 (1959) (disallowing negligence action against parent who instructed child to siphon gas, resulting in burn injuries). *See also Ball v. Ball*, 269 P.2d 302, 314 (Wyo. 1954) (parental immunity applied where pilot father, aware of distance to be traveled, failed to sufficiently fuel airplane causing crash that severely injured son). Moreover, the conduct at issue here is also less egregious than that present in parental immunity cases where willful and wanton misconduct have been found. *See Hoffman*, 67 Wn.2d 31; *Livingston*, 50 Wn. App. at 660 .

In sum, the facts before the trial court, taken in a light most favorable to Torre Woods, simply do not create a jury issue as to "wanton misconduct" under *Zellmer* or *Adkisson*. There is no error; summary judgment was properly granted. Petitioner's contention to the contrary rings hollow.

D. The Trial Court Did Not Abuse Its Discretion In Excluding Irrelevant Evidence Torre Woods Failed To Submit As Part Of His Summary Judgment Opposition.

"Motions for reconsideration are addressed to the sound discretion of the trial court; a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of that discretion." *Wagner Dev. v. Fidelity & Deposit*, 95 Wn. App. 896, 906 (1999) (citing *Perry v. Hamilton*, 51 Wn. App. 936, 938, 756 P.2d 150 (1988)). A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases it upon untenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *cert. denied,* 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998).

"Motions for reconsideration and the taking of additional evidence ... are within the discretion of the trial court." *Chen v. State*, 86 Wn. App. 183, 192 (1997). However, a motion to reconsider a summary judgment and to take additional evidence is properly denied if the evidence sought to be presented is merely cumulative of evidence previously considered by the trial court. *Id.* Moreover, "summary judgment hearing[s] afford the parties ample opportunity to present evidence. If the evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to submit that evidence." *Wagner Dev.*, 95 Wn. App. at 907.

Here, the trial court did not abuse its discretion in excluding the Earles declaration and the Safeco insurance information because these materials unquestionably could have been submitted in opposition to Michael Woods' summary judgment motion but were not. *See id.* Moreover, the Earles declaration was not relevant to the ruling on reconsideration. Finally, evidence of Michael Woods' insurance coverage was likewise irrelevant because Washington is not a state that ignores parental immunity when the parent has liability insurance, and *Borst* does not hold otherwise.

(1) Earles Declaration.

Petitioner's argument – that the Earle declaration "bolstered the notion of Michael Woods' reckless and wanton conduct" and, thus, should have been considered, Brief of Appellant at 19 – once again ignores that Torre Woods did not argue Michael Woods' "wanton" conduct to the trial court.[15] *See* Argument Section "C." *supra.* The trial court granted summary judgment because it determined the automobile accident exception to the parental immunity doctrine created by *Merrick*, did not

[15] Accordingly, pursuant to RAP 9.12, Respondent H.O. Sports hereby moves to strike Argument Section "(E)(3)(a)" from Petitioner's brief. *See also Richter v. Trimberger*, 50 Wn. App. 780, 786 (1988) (Appellant "submitted the letter for the first time in his motion for reconsideration. Because the trial court could not on reconsideration consider new evidence that could have been discovered prior to the trial court's ruling, appellant's argument of conditional tender and the evidence to support it is not properly before this court.").

apply "to a boat or some other type of watercraft." CP 225. ***This*** is the ruling Torre Woods moved the trial court to reconsider, and it had nothing to do with the "wanton misconduct" Torre Woods now alleges. *See* CP 167-174, 228-233.

Even if "wanton misconduct" *had* been argued to the trial court, Petitioner greatly overstates the Earle declaration's value vis-à-vis the issue. As a threshold matter, instead of arguing the Earles declaration supported Michael Woods acted "wantonly," Torre Woods conceded to the trial court that "from a technical standpoint [the Earles Declaration] may not influence this Court's determination one way or the other." CP 229-30. This is because the bulk of Mr. Earles' declaration does not pertain to Michael Woods, and the only non-cumulative[16] information concerning Michael Woods' conduct is that Mr. Earles "***believe***[s] th[e] incident would not have occurred if Mike Woods had been towing the tube at a slower, safer speed, or in a safer manner." CP 187-90 (emphasis added). But unless Mr. Earles holds some expertise regarding marine accidents, what he "believes" caused Torre Woods' accident is inadmissible under ER 701 and, thus, was not properly before the court on reconsideration. *See, e.g., State v. Montgomery*, 163 Wn.2d 577, 594, 183

[16] Indeed, a simple review of Torre Woods' motion for reconsideration shows the motion was a simple re-hashing of his argument that *Merrick* applies to the operation of a boat. *See Chen, supra* at 192.

P.3d 267 (2008) (holding lay witness expression of observation-based "belief" not admissible under ER 701).[17]

Finally, the trial court's decision to exclude the Earles declaration was squarely within its discretion. As Michael Woods correctly pointed out to the trial court in moving to strike, the Earles declaration was untimely, CP 199, and Torre Woods failed to provide any explanation as to why it was not submitted in opposition to Michael Woods' summary judgment motion. CP 198. The trial court's decision to exclude the declaration can be upheld for this reason alone. *See, e.g., Go2net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 89 (2003) (finding "no abuse of discretion where the trial court refuse[d] to consider an untimely affidavit" in the summary judgment context); *Prof'l Marine v. Certain Underwriters*, 118 Wn. App. 694, 707 (2003) ("We grant the respondents' motion to strike Karson's declaration and do not consider it, because Lloyd's provides no reason that his declaration could not have been obtained earlier.").

In sum, to the extent a trial court may, at its discretion, take additional evidence in considering a motion for reconsideration, does not mean it is required to do so. *Wagner Dev., supra* at 907. Here, the trial

[17] Notably, Torre Woods has not identified Mr. Earles as one of his expert witnesses.

court's exclusion of Logan Earles' deposition was in accordance with (if not compelled by) CR 59 and applicable case law. There was no abuse of discretion.

(2) Michael Woods' Safeco Insurance Coverage.

In light of (1) Judge Bryan's January 28, 2013 ruling that Safeco has no duty to indemnify or defend Michael Woods in this matter and (2) ER 411's dictates, it is rather remarkable that Petitioner still insists the trial erred when it excluded evidence of Michael Woods' insurance coverage through Safeco. Like the Earles declaration, this evidence was untimely filed with Torre Woods' motion for reconsideration. More importantly, a parent-defendant in this state can defend himself against his child's claims without losing protection of the law because he has insurance, and *Borst* does not hold otherwise.

In any event, Judge Bryan's determination that Safeco is not obligated to defend / indemnify Michael Woods in this case wholly moots Petitioner's argument. There is no liability insurance for the Court to consider *vis-à-vis* Michael Woods' assertion of the parental immunity doctrine.[18] If Michael Woods is not protected by the doctrine, he will be left with the unfortunate Hobson's choice of expending substantial sums

[18] At this juncture, Petitioner's continued insistence on this point can only be viewed as an attempt to generate jurisprudence permitting evidence of liability insurance in parent-child tort cases.

of money to defend in this matter, or proceeding *pro se* and running the heightened risk of being found at fault for his son's substantial injuries (and possibly subsequent claims for "contribution"). His situation, thus, fully comports with one of the most compelling policy rationale's underlying the parental immunity doctrine: protection of the family's finances. *See Roller*, 37 Wash. at 245.

VI. CONCLUSION

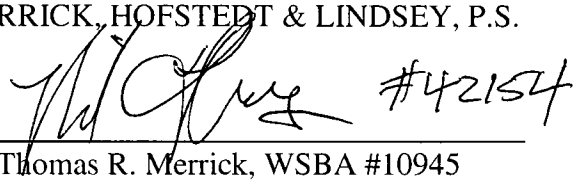
In engaging in a long-enjoyed recreational activity with his son, Michael Woods was acting within his parental capacity at the time his son sustained a very unfortunate injury. That a boat containing a motor was part of the recreational activity makes it no less recreational and, thus, no less within Michael Woods' parental control and discretion – to hold otherwise will likely have a very real chilling-effect on parent-child recreation in this state. Moreover, there exists no legitimate basis for extending the automobile-specific exception created by *Merrick v. Sutterlin* to boating, and certainly not to the recreational activity of tubing.

Because he raises the issue for the first time on appeal, Appellant's "wanton misconduct" argument should not be considered by this Court. And even if Appellant had raised the issue below, there exists no fact question as to whether Michael Woods' conduct was "wanton."

This Court has ample basis for affirming the trial court's summary judgment order and order denying reconsideration; it should therefore do so. Costs on appeal should be awarded to HO Sports.

RESPECTFULLY SUBMITTED this 15th day of May, 2013.

MERRICK, HOFSTEDT & LINDSEY, P.S.

By  #42154

Thomas R. Merrick, WSBA #10945
David S. Cottnair, WSBA #28206
Nicholas G. Thomas, WSBA #42154
Of Attorneys for Respondent HO Sports Company, Inc.

MERRICK, HOFSTEDT & LINDSEY, P.S.
3101 Western Ave., Suite 200
Seattle, WA 98121
Telephone: (206) 682-0610

L:\169\041\Appeal\Pleadings\HO APP BRIEF 5.15.13

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of **BRIEF OF RESPONDENT HO SPORTS COMPANY, INC.** was served via e-mail and first class mail, postage prepaid on May 15, 2013 on the following individuals:

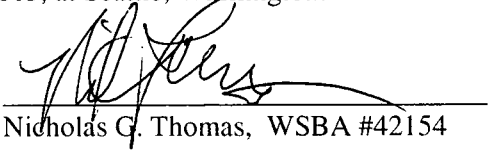
Attorney for Plaintiffs
John R. Connelly, Jr.
Nathan Roberts
Connelly Law Offices
2301 N 30th Street
Tacoma, WA 98403
jconnelly@connelly-law.com
mroberts@connelly-law.com
pwells@connelly-law.com

Philip A. Talmadge
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188
Phil@tal-fitzlaw.com
paula@tal-fitzlaw.com

Defendant Michael E. Woods, Pro Se
4008 N 38th St
Tacoma, WA 98407

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

EXECUTED May 15, 2013, at Seattle, Washington.



Nicholas G. Thomas, WSBA #42154

APPENDIX 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SAFECO INSURANCE COMPANY OF AMERICA, a foreign insurer,

Plaintiff,

v.

MICHAEL E. WOODS and ANNA K. WOODS, individually and the marital community comprised thereof; and TORRE J. WOODS, an individual,

Defendants.

CASE NO. 12-5915 RJB

ORDER ON MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on the Defendant Torre J. Woods' Motion to Dismiss for Lack of Subject Matter Jurisdiction (Dkt. 22) and Plaintiff Safeco Insurance Company of America's ("Safeco") Motion for Summary Judgment (Dkt. 11). The Court has considered the pleadings filed regarding the motions and the file.

In this declaratory judgment action, Safeco seeks to be released from the duty to defend its insured, Michael Woods, for claims made against him in *Woods v. HO Sports Co., Inc., et al.*, Pierce County, Washington Superior Court No. 12-2-08809-3 ("*Woods*"). Dkt. 1. In *Woods,* Torre Woods asserts claims against his father Michael Woods. *Id.*

I. FACTS

Woods arose from an accident which occurred on Tiger Lake, Washington, where the Woods own a vacation home. Dkt. 20. The vacation home, located at 210 NW Tiger Way West, Belfair, Washington, was insured by Plaintiff Safeco, and is on Tiger Lake. Dkts. 1 and 21, at 6. The Defendants in the instant case are Michael Woods and Anna Woods, a married couple, and their son, Torre Woods, a minor who was about 17 years old at the time of these events. Dkt. 30-1. In order to avoid confusion, this Opinion will now refer to the various Woods by their first name.

In July of 2012, Torre was riding a floating tube, a GTX, with two other children. Dkt. 20. In the *Woods*' Complaint, Torre alleges that the GTX was being pulled by Michael using his 240 horsepower inboard jet boat. Dkt. 11-4, at 2-5. Torre further alleges that Michael "allowed the tube to cross a wave or other water disturbance." Dkt. 11-4, at 6. Torre states that after the tube "encountered turbulence in the water" the riders were dislodged. Dkt. 20, at 2. Torre was rendered a quadriplegic when one of the other children landed on his neck. Dkt. 20.

Torre filed the Pierce County action against the manufacturer of the tube, HO Water Sports Co., Inc. and Michael on May 8, 2012. Dkt. 11-4. On October 16, 2012, Safeco filed this case seeking a declaration that it "has no duty to defend and/or indemnify" its insured Michael for any claims made in *Woods v. HO Sports Co., Inc., et al.,* Pierce County, Washington Superior Court No. 12-2-08809-3. Dkt. 1. It also seeks attorneys' fees and costs. *Id.* Safeco asserts that this Court has diversity jurisdiction under 28 U.S.C. § 1332. *Id.*

In November of 2012, Torre's counsel issued a settlement demand letter to Safeco, asking for the $300,000 policy limits. Dkt. 27-4. On December 7, 2012, Michael's motion for

summary dismissal of the claims asserted against him in *Woods* was granted based on the doctrine of parental immunity. Dkt. 21. Torre's motion for reconsideration of that order was denied. Dkt. 27-6. The Pierce County Superior Court, however, certified to the Washington Court of Appeals that the order granting summary judgment "involved 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," pursuant to Washington Rule of Appellate Procedure 2.3(b)(4). Dkt. 27-6. Accordingly, on December 27, 2012, Torre filed a notice seeking discretionary review of the decision granting Michael summary judgment and of the decision denying the motion for reconsideration with the Washington State Court of Appeals Division II. Dkt. 27-6, at 2.

PENDING MOTIONS

Defendants move for dismissal of this action, arguing that this Court does not have diversity jurisdiction because Safeco is a Washington business and because there is no amount in controversy. Dkts. 22 and 31.

Safeco opposes the motion. Dkt. 25. It argues that although it once was a Washington company, it is now a New Hampshire domiciled corporation with its principal place of business in Boston, Massachusetts. *Id.* It notes that it is undisputed that the Woods are Washington residents. It further argues that the amount in controversy is satisfied because Torre has demanded the full policy amounts, the matter is on appeal and has been certified for immediate review. *Id.*

In Safeco's Motion for Summary Judgment, it argues that it is entitled to a declaration that it has no duty to indemnify/defend Michael in the suit Torre brought against him because the policy does not cover claims of one insured resident (Torre) against another insured resident

(Michael). Dkts. 11 and 29. Safeco further argues that it should be released from its duties to Michael in the suit brought against him by his son because the policy does not provide liability coverage for bodily injury arising out of the use of watercraft with an inboard motor greater than 50 horsepower, and the craft involved here was a 240 horsepower inboard jet boat. *Id.*

The Defendants oppose Safeco's motion, arguing that the home in question was their vacation home, they did not "reside" there, and so Torre was not an "insured" under the policy language. Dkt. 19. Defendants further argue that Torre's injuries arose from use of the GTX tube, not the boat, so the watercraft exclusion does not apply. *Id.*.

II. DISCUSSION

A. MOTION TO DISMISS - STANDARD

A complaint must be dismissed under Fed.R.Civ.P.12(b)(1) if, considering the factual allegations in the light most favorable to the plaintiff, the action: (1) does not arise under the Constitution, laws, or treaties of the United States, or does not fall within one of the other enumerated categories of Article III, Section 2, of the Constitution; (2) is not a case or controversy within the meaning of the Constitution; or (3) is not one described by any jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198 (1962); *D.G. Rung Indus., Inc. v. Tinnerman*, 626 F.Supp. 1062, 1063 (W.D. Wash. 1986); *see* 28 U.S.C. §§ 1331 (federal question jurisdiction) and 1346 (United States as a defendant). When considering a motion to dismiss pursuant to Rule 12(b)(1), the court is not restricted to the face of the pleadings, but may review any evidence to resolve factual disputes concerning the existence of jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989); *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983). A federal court is presumed to lack subject matter jurisdiction until plaintiff establishes otherwise. *Kokkonen v.*

Guardian Life Ins. Co. of America, 511 U.S. 375 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). Therefore, plaintiff bears the burden of proving the existence of subject matter jurisdiction. *Stock West*, 873 F.2d at 1225; *Thornhill Publishing Co., Inc. v. Gen'l Tel & Elect. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

B. DEFENDANTS' MOTION TO DISMISS

Under 28 U.S.C. § 1332(a), district courts have jurisdiction over "civil actions where the matter in controversy exceeds the sum or value of $75,000" and is between citizens of different States. "The federal diversity jurisdiction statute provides that 'a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.'" *Hertz Corp. v. Friend,* 130 S. Ct. 1181, 1192-93(2010) (*quoting* 28 U.S.C. § 1332(c)(1)). A corporation has its "principal place of business" at the corporation's "nerve center," that is where the "a corporation's officers direct, control, and coordinate the corporation's activities." *Id.,* at 1192. As the party asserting diversity jurisdiction, Safeco has the burden of persuasion here. *Hertz,* at 1193.

Defendants' Motion to Dismiss (Dkt. 22) should be denied because Safeco has shown that it is no longer a citizen of Washington, but now has its "nerve center" in Boston, Massachusetts and the amount in controversy is over $75,000. In support of its allegation that its "nerve center" is in Boston, Safeco has submitted the Declaration of James R. Pugh, a corporate officer. Dkt. 26. Mr. Pugh states that Safeco was purchased by Liberty Mutual Group in 2008 and now is a wholly owned subsidiary of Liberty Mutual Group. *Id.*, at 2. He states that the majority of the officers comprising its executive management team are now based out of Boston, Massachusetts. *Id.* He asserts that Safeco's corporate center is now in Boston. *Id.* Mr. Pugh states that the board of directors are located and work out of Liberty Mutual Group's Boston,

Massachusetts headquarters. *Id.* He states that "[m]eetings involving the executives and directors regularly occur" in Boston and . . . this is where Safeco "primarily maintains its records and handles core administrative matters." *Id.* He asserts that Boston is now where Safeco's "overall corporate activities and strategies are dictated." *Id.* He further notes that the Washington State Office of the Insurance Commission approved Safeco's transfer of its domicile address to New Hampshire on January 12, 2012. *Id.*, at 3. Although Defendants point out that Safeco's website still states that it is "based in Seattle," that is not sufficient to overcome Safeco's evidence. Nor is the fact that there is a building and a baseball stadium in Seattle named after it. Safeco has shown that its "never center" is in Boston, and so its "principal place of business" is in Massachusetts. *See Hertz*, at 1192 (holding a corporation has its "principal place of business" at the corporation's "nerve center"). There is diversity of citizenship between Safeco and the Woods, who are Washington residents.

Moreover, the amount in controversy remains over $75,000. Although Michael prevailed in his Motion for Summary Judgment and got the claims against him dismissed based on parental immunity, that order has been certified by the Superior Court for an immediate appeal to the Washington State Court of Appeals Division II. Torre has demanded the policy limits of $300,000. The state court matter is still ongoing, and so the amount in controversy remains over $75,000.

This Court has diversity jurisdiction over this case pursuant to 28 U.S.C. § 1332(a). The parties are residents of different states and the amount in controversy is at least $75,000.

C. MOTION FOR SUMMARY JUDGMENT - STANDARD

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the

movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)(nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 .S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, T.W. *Elect. Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, non specific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

D. SAFECO'S MOTION FOR SUMMARY JUDGMENT

Under the rule of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), "federal courts sitting in diversity jurisdiction apply state substantive law and federal procedural law." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996).

> In Washington, insurance policies are construed as contracts. An insurance policy is construed as a whole, with the policy being given a "fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." If the language is clear and unambiguous, the court must enforce it as written and may not modify it or create ambiguity where none exists. If the clause is ambiguous, however, extrinsic evidence of the intent of the parties may be relied upon to resolve the ambiguity. Any ambiguities remaining after examining applicable extrinsic evidence are resolved against the drafter-insurer and in favor of the insured. A clause is ambiguous when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable.

Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 665-666 (2000)(*internal quotations and citations omitted*).

Safeco's Motion for Summary Judgment (Dkt. 11) should be granted because the policy does not cover claims of one insured against another insured. Safeco should be held to have no duty to defend or indemnify Michael in the suit his son brought against him. The policy provides:

> 2. Coverage E. "Personal Liability . . . does not apply to: . . ."
>
> "f. bodily injury to an insured within the meaning of parts (1) or (2) of Policy Definitions, 3.g. Insured."

Dkt. 21, at 37-40. Parts (1) and (2) of the Policy Definitions read:

> 1. Throughout this policy, "you" and "your" refer to:
>
> a. the "named insured" shown in your Policy Declarations; and if a resident of the same household:

b. the spouse;

c. the civil partner by civil union . . . or

d. the domestic partner. . . .

2. "We," "us" and "our" refer to the underwriting company . . .

Dkt. 21, at 46. Part 3.g. "Insured" provides:

3. In addition, certain words and phrases are defined as follows: . . .

g. Insured means:

(1) you; and

(2) so long as you remain a resident of the residence premises, the following residents of the residence premises:

(a) your relatives;

(b) another person under the age of 24 who is in the care of any person described in (1) or (2)(a) above.

Anyone described above who is a student temporarily residing away from your residence premises while attending school shall be considered a resident of your residence premises."

Dkt. 21, at 47. The named "insured"[s] are Michael and Anna, and the "residence premises" is the property located at 210 NW Tiger Way West, Belfair, Washington. Dkt. 21, at 6. The policy excludes "personal liability" coverage for bodily injury to an "insured." The plain and unambiguous language of the policy states that an "insured" includes "you" and "so long as you remain a resident of the residence premises, the following residents of the residence premises: . . your relatives." The Woods argue that their son, Torre, was not an "insured" under the policy because this "residence premises" was their vacation home so they did not permanently "reside" there. Dkt. 19. A "fair, reasonable, and sensible construction" of the policy language does not

support their assertion. Webster's Dictionary defines a "resident" as "living in a place for some length of time." The Woods were staying at the insured home the night of the accident and had spent at least some of the summer there. Under the ordinary meaning of the word "resident" they were and had been living at the vacation home for some length of time. The policy excludes coverage for injury to Torre because he and his parents are "insured[s]" under the policy.

Safeco should also be granted declaratory relief releasing it from the duty to defend Michael in the suit brought against him by his son because the policy does not provide liability coverage for bodily injury arising out of the use of watercraft with an inboard motor greater than 50 horsepower, and the craft involved here was a 240 horsepower inboard jet boat. The policy language provides:

> 1. Coverage E- Personal Liability and Coverage F – Medical Payments to Others do not apply to bodily injury or property damage: . . .
>
> F. Arising out of the ownership, maintenance, use, loading, or unloading of: . . .
>
> 3. Watercraft: (a) owned by or rented to any insured if it has inboard-outdrive motor power of more than 50 horsepower.

Dkt. 21, at 37.

The Woods argue that the watercraft exclusion does not apply because Torre's injuries arose from the use of the GTX tube, which has zero horse power, not the use of the boat. Dkt. 19.

"The phrase 'arising out of' is unambiguous and has a broader meaning than 'caused by' or 'resulted from.'" *Toll Bridge Authority v. Aetna Ins. Co.*, 54 Wn. App. 400, 404 (1989). Here, as is in other Washington insurance contracts, "[i]t is ordinarily understood to mean 'originating from,' 'having its origin in,' 'growing out of,' or 'flowing from.'" *Id.* The accident here was not caused just from the use of the tube. The children were not merely floating in the lake on it. The

accident "flowed from" the use of the boat to pull the tube. The accident "originated from" the use of the boat's power. Accordingly, bodily injury from the use of this boat was not covered under the policy.

Safeco should be held to have no duty to indemnify/defend Michael in *Woods v. HO Sports Co., Inc., et al.,* Pierce County, Washington Superior Court No. 12-2-08809-3.

III. ORDER

It is **ORDERED** that:

- Defendant Torre J. Woods' Motion to Dismiss for Lack of Subject Matter Jurisdiction (Dkt. 22) **IS DENIED**;
- Plaintiff Safeco Insurance Company of America's Motion for Summary Judgment (Dkt. 11) **IS GRANTED**; and
- Safeco Insurance Company of America has no duty to indemnify/defend Michael in *Woods v. HO Sports Co., Inc., et al.,* Pierce County, Washington Superior Court No. 12-2-08809-3.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 28th day of January, 2013.

ROBERT J. BRYAN
United States District Judge