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No. 72415-1-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

DAVID PONCE and KARMIN ZAPANA, individually and as Co-Personal Representatives of the Estate of JACOB PONCE, a deceased minor child,

Appellants,

vs.

THE MOUNTAINEERS,

Respondent/Cross-Appellant

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

Ruth Nielsen, WSBA #11136
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104-3175
Attorneys for Defendant-Respondent

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I. INTRODUCTION

The Mountaineers filed a cross-appeal in this case based on trial court Judge Theresa Doyle's pretrial ruling dismissing the Mountaineer's defense of "express release". The defense of "express release" relied on a Guest Release signed by plaintiff Karim Zapana. Judge Doyle incorrectly ruled that the Guest Release did not apply to this accident. CP 1139 - 1141. Since the jury found in favor of the Mountaineers at trial, if this appellate court affirms Judge Roger Rogoff's evidentiary rulings at trial and affirms the verdict of the jury, then the issue of partial summary judgment granted pre-trial need not be reached. If the Mountaineers' Cross-Appeal is considered, then Judge Doyle's partial summary judgment dismissing "express release" as a defense should be reversed as to the claims of Karim Zapana and her husband, David Ponce.

II. ARGUMENT

A. Plaintiffs' Arguments Misquote the Guest Release and Should Be Rejected

The court has been provided with the precise language of the Guest Release at issue here as the document itself has been provided and quoted by both parties. CP 1138, Plaintiff's Reply Brief at 25, Mountaineers' Brief at 40. However, plaintiffs in their Reply Brief repeatedly misquote the language of the Guest Release, arguing for an interpretation of language that is different than what Karim Zapana actually signed. *See,*

e.g. Plaintiffs' Reply Brief at 28, 29, 31, and 34. Plaintiffs' entire argument is based on the mistaken premise that the Guest Release requires that Jacob Ponce must have been sledding at the designated area sledding area when his accident occurred in order for the Guest Release to have any application to this accident. However, nowhere does the Guest Release even mention the word "sledding", nor does it refer to a limited area where sledding might take place. Instead, the Guest Release is very broadly worded and refers to "any outdoor activity", "the hazards of traveling in mountainous terrain", "forces of nature", and "the actions of participants and other persons." CP 1138. ALL of these factors played a part in Jacob Ponce's accident. The accident was caused by a combination of traveling in the outdoors walking uphill on snow, the forces of nature including gravity on a snowy surface causing a sled to slide downhill, and the actions of Jacob who sat on the sled and his family member who let go of the sled.

It is significant to note that plaintiffs consistently omit the key phrase "...in any way connected with..." and argue instead that the Guest Release says "participation" in "activities offered by the Mountaineers." *See, e.g.* Plaintiffs' Reply Brief at. 31. By eliminating the words that are actually in the Guest Release and substituting words that aren't there, plaintiffs argue instead that the Guest Release requires that the accident

occur while "sledding" at the "designated sledding area" in order for the Release language to apply. Plaintiffs have done exactly what the court rejected when interpreting the release used in *Scott v. Pacific West Mt. Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992) by making an argument that is "factually strained and unconvincing." *Scott* at 492. The Guest Release says nothing about sledding, and makes no reference to a sledding area, and those terms cannot be inserted just to support plaintiffs' argument. The Washington Supreme Court has held that common sense should be used in interpreting liability releases, *Scott* at 491, and the trial court failed to do that in this case. Like the Release upheld in *Scott* to bar the claims of the parents whose minor child was injured, broad language is sufficiently clear show the parties' intent to shift the risk of loss and to release the Mountaineers from any alleged negligence in this case. *Id.*

Plaintiffs argue that only the activities of either sledding or snowshoeing in the areas designated for those activities would be covered by the Guest Release. Plaintiffs' Reply Brief at p. 28. However, the Guest Release NOT specify that it only applies to those two activities – it does not mention either activity. Instead, the evidence before Judge Doyle was that a signed the Guest Release was required for anyone to access the Mountaineers' property and the scope of the Guest Release applied to the pathway leading to the designated sledding area and to this particular

accident. CP 1112. (Declaration of Martinique Grigg, Executive Director of the Mountaineers).

Plaintiffs cite to cases for the proposition that courts will not add language to the words of a contract, Plaintiffs' Reply Brief p. 30, but that is exactly what plaintiffs have done by adding the words "sledding" and "designated sledding area" to their arguments. Since those words appear nowhere in the Guest Release, they should not be added to support plaintiffs' arguments. Nor should the words that are actually IN the Guest Release – "in any way connected with" be subtracted as plaintiffs have done here. *See, e.g.* Plaintiffs' Reply Brief at 28. Plaintiffs' arguments have rewritten the Guest Release to say that the accident must take place while sledding at the sledding hill – and since that is not what the Guest Release actually says, those arguments should not be considered.

B. Access is a Necessary and Integral Part of Recreational Activities

Plaintiffs argue that the cases of *Plano v. City of Renton*, 103 Wn. App. 910, 14 P.3d 871 (2000) and *Nielsen v. Port of Bellingham*, 107 Wn. App. 662, 27 P.3d 1242 (2001), do not apply here because in those cases the court found liability based on the recreational use statute. Plaintiffs' Reply Brief pp. 31 – 33. However, those cases are relied on by the Mountaineers precisely because both decisions held that ramps providing

access to recreational moorage were a "necessary and integral" part of the moorage and would not be treated separately for recreational use. *Plano* at 915; *Nielsen* at 669.[1] In this case, the facts are even more clear that the Guest Release signed by Karim Zapana applied to and included the access path because Ms. Zapana had to sign the Release *before* she – or anyone else in the family - was allowed to use the path, and use of the path itself was included in the scope of the Guest Release. CP 1112.

C. Facts Must Be Construed in Favor of the Non-Moving Party on Summary Judgment

Instead of construing the facts in favor of the non-moving party as the court was required to do --- Judge Doyle adopted the plaintiffs' theory of the case as evidenced in her Order dated March 22, 2013. The judge's Order parroted the language argued by plaintiffs in concluding improperly that the Guest Release did not apply because *"...the accident resulted from the Mountaineers failure to maintain reasonably safe premises...* CP 1140. This is not an "undisputed fact", this was a much disputed allegation and an opinion on causation that is properly left to the jury. Judge Doyle's ruling that simply agreed with the plaintiffs' theory of liability as a basis for partial summary judgment dismissing the defense of express release must be reversed.

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[1] If the Mountaineers had argued for immunity based on the recreational use statute claiming that the access path was unrelated to the activities covered by the Guest Release, then no doubt plaintiffs would take the opposite position of what they argue here.

D. Alternative Grounds Do Not Support Partial Summary Judgment

1. Karim Zapana's Signature Applies to the Claims in this Case

Plaintiffs further argue that even if Judge Doyle's ruling was incorrect, partial summary judgment can be affirmed on other grounds. First, plaintiffs argue that since Karim Zapana signed the Guest Release on the line designated as "Participant" the release does not apply to plaintiffs' claims. However, this construction requires the court to ignore the fact that Ms. Zapana also listed Jacob as a family member who was accompanying her and who she thus signed on behalf of. CP 1138. But for his mother's signature on his behalf, Jacob Ponce would not have been allowed to access the Mountaineers' property. CP 1112.

The language of the Guest Release also – as previously noted – applies to claims "in any way connected with" Jacob's parents' participation in activities offered by the Mountaineers, which included their own use of the snow-covered path as they were walking up the path with their children. Plaintiffs' claims for their own damages focused on the emotional distress they experienced as they witnessed their son's accident – and those claims are directly connected to their participation in the activities offered by the Mountaineers which included the use of the access path. CP 1112.

The fact that Ms. Zapana signed a Guest Release on behalf of her entire family agreeing to release the Mountaineers for claims related to their recreational use of the property is further evidenced by the document itself. The Guest Release is part of a document titled "USER FORM" at the top of the page. CP 1057. The "Fee schedule for Property Use" is listed as "$10/person for the day" and "$25/family". The USER FORM states "Waivers for all guests must be signed and turned in to the Campus host at check in." *Id.* If Ms. Zapana had been the only participant, then she would have been charged $10, and she would have been the only family member allowed to access the property. *Id; CP 1112.* It is undisputed that Ms. Zapana paid $25 for the entire family to use the property and filled out and signed the Guest Release on their behalf. CP 1076 -77; CP 1105. It is also undisputed that Ms. Zapana was able to read the document and she did not ask any questions about it. CP 1105. No one in the family would have been allowed to access the Snoqualmie Campus and travel up the snow-covered access path absent her signature on their behalf. The claims brought in this case are precisely those that are within the scope of the Guest Release. CP 1112.

2. The Release Does Not Violate Public Policy

Plaintiffs claim that this Release violates public policy. To the contrary, "In Washington, contracts releasing liability for negligence are

valid unless a public interest is involved." *Johnson v. Spokane to Sandpoint, LLC,* 176 Wn. App. 453, 458, 309 P. 3d 528 (2013). Cases finding a violation of public policy generally involve essential public services. In determining whether to invalidate a release on public policy grounds, courts consider the six-factor *Wagenblast* test:

> (1) whether the transaction concerns a business suitable for public regulation;
>
> (2) whether the service is of great importance to the public, often a matter of practical necessity;
>
> (3) whether the party holds itself out as willing to perform a service for any member of the public who seeks it, or at least those coming within certain established standards;
>
> (4) whether the service is essential in nature, leading to a decisive advantage of bargaining strength;
>
> (5) whether the service involves adhesion contracts; and
>
> (6) whether, as a result of the transaction, the person or property is placed at risk of carelessness.

Wagenblast v. Odessa School Dist., 110 Wn.2d 845, 851-52, 758 P.2d 968 (1988).

The "importance" factor—*i.e.*, whether the transaction is "vital for the benefit of mankind"—is generally viewed as "the most important." *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 109 Wn.App. 334, 344-45, 35 P.3d 383 (2001). "[A] survey of cases assessing exculpatory clauses

reveals that the common determinative factor for Washington courts has been the services' or activities' importance to the public." *Id.* Indeed, among the cases in which releases ***have*** been found to be void as against public policy, "they are ***all*** essential public services—hospitals, housing, public utilities, and public education." *Shields v. Sta-Fit, Inc.*, 79 Wn. App. 584, 589, 903 P.2d 525 (1995) (emphasis added). Plaintiffs' citation to *McCutcheon v. United Homes, Corp.*, 79 Wn.2d 443, 486 P.2d 1093 (1971), only underscores this point. Plaintiffs cite to *McCutcheon* for the proposition that releases can be found to violate public policy and claim that this proposition applies where the plaintiff alleges a duty to provide reasonably safe premises. However, *McCutcheon* dealt with a landlord tenant claim, and did not, as plaintiffs argue, hinge on general duty of a land owner to provide "reasonably safe premises". Rather, the case focused on the specific duty of a landlord to a tenant to provide a safe place to live. *McCutcheon* at 450.

In contrast, releases solely involving voluntary recreational activities have routinely be upheld as not against public policy. *See, e.g., Johnson v. Spokane to Sandpoint, LLC*, 176 Wn. App 453, 309 P. 3d 528 (2013) (long distance running relay race); *Johnson v. NEW, Inc.*, 89 Wn. App. 309, 948 P.2d 877 (1997); (skiing); *Scott v. Pacific West Mt. Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992) (child enrolled in ski school, parents

claims dismissed based on the release); *Blide v. Rainier Mountaineering, Inc.*, 30 Wn. App. 571, 636 P.2d 492 (1981) (mountain climbing); *Boyce v. West*, 71 Wn. App. 657, 862 P.2d 592 (1993) (scuba diving); *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 109 Wn. App. 334, 35 P.3d 383, (2001) (skiing); *Conradt v. Four Star Promotions, Inc.*, 45 Wn. App. 847, 728 P.2d 617 (1986) (automobile demolition derby); *Hewitt v. Miller*, 11 Wn. App. 72, 521 P.2d 244 (scuba diving), review denied, 84 Wn.2d 1007 (1974); *Garretson v. United States*, 456 F.2d 1017 (9th Cir. 1972) (ski jumping). *Broderson v. Rainier Nat'l Park Co.*, 187 Wash. 399, 60 P. 2d 234 (1936) (rev'd on other grounds), (toboggan sledding); *Stokes v. Bally's PacWest, Inc.*, 113 Wn. App. 442, 54 P. 2d 161 (2002), (playing basketball where the player slipped on the floor and fell); *Shields v. Sta-Fit, Inc.*, 79 Wn. App. 584, 903 P.2d 525 (1995), (exercising/weight lifting at a gym).[2]

Sledding or walking up a snow-covered mountain path are activities that are no more an "indispensable necessity as a matter of public policy," *Shields*, 79 Wn. App. at 589, than skiing, gym membership, auto racing, basketball, relay racing, or scuba diving. In fact, one of the earliest cases in Washington enforcing a liability release

[2] Recognizing that GR 14.1 prevents citing to unpublished opinions of the Court of Appeals as "authority", the list of decisions upholding releases signed by adults in cases involving recreational and non-essential activities would be even longer if that were not the case.

involved toboggan sliding (a type of sledding.) In *Broderson v. Rainier Nat'l Park Co.*, 187 Wash. 399, 406, 60 P. 2d 234 (1936) (rev'd on other grounds), the court upheld a waiver signed by an injured patron, noting specifically that there was no public duty or public service involved in providing the toboggan hill for people to go sledding. Winter recreation – whether sledding, snowshoeing, toboganning, skiing, or simply walking up a snow-covered path in the mountains – is not an essential service, not regulated, and falls clearly within the scope of activities where both the Washington Supreme Court and the appellate courts have upheld releases. The Guest Release involving the voluntary outdoor recreational activities offered by the Mountaineers is not against public policy.

It is also not necessary, as plaintiffs suggest, for the activity involved in the Release to be defined as a "high risk sport" in order for the Release to be enforceable and not against public policy. While Releases have traditionally been upheld in high risk sports, they have also been consistently upheld in recreational/non-essential services that are not "high risk sports." *See, e.g. Johnson v. Spokane to Sandpoint, LLC, 176 Wn. App 453, 309 P. 3d 528 (2013)* where the court upheld a release in a long distance running relay race when a participant was hit by a car while crossing the road; *Stokes v. Bally's PacWest, Inc.*, 113 Wn. App. 442, 54 P. 2d 161 (2002), where the court upheld the waiver and release provisions

in a health club contract when the plaintiff slipped and fell while playing basketball, and *Shields v. Sta-Fit, Inc.*, 79 Wn. App. 584, 586, 903 P.2d 525 (1995), where the court upheld a similar fitness club release when plaintiff claimed he was injured because a Sta-Fit employee told him to remove his support belt while performing squats. And as the appellate court noted in *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 109 Wn. App. 334, 35 P.3d 383 (2001), where the court upheld a Release signed by a plaintiff who was injured while downhill skiing, the court's decision was *not* based on a determination that skiing was a "high risk sport", and the court expressly declined to make such a determination. *Chauvlier* at p. 345 fn. 35. The court's decision in *Chauvlier* makes it clear that it is not necessary for the activity to be considered a "high risk sport" in order for the release to be enforceable. *Id.*

3. The Release Does Not Apply to the Claims of a Minor

The Mountaineers acknowledged in response to Plaintiffs' Motion for Partial Summary Judgment that the Guest Release does not apply to the claims of the Estate of Jacob Ponce, since Jacob was a minor. CP 1087, 1091. The Mountaineers do not argue otherwise here. *Scott v. Pacific West Mt. Resort*, 119 Wn.2d 484, 495, 834 P.2d 6 (1992). However, the Guest Release does apply to the claims of Jacob's parents,

as the Washington Supreme Court ruled in *Scott*, and the defense of express release should not have been dismissed as to their claims. *Id.*

4. The Release Applies To Both David Ponce and Karim Zapana As a Matter of Law and Undisputed Fact

Plaintiffs' argument that the Release signed by Jacob's mother, Karim Zapana, does not apply to the claims of David Ponce, his father, is also contrary to Washington case law. In *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 495 834 P.2d 6 (1992), where Justin Scott, a minor, was injured while skiing, the Supreme Court upheld the Release as it applied to the claims of Justin's parents based on Justin's injuries. One parent, Justin's mother, had signed the release, but it applied to bar the claims of both. *Id.* This is because, "[i]n general, a husband or wife can be authorized to act for the other party to the marital relation... in the husband-wife context, one spouse cloaks the other with apparent authority to act on his or her behalf if the facts and circumstances surrounding the transaction give rise to the reasonable and logical inference that the non-acting spouse empowered the acting spouse to act for him or her." 41 Am. Jur. 2d Husband and Wife § 52 (2013); *see also* Weber et al., 19 WASHINGTON PRACTICE, Fam. And Community Prop. L. § 5.2 (2013) (acknowledging that spouses may have a fiduciary duty to one another in "[m]anagement by one spouse of the separate assets of the other spouse").

Hall v. Allstate Ins. Co., 53 Wn App. 865, 770 P.2d 1082 (1989), provides a helpful illustration. There, the husband purchased insurance—but specifically waived UIM coverage on behalf of his wife. When

injured by an underinsured motorist, the wife made analytically identical arguments to those made by plaintiffs here. She argued that the husband lacked authority to compromise her separate claim. The Court rejected these arguments, observing that "[w]e are not dealing with the proceeds of a personal injury claim, but with the contract rights." *Id.* at 868. There is no statutory prohibition on spouses entering into insurance contracts and selecting the terms thereof. *Id.*

In *Hall*, there was no indication that the wife even knew her husband waived her UIM coverage. Here, in contrast, the Mountaineers had every reason to believe one spouse was acting on behalf of the other. Ms. Zapana and Mr. Ponce demonstrated every objective indication of agency authority. Ms. Zapana accepted the Guest Release form, and with her husband present, expressly listed his name in the appropriate section and signed on his behalf. CP 1086. At no point did Mr. Ponce object, intervene, or do anything but acquiesce as his wife took the paperwork and paid on their behalf. *Id.* Both parents accepted the very consideration provided by the payment and Guest Release: access to the Mountaineers' property. *See* Weber et. al., 19 WASHINGTON PRACTICE, Fam. And Community Prop. L. § 12.20 (2013) (when consideration is paid, the assent of the non-acting spouse is presumed) (citing *Campbell v. Webber*, 29 Wn.2d 516, 523, 188 P.2d 130, 134 (1947) ("consideration paid by the purchaser was presumed to move to the community and the assent of the wife is presumed until the contrary is made to appear")). If Ms. Zapana's

signature had not been on behalf of Mr. Ponce, then he would not have been allowed to access the Mountaineers' property. CP 1112.

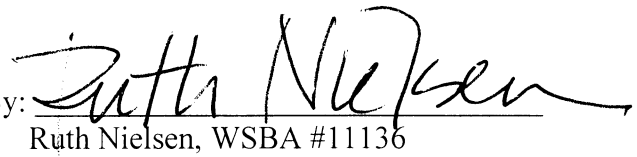
By plaintiffs' logic, they should avoid their signed release because they successfully fooled the Mountaineers into permitting them on the property—by explicitly representing that they executed a release on behalf of all parties, when in fact they did not mean it. This is neither fair, nor does it comport with the law. Ms. Zapata had—and exercised—apparent authority on behalf of her husband, which he at no time objected to. He is bound by the Guest Release as well. The same result should apply here as was upheld by the Supreme Court in the *Scott* case –while a Release signed by one parent does not dismiss the claims of the injured minor child, it does release the claims of *both* parents based on injuries to their child.

III. CONCLUSION

The appellate court should affirm the verdict of the jury in this case, and thus the issues raised on this cross-appeal need not be reached. If the court does consider the issues raised on cross- appeal, then the partial summary judgment ruling of Judge Teresa Doyle should be reversed, and the defense of express release should be reinstated as to the claims of Karim Zapana and David Ponce.

Respectfully submitted this 3rd day of June, 2015.

KEATING, BUCKLIN & MCCORMACK, INC., P.S.

By: 

Ruth Nielsen, WSBA #11136
Attorneys for Respondent/Cross- Appellant

DECLARATION OF SERVICE

I declare that on June 3, 2015, a true and correct copy of the foregoing document was sent to the following parties of record via method indicated:

Attorneys for Plaintiffs-Appellants

Leonard J. Feldman
Felix Gavi Luna
PETERSON WAMPOLD ROSATO LUNA KNOPP
1501 Fourth Avenue, Suite 2800
Seattle, WA 98101
Email:

☑ E-mail ☐ United States Mail ☑ Legal Messenger

DATED this 3rd day of June, 2015.

Deanna Nylund, Legal Assistant