No. 44346-5-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

TORRE J. WOODS, individually,

Appellant,

v.

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

Respondent,

and

MICHAEL E. WOODS, individually,

Respondent.

REPLY BRIEF OF TORRE WOODS

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A. INTRODUCTION

The parental immunity doctrine does not apply here to immunize Michael Woods' egregiously negligent operation of a motorized watercraft that severely injured his son, Torre. This is not a parental supervision case. For purposes of the present summary judgment matter, the salient point is that Michael operated a motorized vehicle, a 240 horsepower jet boat, in a fashion endangering three minor boys who were passengers.[1] Michael's conduct, in fact, resulted in an accident injuring one of the boys. By mere fortuity, the boy injured was Michael's son, Torre.

Michael admitted that the accident would not have occurred had he been operating the motorized vehicle at a slower speed. The circumstances of this case distinguish it from parental immunity cases concerning a parent's discretionary decisions addressing child rearing matters. But even if this case may be characterized as falling within the scope of a parent's supervision of his child, a fact question regarding Michael's conduct, i.e., whether Michael's conduct amounted to wanton misconduct, rendered summary judgment unavailable.

B. RESPONSE TO HO SPORTS' STATEMENT OF THE CASE[2]

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[1] The boys were riding in the compartments of an inflatable water craft being towed by the jet boat.

[2] While many of the facts recited here were presented in Torre's opening brief, they are reiterated to refute HO Sports' skewed version of the facts.

HO Sports Company ("HO Sports") seeks to claim the parental immunity doctrine for Michael, essentially arguing a one-sided version of the facts in its brief. The record belies its factual recitation.[3] This case arises from a boating accident that occurred on Tiger Lake in Mason County in July 2010. CP 4-5, 11, 188. Michael Woods was operating his 240-horsepower SugarSand® jet boat on the lake, towing his son Torre and two other teenage boys behind the jet boat in an inflatable tube designed and manufactured by HO Sports. CP 4-5, 11, 29, 188-89. Michael Woods was towing the tube at a speed of 30 miles per hour. That speed greatly exceeded the limits imposed by its manufacturer; HO Sports advised users that the tube should not be used at any speed greater than 15 m.p.h. for kids ("Boat speeds should never exceed . . . 15 m.p.h. for children."). CP 3, 42, 168, 183.

HO Sports also advised users: "Watercraft driver should avoid excessive speed or sharp turns which might cause the tube to flip over abruptly resulting in serious injury to the rider." CP 183. HO further advised users: "Watercraft driver is responsible for the ride since the tube cannot be controlled by the rider." CP 183. Michael acknowledged that he cut across the Jet Boat wake when Torre was injured. CP 42, 44. The

[3] As will be noted *infra*, HO Sports has no standing to present an argument for immunity on Michael's part, particularly where it had no role on summary judgment below.

tube crossed the wake ejecting all three boys from the tube. CP 189. One of Torre's companions landed on Torre. CP 189. The impact broke Torre's neck, rendering him a quadriplegic. CP 1, 5, 23, 189. Michael Woods later admitted that the accident would have been avoided had he been operating the boat at a slower speed. CP 43-44. Michael was not supervising, disciplining or otherwise engaging in Torre's upbringing when Torre was injured.

Torre filed suit in the Pierce County Superior Court against his father, in part to trigger coverage by his father's insurance carrier, Safeco. CP 1, 8, 34; RP (12-7-12) at 8, 13-14.[4] Safeco appointed counsel for Michael. CP 35.[5] HO Sports did not participate in the summary judgment proceedings below.

C. SUMMARY OF ARGUMENT

HO Sports has no standing to assert Michael's personal parental immunity defense, thus HO Sports brief so asserting should be stricken. Even if HO Sports' substantive arguments are reached, they fail. Michael was acting outside his parental capacity when he negligently operated a powerful jet boat thereby endangering his minor son and two other minor

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

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

boys resulting in an accident in which Torre was injured. Michael's reckless conduct is not immunized from liability by the mere fortuity that the victim of such conduct was his own son. Moreover, even if this Court considers the context in which this accident occurred as falling within the parameters of a parent's discretionary child rearing decisions, a fact question exists regarding whether Michael's conduct was wanton, thus rendering improper the trial court's grant of summary judgment to Michael. Finally, Michael's pro se response should be disregarded because it presents a wholly new position for the first time on appeal.

D. ARGUMENT

(1) HO Sports Has No Standing to Assert Michael's Parental Immunity Defense

The common law doctrine of standing prohibits a litigant from raising another's legal right. *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004); *Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994). And RAP 3.1 mandates that "[o]nly an aggrieved party may seek review by the appellate court." Washington courts define "aggrieved party" as one whose personal right or pecuniary interests have been affected by the matter at issue. *State ex rel. Simeon v. Superior Court for King County*, 20 Wn.2d 88, 90, 145 P.2d 1017 (1944). *See also, State v. Taylor*, 150 Wn.2d 599,

603, 80 P.3d 605 (2003) (an aggrieved party is not one whose feelings have been hurt or one who is disappointed over a certain result). *See also, Bunting v. State*, 87 Wn. App. 647, 651, 943 P.2d 347 (1997) (party has standing to raise an issue if it has a distinct and personal interest in the outcome of the case and can show it would benefit from the relief requested). Standing is a question of law that this Court decides de novo. *Wolstein v. Yorkshire Ins. Co.*, 97 Wn. App. 201, 206, 985 P.2d 400 (1999).

Although HO Sports filed a statement of "joinder" in Michael Woods' summary judgment motion, HO Sports filed no briefing and made no oral argument to the trial court. CP 32. *See* RP (12-7-12) at 2; RP (12-21-12) at 13-14. HO Sports acknowledged to the trial court at the summary judgment hearing that it was "planning on staying on the sidelines for the summary judgment." RP (12-7-12) at 2. The trial court acknowledged that the summary judgment motion was between Torre and Michael and not HO Sports. RP (12-21-12) at 13-14.

Despite having not participated in the summary judgment motion below, HO Sports has filed a response to Torre's opening brief, asserting that the parental immunity doctrine applies barring any claim by Torre against Michael. This is not proper. While HO Sports as a defendant clearly has a right to appear and defend its own interests, *it may not assert*

Michael's legal rights on Michael's behalf. See Grant County Fire Prot. Dist. No. 5, 150 Wn.2d at 802. That is particularly so here because Michael has filed his own pro se response making his own modified argument regarding the applicability of parental immunity as to Torre's claims against Michael. As explained in later sections, HO Sports' response does not reflect Michael's adopted position on appeal. Under these circumstances, HO Sports has no standing to assert Michael's personal parental immunity defense and HO Sports' response so arguing should be disregarded. *See id.* at 802.[6] Accordingly, Torre moves this Court to strike HO Sports' brief.[7]

(2) *Merrick* Controls Here - The Parental Immunity Doctrine Is In Applicable

HO Sports contends that "the exception created in *Merrick* remains restricted to automobiles." HO Sports' Br. at 11. But HO Sports' view, that only a few narrow express restrictions impinge a robust parental

[6] Nor does the representational standing doctrine apply because HO Sports is not the only party available to assert and protect Michael's rights; as noted Michael is available to assert his own interests and has done so. *See Grant County Fire Protection Dist. No. 5*, 150 Wn.2d at 804.

[7] A party may include in a brief only a motion which, if granted, would preclude hearing the case on the merits. RAP 17.4(d). Because Torre's motion to strike would result in "preclude[ing] a hearing on the merits as to one or more of the respondents," the motion is proper and should be considered by this Court. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 199, 11 P.3d 762, 27 P.3d 608 (2000). Alternatively, if this Court does not strike HO Sports' brief, Torre offers the sections following which address HO Sports' arguments.

immunity doctrine, is a misreading of *Merrick v. Sutterlin*, 93 Wn.2d 411, 610 P.2d 891 (1980). In that case, our Supreme Court made clear that the parental immunity doctrine is *disfavored.*

The *Merrick* court was extremely critical of the parental immunity doctrine, describing *Roller*,[8] the first case in Washington to apply the parental immunity doctrine, as "absurd" and "unreal." *Merrick*, 93 Wn.2d at 413. Noting its retreat from *Roller*, the Court described with approval its subsequent decision in *Borst v. Borst*, 41 Wn.2d 642, 251 P.2d 149 (1952), stating therein "this court examined and renounced most of the policy considerations advanced by the cases to justify the doctrine of [parental] immunity." *Merrick*, 93 Wn.2d at 413. The Court also noted with approval its decision in *Hoffman v. Tracy*, 67 Wn.2d 31, 406 P.2d 323 (1965), which allowed a child's action against her deceased mother's estate where the mother had been driving while intoxicated resulting in injury to the child. *See Merrick*, 93 Wn.2d at 413 (discussing *Hoffman*).

Discussing *Stevens v. Murphy*, 69 Wn.2d 939, 421 P.2d 668 (1966), the Court "overrule[d] that portion of *Stevens* which upheld immunity in its broadest terms." *Merrick*, 93 Wn.2d at 413. The Court further noted that "text and law review writers have generally been critical of the parent-child immunity doctrine," citing examples. *Id.* at 413. The

[8] *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905), *overruled by Borst v. Borst*, 41 Wn.2d 642, 251 P.2d 149 (1952).

Court observed that the *Restatement (Second) of Torts* section 895G (1979) has "adopted a policy of abrogation of the immunity;" and that the trend of modern cases is "to limit or entirely abolish parental immunity." *Id.* at 414, 415-16 (citing many jurisdictions that have limited or abolished the doctrine).

The *Merrick* court (apparently lamenting) observed that "an absolute abrogation of the doctrine of parent-child immunity is not before the court." *Id.* at 416. The Court recognized that although "there may be situations of parental authority and discretion which should not lead to liability," and that although some courts had tried to articulate an all-encompassing rule to deal with such situations, "the better approach is to develop the details of *any portion of the immunity that should be retained* by a case-to-case determination." *Id.* at 416 (emphasis added). In other words, the appropriate inquiry begins with the acknowledgement that the parental immunity doctrine, once widely applied, is now disfavored and the correct question is whether, despite this appropriate retreat, the particular case before the court is one in which the parental immunity doctrine "should be retained." *Id.* at 416.

Having so explained and described the continued questionable viability of the parental immunity doctrine, the Court held that as to the case before it, "[i]n 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. *Merrick* does not stand for the proposition that a limited and narrow automobile exception applies to a robust parental immunity doctrine. Rather, a fair reading of that case indicates that the burden is on the party asserting the parental immunity doctrine to show that the particular facts of the case at issue warrant application of that now disfavored and questionable doctrine. As discussed herein this is not such a case.

HO Sports also argues that *Merrick*'s exception to the parental immunity doctrine should remain limited to auto accidents because Washington requires automobile drivers to carry liability insurance but does not require the same for boat operators. HO Sports' Br. at 11. But HO Sports *ignores* the extensive legislative regulation of boating discussed at length in Torre's opening brief at 11-12. That extensive regulation demonstrates a legislative intent to treat the safe operation of boats on a par with safe operation of automobiles. Both are motorized vehicles with a serious capacity for harm to their operators, passengers, and others. A parent operating a boat recklessly and injuring his or her child should not receive a free pass.

Because the parental immunity doctrine does not apply here, HO Sports is compelled to invent a new basis for the doctrine. It argues that

the parental immunity doctrine applies because the family was engaged in a recreational activity when Torre was injured. *See* HO Sports' Br. at 12-16. Throughout its discussion, HO Sports relies on *Zellmer v. Zellmer*, 164 Wn.2d 147, 188 P.3d 497 (2008), as supporting this notion, but *Zellmer nowhere* so holds and HO Sports misapprehends the appropriate analysis under Washington law.

HO Sports argues that the "dispositive" issue here is not Michael's operation of the 240 horsepower jet boat at the time of Torre's injury, but rather the proper focus is the "nature of the relationship between the parent and child at the time of injury," citing *Zellmer*, 164 Wn.2d at 155, for the proposition that "[a] parent is not immune when acting outside his or her parental capacity." HO Sports' Br. at 13. HO Sports argues that because Torre's injury occurred during a family recreational activity, that circumstance necessarily involved Michael's supervision of Torre and thus Michael is immune from suit regarding any decision occurring in that context. *See* HO Sports' Br. at 13, 14, 15, 16 (citing *Zellmer*).[9]

HO Sports' attempt to characterize this case as involving "recreation," and therefore parental supervision under *Zellmer*, does not assist it. First, *Zellmer* is properly a negligent parental *supervision* case in

[9] HO Sports contends "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; HO Sports' Br. at 14.

which a stepfather failed to supervise a toddler who left the house through an open sliding glass door and drowned in a backyard pool. *Zellmer,* 164 Wn.2d at 151, 161. *Zellmer* does not mention "recreation," nor does it involve an affirmative act of a parent resulting in injury to a child as is the case here. Moreover, in *Zellmer*, our Supreme Court expressly affirmed the holding and analysis set forth in *Jenkins v. Snohomish County P.U.D. No. 1,* 105 Wn.2d 99, 713 P.2d 79 (1986), noting "parents are immune from suit for negligent parental supervision, but not for willful or wanton misconduct in supervising a child." *Zellmer,* 164 Wn.2d at 161 (affirming *Jenkins*, 105 Wn.2d at 105-06).[10] Thus, even if this case may be characterized as concerning parental supervision, (a dubious proposition) the appropriate analysis and considerations are set forth in *Jenkins*.[11] In *Jenkins*, our Supreme Court noted that "[p]arents should not routinely have to defend their child rearing practices where their behavior does not rise to the level of wanton misconduct." *Jenkins*, 105 Wn.2d at 105. Our Supreme Court explained that:

> where parental negligence rises to the level of willful or wanton misconduct, the doctrine of parental immunity will

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[10] *See also, Zellmer,* 164 Wn.2d at 155 ("Even when acting in a parental capacity, a parent who abdicates his or her parental responsibilities by engaging in willful or wanton misconduct is not immune from suit.").

[11] In *Jenkins*, the parents failed to supervise their 7-year-old son, who, while playing with a friend, climbed the fence of an electric substation and was injured. *Jenkins*, 105 Wn.2d at 100, 106.

> not preclude liability. Willful and wanton misconduct falls between simple negligence and an intentional tort. It is sufficient that the actor know, or has reason to know, of circumstances which would bring home to the realization of the ordinary reasonable [person] the highly dangerous character of his conduct.

Jenkins, 105 Wn.2d at 105-06 (internal quotation marks and citations omitted). Further, because differences in gravity of fault cannot be stated with mathematical precision, the proper focus "must be on the seriousness of the actor's misconduct." *Id.* at 106 (internal quotation marks and citation omitted). In *Jenkins*, our Supreme Court noted that there was "[n]o evidence . . . that the [parents] were reckless or indifferent with regard to [their minor son's] welfare." *Id.* at 106.[12] That is clearly not the case here. As discussed above, Michael admitted towing the GTX tube across rough water at twice the maximum speed set by the manufacturer for use with children. CP 41-44, 46.[13] Michael also admitted that he could have prevented the accident by operating the jet boat at a slower speed. CP 43-44.

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[12] The *Jenkins* court reversed and remanded for a new trial based on the erroneous admission of another minor child's deposition *Jenkins*, 105 Wn.2d at 103, 108. The *Jenkins* court also held that evidence proffered by the utility to show the parents' negligent supervision of their son, i.e. the fact that another parent had warned the boy not to play on railroad tracks and that he was a discipline problem in one class at school, was admitted in error because in total the evidence did not rise to the level of willful or wanton misconduct by the parents. *Jenkins*, 105 Wn.2d at 106.

[13] Michael's admitted 30 mph speed at the time of the accident was also 50 percent faster than the maximum speed set by the manufacturer for use of the GTX tube by adults. CP 42, 46.

Under *Jenkins,* the appropriate focus is "the seriousness of [Michael's] misconduct," that is, his driving the 240 horsepower jet boat at excessive speed over rough water while towing the tube with children on it. *See Jenkins*, 105 Wn.2d at 106. Thus, the relevant question is whether the ordinary reasonable person would realize the highly dangerous character of such conduct. *See id.* at 104-05. As discussed more fully below, a fact question on whether Michael's conduct was wanton precludes summary judgment. But, for present purposes, HO's contention--that because Michael and Torre were engaged in a family recreational activity Michael is necessarily immune from liability--ignores the analysis and directives of *Jenkins* and *Zellmer.*[14]

Finally, HO Sports' position is simply absurd. Under its analysis, if a parent was driving to a Seahawks game or to a park drunk or at a speed double the posted speed limit, *Merrick* would be inapplicable because of the "recreational" purpose of the drive. Again, HO Sports misreads the scope of the parental immunity doctrine.

In sum, the parental immunity doctrine does not apply on these facts.

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[14] Likewise, *Jenkins* and *Zellmer* and the facts of this case as discussed above answer Michael's contention in his response that at the time of the accident he and Torre were engaged in a "wholesome family recreational activity" to which the parental immunity doctrine applies. *See* Michael's Br. at 17-19.

(3) Even if the Parental Immunity Doctrine Did Apply Here, There Is a Fact Question As to the Degree of Michael Woods' Misconduct, Preventing Summary Judgment

HO Sports contends there was insufficient evidence of Michael's wanton misconduct to create a jury question on that issue. *See* HO Sports' Br. at 21-27. That is not so.

HO Sports relies on the definition in *Adkisson v. City of Seattle*, 42 Wn.2d 676, 258 P.2d 461 (1953) that wanton misconduct 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.

Id. at 687.[15] As the nonmoving party on summary judgment, the facts are considered in the light most favorable to Torre. *See Elcon Constr., Inc. v. Eastern Wash. Univ.*, 174 Wn.2d 157, 164, 273 P.3d 965 (2012).

Here, HO Sports relies on Michael's statement in his declaration that Torre had ridden on the tube somewhere between 4-10 times before the accident, and that Michael was "always careful to operate the boat at a speed that Torre was comfortable with." CP 29. *See also,* HO Sports' Br.

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[15] HO Sports contends that Torre's brief "flatly misstates the law" in noting that whether a defendant's conduct is wanton is a question of fact for the jury under appropriate instructions. *See* HO Sports' Br. at 22. That is false. In *Adkisson v. City of Seattle*, 42 Wn.2d 676, 688, 258 P.2d 461 (1953), our Supreme Court stated: "Whether or not [defendant's] conduct is willful or wanton is a question of fact for the jury."

at 25. But, as noted, Michael also admitted that he was pulling the tube across the boat wake at excessive speed and that the accident would not have occurred had he been going slower. CP 42-44.[16] Moreover, the fact that Torre had some prior experience riding on the tube did not inure to the other boys riding the tube. In fact, the evidence was to the contrary, suggesting that the other boys had little or no prior experience riding on the GTX tube.[17] At the very least, there was conflicting evidence about Michael's conduct and how careful he was when towing the tube with the boys on it.

As described above, conflicting evidence created a jury question as to whether Michael's intentional conduct demonstrated reckless disregard for the probable consequence that one of the boys would be hurt as he pulled the tube across the boat wake at twice the maximum speed set for use of the tube by the manufacturer. Considering the evidence in the light most favorable to Torre, a jury question was present as to whether

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[16] In light of Michael's admissions, HO Sports' assertion that there is no evidence suggesting that Michael "intentionally exceeded the warning speed" is frivolous. Michael *admitted* that he was going 30 miles per hour and there is no evidence that he did so inadvertently.

[17] *See* CP 187-89 (Declaration of Logan Earle indicating the boys' discussions about what different seating positions on the tube would be like).

Michael's actions amounted to willful misconduct.[18] Accordingly, the trial court erred in granting summary judgment to Michael.[19]

Finally, HO Sports argues that the facts of this case are less egregious than in other cases in which the parental immunity doctrine has been applied, citing *Talarico by Johnston v. Foremost Ins. Co.*, 105 Wn.2d 114, 712 P.2d 294 (1986) (parental immunity doctrine applied where parent started backyard fire and left three-year-old son unattended, who was then burned by another child playing with the fire); *Baughn by Baughn v. Honda Motor Co., Ltd. (Honda Giken Kogyo Kabushiki Kaisha)*, 105 Wn.2d 118, 712 P.2d 293 (1986) (tortfeasor may not seek indemnity or contribution from parents for tort damages paid to those parents' child on theory that parents' negligent failure to properly supervise child was cause of child's injury where child was injured while riding a mini bike driven by another child); *De Lay v. De Lay*, 54 Wn.2d 63, 337 P.2d 1057 (1959) (father immune from suit by son who suffered burns while siphoning gas from father's truck as father suggested); *Ball v. Ball*, 73 Wyo. 29, 269 P.2d 302 (1954) (parental immunity doctrine

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[18] The above discussion applies equally to Michael's contention in his response that his actions did not amount to willful and wanton misconduct. *See* Michael's Br. at 17-19.

[19] *See Baughn*, 105 Wn.2d at 119 ("if parental negligence is such that it amounts to willful and wanton misconduct, the doctrine of parental immunity will not preclude liability").

applied to bar suit by minor son against pilot father who failed to put sufficient gasoline in private plane to complete flight resulting in crash and injury to passenger son). *See* HO Sports' Br. at 26. The latter two cases, one involving foreign law, both *predate Merrick.* The former two cases are classic parental supervision cases. Of course, in none of those cases was the parent operating a motorized craft in a reckless fashion likely to cause injury to one of the minor riders.

HO Sports also contends this case is not like cases in which wanton misconduct has been found, citing *Hoffman v. Tracy*, 67 Wn.2d 31, 406 P.2d 323 (1965) (parental immunity doctrine not applicable where intoxicated parent has automobile accident injuring minor child), and *Livingston v. City of Everett*, 50 Wn. App. 655, 751 P.2d 1199, *review denied,* 110 Wn.2d 1028 (1988) (jury question as to whether mother's action of leaving her small child in a room with active Doberman pincers was willful or wanton rendering her not immune from suit by child for injuries from dog attack). *See* HO Sports' Br. at 26. Parental intoxication is not the controlling factor in deciding whether conduct was willful or wanton. The *Livingston* court held that whether the mother's actions amounted to wanton misconduct was a jury question. "'Willful or wanton misconduct' means that the actor knew, or had reason to know, of circumstances which would inform a reasonable person of the highly

dangerous character of his conduct." *Livingston*, 50 Wn. App. at 660 (citing *Jenkins v. Snohomish Cy. Public Utility Dist. No. 1*, 105 Wn.2d 99, 105-06, 713 P.2d 79 (1986)). That is precisely the circumstance here. Michael admitted that as he pulled the tube across rough water he operated the jet boat at twice the maximum speed set by the tube manufacturer for use with children. Any reasonable person would know of the highly dangerous character (risk of injury to the children) of such conduct. This issue is a jury question to be decided under proper instructions, thus summary judgment was improper. *See Adkisson*, 42 Wn.2d at 688.

Finally, HO Sports contends that this Court should not consider any argument concerning Michael's wanton misconduct because that issue was not raised before the trial court. *See* HO Sports' Br. at 16-21. That is false.[20]

Here, *Michael* in fact raised the issue of wanton misconduct in his summary judgment motion alleging: "There is no evidence that Michael engaged in any willful or wanton misconduct regarding the boating

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[20] "The scope of a given appeal is determined by the notice of appeal, the assignments of error, and the substantive argumentation of the parties." *Clark County v. Western Washington Growth Management Hearings Review Bd.*, 177 Wn.2d 136, 144, 298 P.3d 704 (2013). "[W]illful or wanton conduct is not a separate cause of action, but a level of intent which negates certain defenses which might be available in a negligence action." *Rodriguez v. City of Moses Lake*, 158 Wn. App. 724, 730, 243 P.3d 552 (2010), *review denied*, 171 Wn.2d 1025 (2011) "[I]f parental negligence is such that it amounts to willful and wanton misconduct, the doctrine of parental immunity will not preclude liability." *Baughn by Baughn v. Honda Motor Co., Ltd. (Honda Giken Kogyo Kabushiki Kaisha)*, 105 Wn.2d 118, 119, 712 P.2d 293 (1986).

activity." CP 25.[21] But the evidence before the trial court was that while operating a 240 horsepower jet boat, Michael was pulling the tube at twice the maximum speed set by the manufacturer for use of the tube by children. The warning label affixed to the tube directed: "Do not use at speeds that exceed the skills of the rider. Boat speed should never exceed 20 mph for adults and 15 mph for children." CP 46. Michael admitted that he was pulling the tube at 30 mile per hour and across his own boat wake when the accident occurred. CP 42. He also admitted that the accident would not have occurred had he been operating the boat at a slower speed. CP 43-44. Torre's attorney argued these facts in both his response to Michael's summary judgment motion and at the hearings for Michael's summary judgment motion and for Torre's motion for reconsideration, focusing on Michael's conduct. *See* CP 35; RP (12-7-12) at 9, 12, 13; RP (12-21-12) at 5. Torre's attorney argued that Michael admitted he was driving too fast and that he intentionally pulled the tube back and forth across the wake ejecting some of the riders. RP (12-7-12) at 9. Torre's attorney repeatedly argued at the summary judgment hearing and at the hearing on Torre's motion for reconsideration that Michael's

[21] Torre responded, arguing that "'parental immunity' is not available to [Michael] under the circumstances of this case" including that Michael towed the tube "at unsafe speeds" greatly exceeding the limits imposed by the manufacturer, and that Michael admitted the accident would have been avoided if he had been driving at a slower speed. CP 35.

conduct endangered the boys on the tube and by a mere fortuity Michael's own son was injured rather than one of the other boys. RP (12-7-12) at 9, 12-13; RP (12-21-12) at 5.

Responding to these arguments, the trial court ruled in part , "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. Thus, the *trial court itself* addressed the question of the degree of Michael's misconduct. HO Sports' contention that the issue of Michael's wanton misconduct was not before the trial court borders on the frivolous.

In sum, even if the parental immunity doctrine applies here, which Torre denies, there is a fact question for the jury on the degree of Michael's misconduct that should have prevented entry of summary judgment.

(4) The Trial Court Abused Its Discretion in Excluding Evidence on Reconsideration[22]

[22] As a threshold matter, in a footnote in its brief HO Sports "moves to strike Argument Section '(E)(3)(a)' from petitioner's [opening] brief." HO Sports' Br. at 28 n.15. That portion of Torre's opening brief argued that the trial court abused its discretion in declining to admit and consider the declaration of Logan Earle. *See* Br. of Appellant at 17-19. RAP 17.4(d) provides: "A party may include in a brief only a motion which, if granted, would preclude hearing the case on the merits." Here, granting HO Sports' motion would not preclude hearing the case on the merits. While the evidentiary issue is important, it is not dispositive. Accordingly, "[t]he motion is therefore not properly before the court, and ... [should be] denied." *State v. Saas*, 118 Wn.2d 37, 46 n.2, 820 P.2d 505 (1991).

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

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

Here, the rejection of the Earle declaration was an abuse of discretion in the context of Torre's reconsideration motion. As explained in Torre's opening brief, the trial court, without permitting oral argument,

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Further, HO Sports cites RAP 9.12 and *Richter v. Trimberger*, 50 Wn. App. 780, 786, 750 P.2d 1279 (1988), as supporting its motion to strike, but neither assist HO. *Richter* does not address summary judgment and the noted rule provides in relevant part that in reviewing a summary judgment decision, "the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12. Here, the Earle declaration *was* called to the attention of the trial court, but, as discussed herein, the trial court summarily and improperly declined to admit and consider it.

summarily rejected the additional evidence as irrelevant and inappropriate. *See* CP 197; RP (12-21-12) at 2. But the Earle declaration is neither. The Earle declaration described the accident in detail from the point of view of one of the children riding the tube at the time. That evidence demonstrated the excessive speed at which the tube was towed, how the passengers were helpless, and how the boys were violently thrown from the tube as it was pulled across a large wake. CP 187-89. In granting summary judgment, the trial court described the event as a common recreational activity. RP (12-7-12) at 16-17; CP 224-25. But the Earle declaration belies such a benign characterization of the tragic accident and demonstrates Michael's reckless speed and operation of the jet boat. [23] Because the Earle declaration showed that Michael's reckless and wanton conduct resulted in Torre's injuries, the declaration was relevant, raised an important question of fact, and should have been considered by the trial court. In this context it was an abuse of discretion not to admit and consider Earle's declaration.

(5) Reply to Michael's Pro Se Response Brief

As Michael notes in his pro se response, he has been abandoned by his insurer. Michael's Br. at 1. He abandons the position taken by his

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

attorney below that benefitted his insurer, namely that the parental immunity doctrine applied to Michael thereby barring Torre's claims against Michael. *Id.* at 2; *see also,* CP 21-27. Michael now seeks reversal and remand for trial. Michael's Br. at 20. He adopts a position that in part comports with Torre's observation that some jurisdictions do not apply the parental immunity doctrine where liability insurance is available. *See* Michael's Br. at 2; Br. of Appellant at 19-20. Michael contends on appeal that the trial court erred in failing to recognize an exception to the parental immunity doctrine that would permit recovery up to, but not in excess of, available insurance policy coverages applicable to a claim brought by a child against his parent. Michael's Br. at 5. In other words, Michael's *new* argument on appeal is that any interpretation of the parental immunity doctrine should not reduce an award to Torre; thus parental immunity should not apply to the extent insurance coverage is available, but the doctrine should apply to any damage award against Michael beyond the amount of available insurance coverages.[24] Michael's Br. at 9.[25]

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[24] Michael asserts that he has "a variety of insurances" available to protect his family. Michael's Br. at 8. Accordingly, since Michael purportedly has other insurance available, this issue is not rendered moot by the U.S. District Court's subsequent (1-28-13) decision that Safeco had no duty to defend Michael under the terms of his policy with Safeco. *See* HO Sports' Br. at Appendix No. 1. *See In re Cross*, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983) (a case is moot if a court can no longer provide effective relief).

[25] Michael cites to *Jilani By and Through Jilani v. Jilani*, 767 S.W.2d 671 (Tex. 1988), but that case does not assist him. *Jilani* held that the parental immunity doctrine did not bar suit by a minor child against his parent for injuries to the child resulting from

Michael acknowledges that his present position is newly raised for the first time on appeal, but he urges this Court to address his argument in its "discretion" and because "fundamental justice" requires that the matter be addressed. Michael's Br. at 3-4. But because this appeal addresses review of a summary judgment decision, this Court "will consider only . . . issues called to the attention of the trial court." RAP 9.12. This Court may disregard Michael's newly adopted position on this basis alone. *See Cascade Manor Associates v. Witherspoon, Kelley, Davenport & Toole, P.S.*, 69 Wn. App. 923, 930, 850 P.2d 1380 (1993), *review denied,* 123 Wn.2d 1003 (1994) (argument not raised before the trial court cannot be raised on appeal (citing RAP 9.12)).

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the parent's negligent operation of an automobile. *Id.* at 673. The *Jilani* majority opinion does not mention insurance. *See id.* at 671-74. A concurring opinion observed that "[I]f a defendant has purchased liability insurance and a child sues to collect such insurance, there is little possibility of any disruption of family harmony if the child is allowed recovery." *Jilani*, 767 S.W.2d at 674 (Mauzy, J., concurring). The concurrence also quoted from a Massachusetts Supreme Court opinion, stating:

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

Id. (quoting *Sorensen v. Sorensen*, 339 N.E.2d 907, 914 (Mass. 1975)). However, neither the majority in *Jilani*, nor the *Sorensen* opinion address the matter of whether to apply the parental immunity doctrine to award amounts in excess of insurance coverage, the issue that Michael asks this Court to address on appeal. *See Jilani*, 767 S.W.2d at 671-74; *Sorensen*, 339 N.E.2d 907, 908-09.

Even if this Court were to reach Michael's substantive issue, his argument is erroneous. No Washington case has ever held that the parental immunity doctrine is synonymous with insurance coverage. While such coverage is a factor in applying the doctrine, it is not conclusive. Michael contends that the parental immunity doctrine should be interpreted not as an immunity, but simply to mean that a parent has no duty to a child to engage in non-negligent supervision. Michael's Br. at 10. He does not clearly explain why that should be so.

Michael relies on two notions that he asserts support his viewpoint, the common law idea that "the negligence of a parent is not imputable to his child in an action by [the] child against a third party," and a provision in RCW 4.22.020 that the contributory fault of a spouse/(parent) shall not be imputed to his child "to diminish recovery." Michael's Br. at 10, 16. Neither notion appears to apply here.[26] For the common law proposition that the negligence of a parent is not imputable to his child, Michael cites *Vioen v. Cluff*, 69 Wn.2d 306, 316, 418 P.2d 430 (1966); *Adamson v. Traylor*, 60 Wn.2d 332, 373 P.2d 961 (1962); *Gregg v. King County*, 80 Wash. 196, 141 P. 340 (1914), and *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 260 P.3d 857 (2011). Michael's Br. at 10-11. Because

[26] The more troublesome aspect of RCW 4.22.070 that has prompted HO Sports' assertion of the parental duty doctrine for Michael is its ability before the jury under that statute to point to the "empty chair" of a party that is immune.

none of these cases involved a claim against a defendant parent, as is the case here, they are inapposite.[27]

Michael's reliance on RCW 4.22.020 is also misplaced. The statute provides in relevant part:

> The contributory fault of one spouse . . . shall not be imputed to the other spouse . . . or the minor child of the spouse . . . to diminish recovery in an action by the other spouse or . . . the minor child of the spouse . . . to recover damages caused by fault resulting in . . . injury to the person . . . of the spouse.

RCW 4.22.020.[28] By its terms the statute applies to an action by a spouse or child to recover damages caused by fault resulting in injury to "the person. . . of *the spouse*." *Id.* (emphasis added). That's not the action we have here and RCW 4.22.020 does not apply. Thus, there is no basis for Michael's contention that a conflict exists in this case between RCW

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[27] Moreover, *Vioen, Adamson*, and *Gregg* were decided in a time when any fault on the part of the plaintiff was a complete bar to recovery, as our Supreme Court explained in *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 633-34 n.1, 244 P.3d 924 (2010). Thus, the "complete bar" available at the time *Vioen, Adamson*, and *Gregg* were decided provides an explanation for the noted common law rule applied in those cases.

The more recent *Anderson* case merely states in a citation without discussion "RCW 4.22.020 (negligence of the parent may not be imputed to the child)," while noting that the jury should be properly instructed on remand if the *mom's* comparative negligence claim proceed to trial. *Anderson*, 172 Wn.2d at 614-15. The absence of any pertinent discussion provides no guidance here.

[28] Michael's concern is that if he is immune from suit, then HO will only be severally liable, thereby reducing Torre's available damages recovery. *See* RCW 4.22.070. He contends that if his actions are allowed to be "a damage-reducing factor," such result would be at odds with the portion of RCW 4.22.020 that provides that contributory fault of the spouse/(parent) shall not be imputed to the minor "to diminish recovery." *See* Michael's Br. at 16; RCW 4.22.020.

4.22.020's no-diminished-recovery provision and RCW 4.22.070's provisions concerning assignment of comparative fault and resulting joint or several liability. *See* Michael's Br. at 13-17.

Nothing offered in Michael's newly minted theory on appeal should deter this Court from finding the parental immunity doctrine inapplicable.[29]

E. CONCLUSION

This is not a case to which the parental immunity doctrine applies. Michael Woods was acting outside his parental capacity when he negligently operated a powerful jet boat thereby endangering his minor son and two other minor boys and causing an accident in which Torre was injured. Michael should not be immunized from liability by the mere fortuity that the victim of his reckless conduct was his own son.

In any event, even if Michael was acting in a parental capacity in operating the jet boat, there is a fact question as to whether his actions amounted to wanton misconduct. Accordingly, the trial court erred in granting summary judgment dismissing Torre's claim against Michael.

Further, on appeal HO Sports has no standing to assert Michael's' personal parental immunity defense and HO Sports' response brief so

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[29] Michael's remaining contentions that he and Torre were involved in a recreational activity at the time of the accident and that his actions did not amount to willful or wanton misconduct are addressed in previous sections concerning HO's similar arguments. *See* section C(2) and C(3).

asserting should be stricken. Also, because Michael asserts a new argument in his pro se response, this Court should disregard his new position as improperly raised.

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

DATED this 20th day of August, 2013.

Respectfully submitted,

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DECLARATION OF SERVICE

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

DATED this 20th day of August, 2013, at Tukwila, Washington.

Paula Chapler
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August 20, 2013 - 1:44 PM

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