Supreme Court No. 92540-2

Court of Appeals No. 72415-1-I



**SUPREME COURT**
**OF THE STATE OF WASHINGTON**

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

Plaintiffs-Petitioners

v.

THE MOUNTAINEERS,

Defendant-Respondent.

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# OPPOSITION TO PETITION FOR REVIEW

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

This Petition ultimately arises from Petitioners' disagreement with the jury's defense verdict, not out of any legitimate argument over the discretionary, evidentiary rulings made by the trial court or the subsequent affirmance by Division I. Although the death of Jacob Ponce was absolutely tragic, the jury concluded that the Mountaineers was not negligent and thus could not have negligently caused Jacob Ponce's death. Accordingly, the Mountaineers respectfully request the Court deny discretionary review.

## I. IDENTITY OF RESPONDENT

Respondent is the Mountaineers, a volunteer-based outdoor stewardship organization. The Mountaineers won at trial and judgment was entered in its favor on the basis of the jury's verdict. The Court of Appeals Division I affirmed the trial court's discretionary rulings. This Petition followed.

## II. COURT OF APPEALS DECISION

The Court of Appeals issued an opinion on November 2, 2015, affirming the trial court in all respects. The opinion was written by Hon. Judge Linda Lau with panel concurrence. There was no dissent.

## III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court should deny review of a well-reasoned, unpublished Court of Appeals decision based on the trial court's decision to allow the Mountaineers' expert to testify on the industry standard of care in a negligence case.
2. Whether the Court should deny review of a well-reasoned,

unpublished Court of Appeals decision based on Petitioners' urging the Court of Appeals to define the standard of care for sledding areas without presenting that argument to the trial court in the first instance.

## IV. STATEMENT OF THE CASE

The Mountaineers does not wish to address each and every misstatement contained in the Petition tit-for-tat. Suffice to say that Petitioners' Statement of Case resembles their closing argument at trial. This fact should give the Court pause because *the jury found in favor of the Mountaineers.* Petitioners' Statement is a "best case scenario" of evidence that either never came to pass at trial, or, at the very least, was rejected by the jury when this case was tried in May 2015.

The jury found that—while undoubtedly a tragedy—the death of Jacob Ponce was not the result of negligence by the Mountaineers. Petitioners' revisionist history of the evidence and the jury's findings should be rejected. For the sake of orienting the Court to the facts as found by the jury, the Mountaineers respectfully submit the following brief description of the parties and the facts as adduced by the jury's verdict.

### A. The Mountaineers and the Snoqualmie Campus.

The Mountaineers is a volunteer-based organizations whose mission is to help get people outside and in touch with nature. 5/28 RP 12: 22-13: 10. The Mountaineers own a piece of recreational property at Snoqualmie Pass that is referred to as the Snoqualmie Campus (the

"Campus"). The Mountaineers operated the Campus as a snow play area, which was used for sledding, among other things. The snow play area was accessible by a path that abutted State Route 906. 5/21 RP 15:14-18.

When guests, like the Ponce family, arrived to use the snow area, they were greeted by a Mountaineers volunteer who explained that they had to walk up the path to get to the play area. 5/28 RP 18. Guests also signed a form when they paid the fee to use the play area. 5/21 73:9-19.

**B. The Accident.**

On the day of the accident, Petitioners decided to go skiing at Snoqualmie Pass. 5/22 RP 11. Because none of the children had ever skied, the family bought plastic sleds along the way. *Id.* at 74:4-12. Petitioners stopped at a ski area but decided to go sledding instead. They drove to the Campus, parked on the road near the Campus, and walked alongside the road to the Campus. 5/27 49:13-25.

The family was greeted by a volunteer. Petitioners signed a form that included the risks associated with using the outdoor recreation area. The volunteer explained that they could walk up the path where they would eventually be greeted by another volunteer wearing an orange vest. 5/27 RP 83-86.

As the family walked up the hill, pulling the sleds behind them, Jacob Ponce suddenly sat down on a sled being pulled by a family

member. RP 5/28 RP 34:8-23. Despite his father's efforts to stop the sled from sliding down the path, the sled went back down the path and into the roadway. Jacob Ponce was hit by a car in the roadway. 5/22 RP 29:10-20:14.

A lawsuit against the Mountaineers followed. CP 1-4.

**C. The Experts.**

Importantly for the Court's purposes, each side hired liability experts in support of their cases. Petitioners hired a human factors expert named Richard Gill to offer the opinion that the access path was "unreasonably dangerous." CP 91. Expert Gill's opinion was that the Mountaineers should have placed barricades between the pathway and the road. The Mountaineers hired Chris Stoddard, a winter recreation safety expert. CP 455.

The parties filed cross-motions to exclude each other's experts. CP 90-101; CP 319-328. On one hand, the Mountaineers argued that Petitioners' expert, Gill, should be excluded because he did not compare the Campus to any other winter recreation areas. CP 92-93. On the other hand, Petitioners argued the Mountaineers' expert, Stoddard, should be excluded because his industry standard-based opinions were unreliable and/or disfavored under Washington law. CP 324-25.

The trial court, faced with cross-motions from parties that clearly had a different perspective on what type of experts would help the jury to decide the case, struck a reasonable balance: both experts would be

permitted to testify and the jury would decide which method was more persuasive. It is essentially the following ruling that Petitioners would have the Court hold as an abuse of discretion:

> Mr. Stoddard is qualified to opine regarding the manner in which other mountain recreation areas handle situations that are similar to the one at issue in this case. His training and experience with other similar recreation areas allows him to speak to the dangerousness of suggested safety measures, the adequacy of warning signs, and the way in which other recreation areas have handled similar access paths. After significant consideration, the Court will also allow Mr. Stoddard to refer to "industry standards" in describing his understanding of what other recreation areas do in similar situations.
>
> As always, Plaintiff will have every opportunity during cross-examination to attack any loose language that Stoddard uses. They can delve into his definition of "industry standards" and in all other ways insure that the jury is not misled by any definitions or language he chooses.
>
> The Court notes that the two sides have chosen to use expert witnesses in this case in two very distinct ways. To simplify: Defendant has chosen to present an expert who is incredibly qualified to opine regarding, "the way everyone does it". Plaintiff on the other hand, has chosen to present an expert who is incredibly qualified to opine regarding, "the way it should be done, regardless of how the industry handles it." The Court finds both approaches helpful to the jury here in determining what constitutes "ordinary care" in this premises liability case.

CP 713-14.

**D. The Verdict.**

The jury ultimately sided with the party that relied on the standard of care based on "the way everyone does it" and against the Petitioners that solely relied on their expert's opinion on the way it should be done. CP 918 (jury verdict form reflecting a defense verdict). Petitioners filed a motion for a new trial, arguing that the trial court erred in admitting expert Stoddard's testimony. Notably, Petitioners did not include in their motion for a new trial the concept they pursued on appeal: that the court should define the standard of care for the sledding industry. In either event, the trial court denied the motion for a new trial.

Petitioners appealed to Division I of the Washington Court of Appeals.

**E. The Court of Appeals' Decision.**

Following oral argument, the Court of Appeals issued a 23-page, unpublished decision, which affirmed the trial court's judgment on the verdict. After setting out a relatively neutral statement of the facts and the relevant legal standards, Division I got to the essence of Petitioners' appeal: that Stoddard should not have been allowed to testify in the absence of Stoddard referring to the other comparator snow recreational areas by name. Petitioners' rationale was that without the specific names of the recreation area comparators, they were deprived of the ability to cross-examine expert Stoddard. Division I correctly found that nothing in the record supported the proposition that expert Stoddard was unable to identify these areas *because he was never asked:*

> Responding to Ponce's claim below that the generalized opinion deprived him of effective cross-examination, The Mountaineers pointed out that no one asked Stoddard during his discovery deposition (or at trial) to identify by name any of the locations he inspected or to name which ones were near roads. On appeal, Ponce argues that, "Mr. Stoddard did not—and could not—identify at his deposition any other sledding operation where the access paths funneled directly onto a roadway." Br. Of Appellant at 17 (emphasis added [by Division I]). He cites to the deposition transcript at 290-313 for this assertion. He also argues this deficiency caused him to file a motion in limine. Even reading the deposition excerpts liberally, they show Stoddard was never asked to name, list or identify a specific area. Thus, there is no support for Ponce's claim that Stoddard "could not" identify the areas he testified about at his deposition.

AP 18.

The Court of Appeals went on to point out the illogical premise upon which Petitioners' argument was based, that the Mountaineers had an obligation to cross-examine its own witness. "As to the Mountaineers' argument that Ponce could have elicited the testimony on cross-examination, Ponce asserts this constitutes impermissible burden shifting. We disagree. It is true that the proponent of expert testimony carries the burden to establish foundation for the expert's opinions. The record here establishes that burden was met in this case." AP 19. In other words, because the Mountaineers established an adequate foundation for admission, the duty to poke holes in expert Stoddard's testimony went to the cross-examining Petitioners. It is on the basis of these absolutely uncontroversial propositions that Petitioners seek discretionary review.

The Court should decline to entertain discretionary review of this case.

## V. ARGUMENT WHY REVIEW SHOULD BE DENIED

Petitioners ask the Court to accept review on two bases. First, Petitioners claim that the Court of Appeals' decision conflicts with Supreme Court case law. *See* RAP 13.4(b)(1). It does not. Second, Petitioners claim there is a substantial public interest at stake that warrants discretionary review. *See* RAP 13.4(b)(4). Again, no, there is no public interest at stake in accepting discretionary review of this matter. Each basis for review acceptance will be addressed in turn.

### A. The Court of Appeals' Decision is Not in Conflict with Supreme Court Precedent.

Plaintiff cites several Supreme Court cases in a bid to convince the Court that Division I somehow contravened Supreme Court jurisprudence.

#### i. *Miller v. Stanton*

The Petition relies heavily on the case of *Miller v. Stanton*, 58 Wn.2d 879, 885, 365 P.2d 333 (1961). In *Miller*, a tavern patron was knocked down during a drunken New Year's Eve brawl between two other patrons. The injured person and her husband sued the tavern. The trial court admitted evidence of the practices of *one* other tavern as to policing and keeping order (the Eagles Lodge in Omak). *Id.* at 885. The Supreme Court determined that was the wrong ruling and remanded the case for a new trial. *Id. Miller* does not stand for the proposition Petitioners' claim.

The Court of Appeals accurately cited *Miller v. Stanton* in its decision as standing for the concept that evidence of industry custom

cannot be established by evidence of the conduct of a single person or business. AP 05. But Defense expert Stoddard, in a sworn declaration filed in opposition to Petitioners' motion in limine, described his opinion as being based on conducting "300-400 inspections at over 100 locations, the majority of which included areas specifically designated for snow-tubing or sledding." AP 07. *Miller* requires nothing more. *Miller* certainly does *not* stand for the proposition Petitioners' claim, that an expert must individually name each location when the cross-examining party did not bother to ask him or her.

### ii. *Young v. Key Pharmaceuticals*

In *Young v. Key Pharmaceuticals,* 130 Wn.2d 160, 922 p.2d 59 (1996), the plaintiff sued a pharmaceutical company for injuries caused by an asthma medication. At trial, the plaintiff sought to admit an advertisement for a similar medication that included a warning. The defendant pharmaceutical company objected on foundation grounds. The trial court excluded the exhibit because the plaintiff could not establish the source of the advertisement or the defendant's awareness of the information contained in the document. The Court of Appeals reversed, and the Supreme Court reversed the lower appellate court, essentially reinstating the original ruling of the trial court. *Id.* at 174.

As the Court of Appeals correctly noted in distinguishing *Young*, *Young* was a classic foundation case based on the parties' respective knowledge of the exhibit, not an industry custom case. AP 21-22. *Young* has no bearing on this case and is not in conflict with the decision below.

### iii. *Haysom v. Coleman Lantern Co.*

*Haysom v. Coleman Lantern Co.* is a products liability case where the plaintiff sustained injuries after fire erupted when the plaintiff was filling a camp stove with fuel. 89 Wn.2d 474, 476, 573 P.2d 785 (1978). The relevant ruling from *Haysom* arose from the plaintiff's attempts to introduce the labeling practices of Sears, Roebuck & Co. to show that Coleman's labeling techniques were not in accordance with industry standards. *Id.* at 486-87. The trial court refused to admit the labeling practice based on the conduct of a single entity. *Id.* The Supreme Court determined the plaintiff's assignment of error to be without merit. *Id.*

Again, defense expert Stoddard testified that he had conducted hundreds of inspections of similarly situated snow recreation areas. AP 07. If Petitioners wanted Stoddard to name each snow area, they had every opportunity to ask him on cross-examination and chose not to. *See* AP 18.

## B. This Case Does Not Involve an Issue of Substantial Public Interest.

The issue on appeal involved the foundation for an expert's opinion. It does *not*, contrary to Petitioners' representations, call on the Court to prevent future deaths from occurring at recreational snow areas. As long as the wilderness is accessible to everyone, there will be accidents. There is nothing the Mountaineers, Petitioners, or the Court can do to prevent it. If Washington law were to change as a result of the Supreme Court reviewing this matter and reversing Division I, the most significant change would likely be shifting the burden of effective cross-

examination to the party offering that expert's testimony. That is, unless, the Court were inclined to set the sledding industry of care as Petitioners argue at pages 16 through 18 of their Petition. *See Helling v. Carey*, 83 Wn.2d 514, 519 p.2d 981 (1974).

Petitioners' half-hearted *Helling v. Carey*-based argument falls flat. First, the Court of Appeals declined to address that argument, citing Rule of Appellate Procedure 2.5, which allows an appellate court to refuse to review arguments not first presented to the trial court. *See* APP 22; Second, the Court of Appeals *did* nevertheless address the obvious problem with Petitioners' *Helling* analogy. *Helling* dealt with a glaucoma test that the experts agreed was simple, harmless, and virtually judgment-free. *Id.* at 519. The Supreme Court held that the defendants were negligent as a matter of law in light of their failure to administer such a harmless test. *Id.* As Division I correctly noted, the remedy proposed by Petitioners' expert Gill was installing hay bales (which can freeze and effectively become cinderblocks) and snow berms (which can catapult a user into the air or become a rock-hard wall to smash into). Those remedies carry significant risks of serious injury or death. The Court of Appeals thus rejected the analogy as a poor comparison in light of the circumstances. AP 22-23.

While this case involves an undeniably tragic fact pattern, a jury considered the relevant factual issues in reaching its defense verdict. This case was not driven by complex legal issues, but rather the jury's efforts to determine what was reasonably safe for users of the Campus under the

circumstances. The trial court's rulings were based on uncontroversial concepts of fairness and the correct application of the rules governing the admission of expert testimony. Division I correctly refused to upset the jury's verdict and properly affirmed the trial court's discretionary rulings in an unpublished, unanimous decision. The Petition should be denied. *See* RAP 13.4(b).

## VI. CONCLUSION

For the reasons stated above, the Mountaineers respectfully requests the Court deny the Petition for Discretionary Review.

Dated this 4th day of January, 2016

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## DECLARATION OF SERVICE

I Shelly Ossinger, being of lawful age, declare under penalty of perjury that on January 4, 2016 I emailed for filing with the Clerk of the U.S. Supreme Court and caused the same to be sent out for service on counsel of record via ABC Legal Messenger Defendant-Respondent's **Opposition to Petition for Review** in the above-entitled case to the following parties:

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

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*Ponce v. The Mountaineers*
Supreme Court No. 92540-2
Defendant-Respondent's **OPPOSITION TO PETITION FOR REVIEW**

Greetings: Attached for filing please find OPPOSITION TO PETITION FOR REVIEW on behalf of counsel for Defendant-Respondent, Ruth Nielsen, WSBA #11136.

Thank you.

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