72415-1

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No. 72415-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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

Plaintiffs-Appellants,

v.

THE MOUNTAINEERS,

Defendant-Respondent.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Jacob Ponce died, at the age of seven, when his snow sled entered a state highway and he was struck by an oncoming car after sledding down an access path at the base of a sledding area operated by The Mountaineers. This horrible accident could have been prevented if The Mountaineers had maintained a barrier at the base of the path. Sadly, The Mountaineers did not do so even though one of its employees had recognized this risk and had warned The Mountaineers that someone might sled into the roadway at the base of the path just as Jacob did. Jacob's parents, David Ponce and Karim Zapana – both individually and as co-personal representatives of the Estate of Jacob Ponce – sued The Mountaineers for negligence. As a result of trial court error, the jury found in favor of The Mountaineers.

The trial court committed reversible error by admitting expert testimony regarding a purported industry standard without sufficient foundational evidence establishing that a relevant industry standard exists. The Mountaineers' expert, Chris Stoddard, testified that the access path was "very typical of what I've seen all over the place" and "was a good example of industry best practices." 5/28 RP at 109, 111. But as set forth below, Mr. Stoddard did not identify a single sledding area operator that

did not construct a barrier at the base of an access path that funneled directly into a roadway. His testimony regarding "industry best practices" therefore should have been excluded.

At the very least, the trial court's judgment should be vacated and the matter should be remanded so that a jury can decide Plaintiffs' negligence claim without Mr. Stoddard's improper and highly prejudicial testimony. Better yet, the Court should vacate the trial court's judgment and remand the matter for a new trial on the issue of damages only. That is because, comparing the cost of avoiding harm to the probability and gravity of such harm, as the Washington Supreme Court did in *Helling v. Carey*, 83 Wn.2d 514, 519 P.2d 981 (1974), The Mountaineers was negligent as a matter of law *irrespective* of any alleged industry standard. Such a ruling would not only allow Plaintiffs to seek appropriate compensation for their losses, it would ensure that sledding area operators in Washington do not let what happened to Jacob happen to anyone else.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Plaintiffs' Motion In Limine Re: Opinions Of Defense Expert Paul Stoddard. CP 713-14.

2. The trial court erred in denying Plaintiffs' Motion For A New Trial. CP 965-69.

3. The trial court erred in entering judgment against Plaintiffs. CP 930-32.

III. ISSUES PRESENTED

1. Whether the Court should vacate the trial court's judgment and remand the matter for a new trial because the trial court committed reversible error by admitting expert testimony regarding a purported industry standard without sufficient foundational evidence establishing that a relevant industry standard exists. (Assignments of Error Nos. 1-3.)

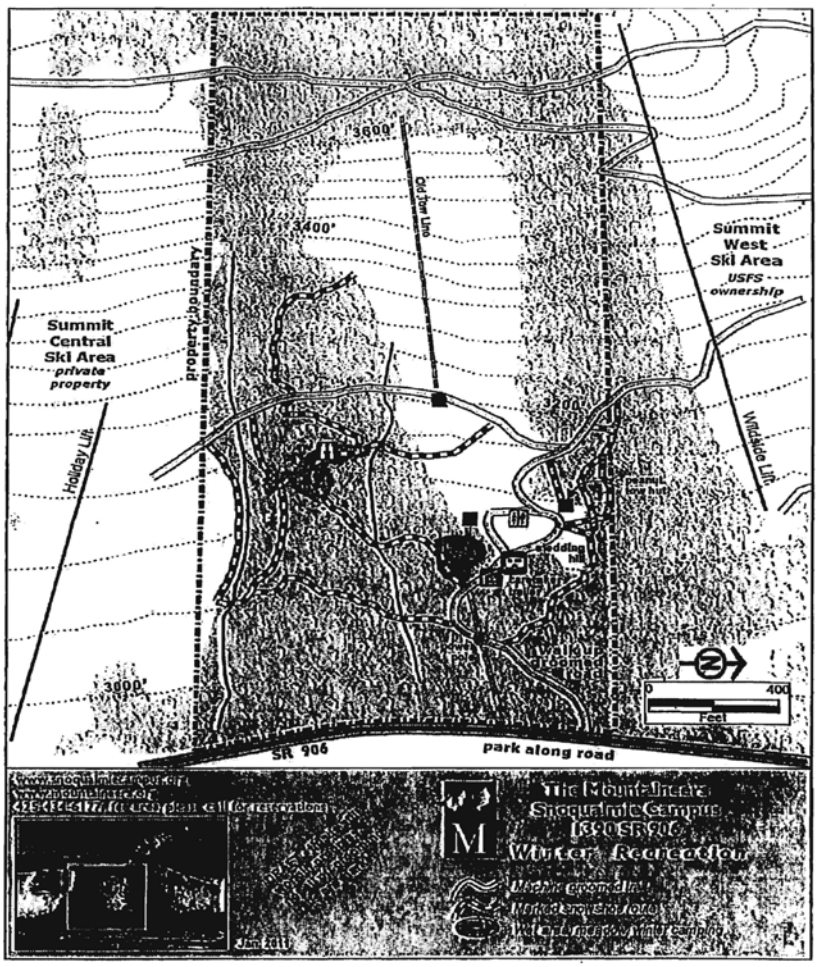
2. Whether, in the alternative, the Court should vacate the trial court's judgment and remand the matter for a new trial on the issue of damages only because undisputed evidence establishes that The Mountaineers was negligent as a matter of law irrespective of any alleged industry standard. (Assignments of Error Nos. 1-3.)

IV. STATEMENT OF THE CASE

A. The Snoqualmie Campus.

The Mountaineers owns and operates a sledding area called the Snoqualmie Campus. 5/21 RP at 9. The facility is adjacent to a highway, Washington State Route 906 ("SR 906"). *Id.* at 15. Customers park along that highway and are directed to access the Campus by hiking up a snow-covered pathway. *Id* at 61. The sledding area is located at the top of this

path, approximately 1,000 feet from the roadway. 5/21 RP at 15-16. The following diagram shows SR 906, the access path, and the sledding area:



Ex. 14. As can be seen, a customer who intentionally or accidentally sleds down the access path is funneled directly into SR 906. *Id.*

Moreover, the access path was especially dangerous. Mary Lynch, the former Chair of The Mountaineers' Snoqualmie Group who oversaw

the operation of the Snoqualmie Campus, acknowledged at trial that "it's a thousand feet up a steep incline." 5/21 RP at 16. She likewise admitted that "[i]t was groomed snow." *Id.* As summarized at trial: "you've got a slope that is 10 to 20 percent, compacted groomed snow, straight shot right onto the highway." 5/20 RP at 93. And if a sled slips out of someone's hand or otherwise breaks free, "you're not catching up to it." 5/20 RP at 96.

The Mountaineers recognized this precise risk that someone might sled into the roadway at the base of the path just as Jacob did. Addressing that critical issue, Ms. Lynch testified:

> Q. *You were concerned that somebody might take a right or a left turn, come down, get on the pathway.*
> A. *Correct.*
> Q. *Get on the pathway and end up in the road.*
> A. *Correct.*
> Q. *And have them be injured or killed, correct*?
> A. *Correct.*
> Q. *Just like what happened to Jacob.*
> A. *Yes.*
> Q. *Okay. And you were so concerned about that that you talked to The Mountaineers about that.*
> A. About the trespassers on the trail? *Yes.*
> Q. Yeah. And you told them that you were concerned that one of them would end up in the road and hit by a car.
> A. Yes.

Q. You were concerned, Ms. Lynch, because you recognized that the trail was long, true? Your pathway was long?
A. Mm-hmm.
Q. And steep.
A. Yes.
Q. With compacted snow.
A. Yes.
Q. And that it fed directly into State Route 906.
A. Yes.

Id. at 32-33 (emphasis added). Martinique Grigg, the executive director of The Mountaineers, likewise acknowledged that Ms. Lynch and other Snoqualmie Campus committee members "shared with me their concern about trespassers." 5/22 RP at 115 (Grigg deposition testimony).

The record at trial also establishes that The Mountaineers could have maintained a barrier at the base of the access path at no cost. Specifically, The Mountaineers had a contract with a company called "Ski Lifts" whereby Ski Lifts provided free grooming services to The Mountaineers in exchange for allowing it to cross The Mountaineers' property to perform work for its paying customers. Ex. 1. Ski Lifts could have created a snow berm at the base of the access path, *at no ongoing cost to The Mountaineers*, to safely prevent sleds from entering the roadway. 5/20 RP at 130. Instead, as Ms. Lynch testified, The

Mountaineers directed Ski Lifts to "to *avoid* the creation of a berm ... at the terminus of the pathway with State Route 906." 5/21 RP at 19 (emphasis added).

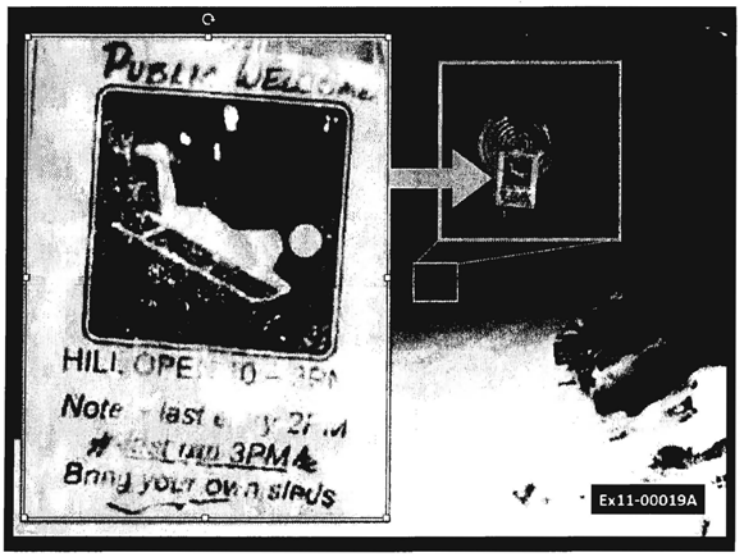
Ms. Grigg confirmed this agreement with Ski Lifts *even after* Ms. Lynch and others had relayed their concerns that someone might sled into the roadway at the base of the path just as Jacob did:

> Q. So you had that information available to you, knew about it, when you negotiated the contract?
> A. That's right.
> Q. The contract, nevertheless, still provided for the removal of a berm at the bottom of the access path.
> A. Yes.
> Q. And provided for the access path to funnel directly into State Route 906?
> A. The access path does end there, yes.

5/28 RP at 50. Ms. Lynch likewise testified: "we specifically requested that [referring to the access path grooming] to allow for pedestrian access." 5/22 RP at 118-19.

The Mountaineers also posted several signs to attract paying customers and direct them to the sledding area. Near the base of the access path, The Mountaineers posted the following sign:

Ex. 49; 5/20 RP at 140. Further up, there was a similar sign:



Ex. 50[1]; 5/20 RP at 140. Lastly, approximately 300 feet up the path, The Mountaineers posted a warning sign stating: "For the safety of all **NO** SNOW PLAY of any kind is PERMITTED on or along the sides of the road." Ex. 53 (emphasis in original); 5/21 RP at 24-25. As discussed below, Jacob and his family never reached that warning sign.

B. Jacob Ponce's Tragic Death.

Jacob's family visited the Snoqualmie Campus in February 2011. 5/27 RP at 34. Like other customers, they parked along SR 906 and were directed by a representative of The Mountaineers to walk up the snow-covered pathway to the sledding area. 5/22 RP at 23; 5/27 RP at 36-38. After hiking approximately 65 feet from the highway, Jacob grew tired and unexpectedly sat down on the sled that was being pulled up the path by his older sister, Shaina. 5/20 RP at 92; 5/22 RP at 29; 5/27 RP at 40. The rope slipped from Shaina's hand and Jacob began sliding down the steep pathway towards the highway just as Ms. Lynch had foreseen and warned The Mountaineers could happen. 5/22 RP at 29; 5/27 RP at 40.

Jacob's father described what happened next as follows:

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[1] Some of the exhibits that are reproduced in this brief include proposed exhibit numbers within the exhibit. The citations in the text of this brief are to the exhibit numbers as admitted. The other exhibit numbers should be ignored.

Q. When you realized that Jacob was on the sled, Mr. Ponce, what did you do?

A. At that moment, I thought I would be able to hold onto him, grab him with my hand. And I was able to get a hold of him. But I was wearing gloves, and I wasn't able to hold onto him.

Then I walked and ran. I saw everything at that moment. It was like in a movie, jumping onto him, pushing him off to the left-hand side, push him to the right-hand side. But I kept going, and I was able to step on the rope. The first time I felt that something pulled. And I ran harder, and I jumped on the rope. I twist my feet against the snow, and I stopped it.

And the whole time he was looking at me and laughing. He was saying, "Papi, I'm having fun." And I said, "Honey, get off. Get off, honey." But I was able to stop the rope, and I crouched over. And then when I crouched over, the rope came loose. And then I tried to move to react, but I wasn't able to because I was crouched over.

He shot off like a bullet. I couldn't even believe what I was seeing.

Q. Did you chase after him, Mr. Ponce?

A. Yes, but he was going so fast. And by the time I stopped, he was so far away from me.

Q. Did you see the car hit your son, Mr. Ponce?

A. I ran after him, and I prayed to God. I said, "God, please forgive me if I'm done something wrong. Save my child." I had -- I hoped that he might be saved, but I saw when the man hit him.

5/22 RP at 29-30. Jacob's mother likewise testified:

Q. I know this is difficult. But can you just kind of walk us through what happened?

A. We were going up, and I saw Jacob sitting down and going down the hill. I scream. David -- my son, he

> tried to save him. He run. And I frozen -- I couldn't move. I was screaming. In my mind, I want to jump. I want to do something but I couldn't move. (inaudible) running behind him. And I heard the car. I run. (inaudible)
>
> I hold him, start talking, saying "Jacob, please, wake up, answer me." He was warm. He (inaudible) always wait for me. I said, Jacob, he's going to answer me. He was answer me when I call him. I said, "Jacob, remember you promised, wake up." He wasn't moving.

5/27 RP at 40.[2] Just as Ms. Lynch had predicted would someday happen, Jacob's parents watched in horror as Jacob's sled entered the roadway and he was run over by a passing car. 5/22 RP at 30; 5/27 RP at 40.

Lian Ng was the driver of the car that hit Jacob. 5/19 RP at 131-33. Mr. Ng testified "suddenly I felt I ran over a bump at the back of my car. And then I didn't know what it was. So I asked my two daughters to look back. And they said, 'Oh my God, it was a child.'" *Id.* at 131. Mr. Ng testified that there was no indication that he was "approaching a pathway or a driveway or anything like that" and that he did not see "anything coming into the road." *Id.* When asked if there were "any signs approaching the trailhead that warned drivers," another driver likewise testified: "No." 5/20 RP at 46.

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[2] Jacob's mother grew up in Peru and did not learn English until her family moved to California. 5/27 RP 16-18.

Jacob left the scene of the accident in an ambulance. 5/22 RP at 31. His parents were not permitted to ride with him, so they followed in their own vehicle. *Id.* While driving to the hospital, Jacob's parents received a call from the police, who asked them to pull off the road before continuing the call. 5/22 RP at 31; 5/27 RP at 41. At that point, the police informed Jacob's parents that Jacob had died as a result of his injuries. 5/22 RP at 31; 5/27 RP at 42.

C. The Ordinary Care Issue.

Plaintiffs filed suit in May 2012, alleging that The Mountaineers was negligent and that its negligence proximately caused Jacob's death. CP 1-4. The central issue at trial was whether The Mountaineers failed to use ordinary care, and was therefore negligent, because it did not maintain a barrier at the base of its access path even though the path funneled directly into SR 906 and even though The Mountaineers was aware of the risk that someone would accidentally sled into the roadway at the base of the path just as Jacob did. CP 30-34, 62-63.

The ordinary care issue, in turn, was governed by Washington pattern jury instructions. As required by WPI 10.01, the jury was instructed:

> Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

CP 899. As required by WPI 10.02, the jury was further instructed:

> Ordinary care for an adult or for a legal entity such as a corporation means the care a reasonably careful adult person or corporation would exercise under the same or similar circumstances.

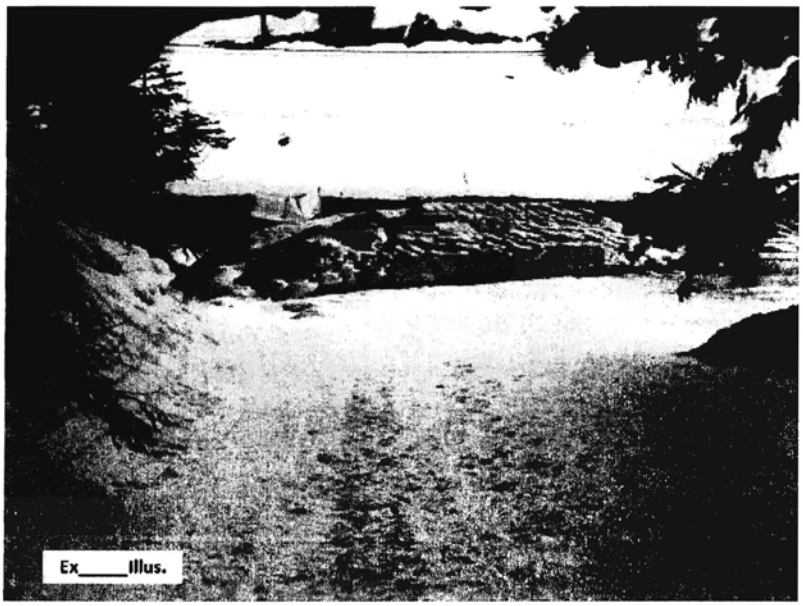
CP 902. The trial court also instructed the jury that the owner or operator of a sledding area owes its invitees "a duty to exercise ordinary care for [the invitees'] safety. CP 906.

The parties addressed the ordinary care issue through expert testimony. Plaintiffs, for their part, retained Dr. Richard Gill, a professor of engineering and human factors, to testify regarding the design and layout of the Snoqualmie Campus access road. 5/20 RP at 60-62, 68. Dr. Gill testified that The Mountaineers created a "hazardous condition": "a slope that is 10 to 20 percent, compacted groomed snow, straight shot right onto the highway." *Id.* at 68, 93. He further explained that this risk was "known to The Mountaineers," as reflected in Ms. Lynch's and Ms. Grigg's testimony, and "functionally hidden to the typical patron." *Id.* at 68, 99-102.

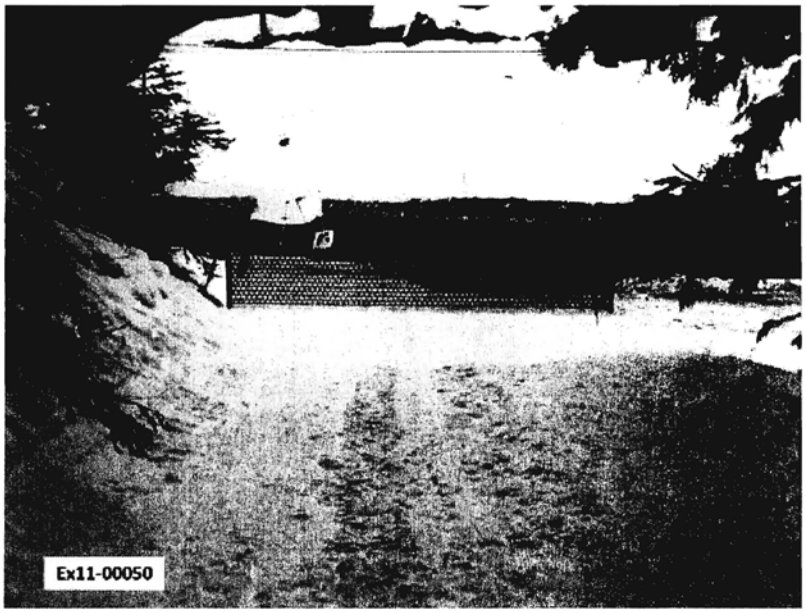
Having identified the hazardous condition, Dr. Gill explained how a reasonably careful person would eliminate that risk. First, The Mountaineers could have created a curved bank to direct customers (whether on sled or not) parallel to the highway – something that The Mountaineers could have done *at no ongoing cost*. *Id.* at 128-30. Second, The Mountaineers could have used hay bales or fencing to guard against the hazard. *Id.* at 132-37. Indeed, as Dr. Gill noted, The Mountaineers erected orange vinyl fencing at the end of every business day, so they could simply have left that fencing in place. *Id* at 132-33.

Dr. Gill prepared the following exhibits to illustrate his testimony:

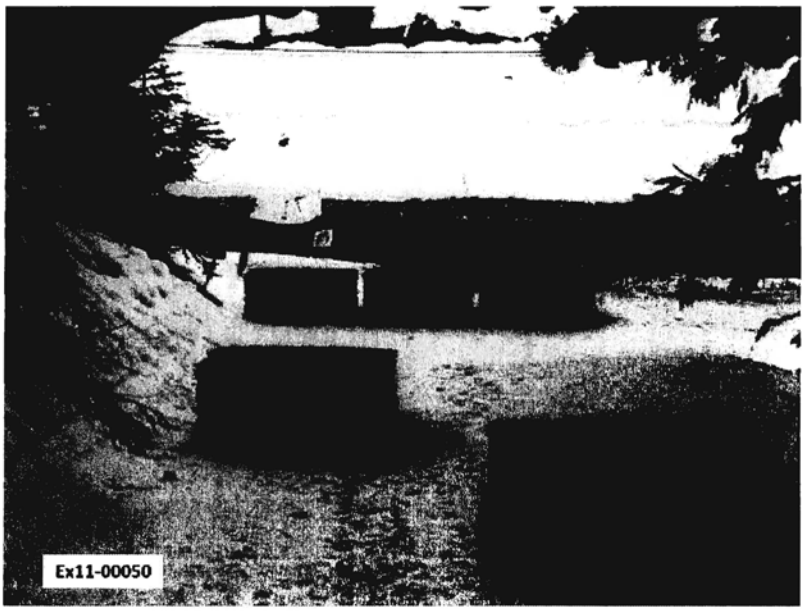
Ex. 44 (5/20 RP at 123-24) – access path with curved bank



Ex. 47 (5/20 RP at 134-37) – access path with fencing



Ex. 48 (5/20 RP at 134-37) – access path with hay bales



Unfortunately, The Mountaineers did not do any of these things. As a result, the access path looked like this:

Ex. 46; 5/20 RP at 127-31. In short, The Mountaineers *created* a hazard by grooming the access trail and removing the snow berm at the base of the trail and then *failed* to take reasonable steps to eliminate that hazard. 5/20 RP at 119-20. This approach to the safety of its customers, according to Dr. Gill, was "grossly inadequate." *Id.* at 148.

Lastly, Dr. Gill also testified that The Mountaineers should have prominently posted "no sledding signs" at the base of the access path. *Id.* at 144-46. But rather than do so, the only signs at the base of the access path, as shown on page 8 above, showed an individual on a sled and indicated "FAMILY FRIENDLY" and "PUBLIC WELCOME." Exs. 49-50. As Dr. Gill testified, even if warnings were an adequate solution (as opposed to not creating the hazard in the first place and/or guarding against it), "what [The Mountaineers] did for warnings was counterproductive by putting up signs at the very beginning saying 'Sledding hill, family invited.'" 5/20 RP at 149.

The Mountaineers, for its part, retained Chris Stoddard to testify that the access path at the Snoqualmie Campus was consistent with "industry best practices." CP 456-57 ¶ 6. But Mr. Stoddard did not – and could not – identify at his deposition any other sledding operation where the access path funneled directly into a roadway. CP 290-313. Plaintiffs therefore filed a motion *in limine* to exclude his testimony regarding a purported industry standard. In that motion, Plaintiffs argued:

> The Mountaineers cannot point to a single other commercial sledding operation, much less the *several* necessary to establish "custom," that has an access road or pathway that feeds directly into a highway and failed to

> place any barricades to protect its patrons from unwittingly entering the highway. Thus, there is no uniform practice in the industry or anything close to it.

CP 325. At oral argument, Plaintiffs' counsel again asserted that any such "industry standard" testimony should be excluded because "there's no way for us to cross him on that, because *he couldn't identify a specific area that he was referring to*." 5/15 RP at 106; *see also id.* at 119 (objecting to opinion testimony "based on every place that I've gone ... without giving us some sort of foundation to test whether... what he's saying is true").

The Mountaineers, in response, did not identify any such specific area in briefing or argument. In briefing, The Mountaineers argued that Mr. Stoddard "simply relies on his professional experience." CP 429 n.2. At oral argument, counsel likewise stated: "his opinions on an industry standard are based on looking at over a hundred facilities." 5/15 RP at 113. Lastly, The Mountaineers also submitted a declaration in which Mr. Stoddard claimed, once more, that he relied on "hundreds of inspections across the country" without identifying a single sledding area operator that did not construct a barrier at the base of an access path that funneled directly into a roadway. CP 460 ¶ 16.

The trial court denied Plaintiffs' motion as follows:

> 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.

CP 713. The trial court thus allowed Mr. Stoddard to testify regarding "industry standards" despite Plaintiffs' argument that there was no foundational evidence establishing that a relevant industry standard exists.

Nor did Mr. Stoddard provide that foundational evidence at trial. Instead, Mr. Stoddard testified regarding access roads that (a) led to a *ski resort* rather than a sledding area (5/28 RP at 101-08), (b) funneled into a *parking lot* rather than a roadway (*id.* at 129-30), (c) were located *above* the sledding area and therefore funneled into the sledding hill (*id.* at 135), and/or (d) *zigzagged* toward the roadway rather than approaching it directly (*id.* at 154). Mr. Stoddard nevertheless testified, as permitted by the trial court's ruling denying Plaintiffs' motion *in limine*, that the access path at the Snoqualmie Campus was "very typical of what I've seen all

over the place" and "was a good example of industry best practices." *Id.* at 109, 111.

D. The Jury's Defense Verdict.

At the conclusion of trial, the jury returned a defense verdict, concluding that The Mountaineers was not negligent. CP 918. On June 19, 2014, the trial court entered judgment on the jury's verdict. CP 930-32. Plaintiffs then filed a motion for a new trial, which the trial court denied on July 18, 2014. CP 934-44, 965-69. This timely appeal followed. CP 970-91.

V. ARGUMENT

A. The Court Should Vacate The Trial Court's Judgment And Remand The Matter For A New Trial Because The Trial Court Abused Its Discretion By Admitting Highly Prejudicial Expert Testimony Regarding A Purported Industry Standard Without Sufficient Foundational Evidence Establishing That A Relevant Industry Standard Exists.

The admissibility of Mr. Stoddard's industry standard testimony is governed by several additive legal principles. First, under ER 702, an expert's opinion must be "helpful to the trier of fact." *Queen City Farms, Inc. v. The Central Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 102, 882 P.2d 703 (1994). Second, Washington law is equally clear that "there is no value in an opinion that is wholly lacking some factual basis." *Id.* at 102-03. Third, for Mr. Stoddard's industry standard testimony to be relevant

under WPI 10.01 and 10.02 (quoted on page 13 above), there must be evidence that other sledding area operators have not constructed a barrier at the base of an access path "under the same or similar circumstances." Fourth, to establish an industry standard regarding such circumstances, The Mountaineers must identify more than one other sledding area operator that did not construct a barrier at the base of an access path that funneled directly into a roadway. Relevant case law regarding these requirements is discussed below.

Starting with the first two requirements – that the testimony must be "helpful to the trier of fact" and that there must be an adequate "factual basis" for the testimony – the Supreme Court's opinion in *Queen City Farms* is instructive. The plaintiff there argued that the trial court abused its discretion when it overruled the plaintiff's foundational objection to expert testimony concerning various insurers' underwriting practices regarding waste disposal sites. 126 Wn.2d at 102. The Supreme Court found that the expert had insufficient knowledge of the relevant underwriting practices and therefore held that the expert's testimony "should have been excluded because it lacked sufficient foundational facts to support his opinion that the actual underwriters would have reached a

different decision about issuing the insurance had they known about the waste ponds." *Id.* at 103-04.

Turning to the third requirement above – that there must be evidence that other sledding area operators have not constructed a barrier at the base of an access path "under the same or similar circumstances" – Washington courts have consistently held that evidence showing how others addressed a given issue is not admissible *unless* the conditions are similar. *See State v. J-R Distributors, Inc.*, 82 Wn.2d 584, 644, 512 P.2d 1049 (1973) (evidence regarding acceptance of other films not probative in obscenity case because questioned film and proffered film must be "similar" and "there was no way for the jury to have compared similarity, or lack thereof"); *Puget Sound Elec. Ry. v. Carstens Packing Co.*, 76 Wash. 364, 366, 136 P. 117 (1913) (evidence that another railroad loaded cars in the same manner as the defendant not admissible because tracks at issue had greater curves and side wash).[3] As noted previously, the applicable jury instructions – WPI 10.01 and 10.02 (quoted on page 13 above) – likewise require proof of similarity.

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[3] *See also Grand Trunk R. Co. v. Richardson*, 91 U.S. 454, 469-70 (1875) ("The usual practice of other companies in that section of the country sheds no light upon the duty of the defendant when running locomotives over long wooden bridges, in near proximity to frame buildings, when danger was more than commonly imminent.").

Finally, regarding the fourth requirement above – that to establish an industry standard there must be evidence regarding the conduct of more than one other actor – the Supreme Court's opinions in *Young v. Key Pharmaceuticals, Inc.*, 130 Wn.2d 160, 922 P.2d 59 (1996), and *Haysom v. Coleman Lantern Co.*, 89 Wn.2d 474, 573 P.2d 785 (1978), are instructive. The plaintiff in *Young* offered evidence that another drug manufacturer had provided in its advertising additional information about a product and its potential dangers. 130 Wn.2d at 174-75. The Supreme Court held that the trial court correctly excluded the evidence because there was no showing that this "single post-incident statement" was the industry standard. *Id.* at 175. In *Haysom*, the Supreme Court likewise held that "while evidence of a general industry standard or custom is relevant to show negligence (or in this case defective labeling), evidence of the practices of a single other business or person is inadmissible." 89 Wn.2d at 489. Other courts and commentators agree.[4]

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[4] *See, e.g., Miller v. Staton*, 58 Wn.2d 879, 885, 365 P.2d 333 (1961) (holding that even when usual conduct or general custom of others under similar circumstances is relevant and admissible, "such custom may not be established by evidence or conduct of single persons or businesses"). The Washington Practice deskbook confirms the above analysis. The deskbook recognizes that in most product liability actions the trier of fact may properly consider evidence that the defendant did or did not comply with private, nongovernmental standards relating to the design or construction of the product at issue. 5 Washington Practice § 402.18, at 326. But it also recognizes that "[i]n situations other

(continued . . .)

Mr. Stoddard's testimony runs afoul of these rules. Although the trial court permitted Mr. Stoddard to "refer to 'industry standards,' in describing his understanding of what other recreation areas do in similar situations" (CP 713), The Mountaineers did not identify in their response to Plaintiffs' motion in limine or in oral argument regarding that motion, nor did Mr. Stoddard identify in his declaration that The Mountaineers filed with their response brief, any other sledding operation where the access path funneled directly into a roadway. *See* discussion on page 18 above. Without that foundational evidence, Mr. Stoddard's testimony regarding an alleged "industry standard" is inadmissible under ER 702, *Queen City Farms*, WPI 10.01 and 10.02, *J-R Distributors*, *Puget Sound Electric Railway*, *Young*, *Haysom*, and the other authorities discussed above.

The trial court's contrary ruling is legally flawed. The trial court ruled that Mr. Stoddard's "training and experience with other similar recreation areas allows him to speak to … the way in which other

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(. . . continued)
than products liability actions, generalizations about the relevance of private, nongovernmental standards are hazardous." *Id.* Accordingly, "[t]he fact that one business or person (other than the party to the case) follows a certain practice may not rise to the level of a standard or custom, and may not be admissible." *Id.* at 328.

recreation areas have handled similar access paths." CP 713. The critical flaw in the trial court's analysis is that there was no foundational evidence that Mr. Stoddard had experience with "similar recreational areas" or "the way in which other recreation areas have handled similar access paths." *Id.* As noted above, that evidence was entirely missing in the briefing and testimony that The Mountaineers submitted in response to Plaintiffs' motion *in limine*.

Rather than require Mr. Stoddard and The Mountaineers to provide the requisite foundational evidence for the purported industry standard, the trial court held that it was enough for Mr. Stoddard to testify that he has "training and experience with other similar areas." CP 713. That is the wrong legal standard. As the proponent of Mr. Stoddard's testimony, it was The Mountaineers' burden to establish admissibility. *See State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 678 (1993) ("A party seeking to admit evidence bears the burden of establishing a foundation for that evidence."); *State v. Smith*, 87 Wn. App. 345, 348, 941 P.2d 725 (1997) ("The burden of establishing the foundation is on the state, who introduced

the reports."). [5] Here, as the above discussion shows, it was The Mountaineers' burden, as the proponent of Mr. Stoddard's testimony regarding a purported industry standard, to identify *at least two* other sledding area operators that did not construct a barrier at the base of an access path that funneled directly into a roadway. As the above discussion also shows, neither The Mountaineers nor Mr. Stoddard ever provided that required foundation.

It necessarily follows that the trial court abused its discretion when it allowed Mr. Stoddard to testify regarding "industry standards" without the required foundational evidence establishing that a relevant industry standard exists. In so ruling, the trial court applied the wrong legal standard and exercised its discretion on untenable grounds. In addition, the facts do not meet the requirements of the correct legal standard. These circumstances constitute an abuse of discretion under Washington law. *See State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (trial court abuses its discretion when its decision is manifestly

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[5] *See also State v. Vaughn*, 101 Wn. 2d 604, 611, 682 P.2d 878 (1984) ("The burden of laying a foundation that the witness had an adequate opportunity to observe the facts to which he testifies is upon the proponent of the testimony."); *In re Det. of McGary*, 175 Wn. App. 328, 340, 306 P.3d 1005 (2013) ("The proponent of the testimony must show that experts in the witness's field, in general, reasonably rely upon such material in their own work; *i.e.,* for purposes other than litigation.").

unreasonable or its discretion is exercised on untenable grounds or for untenable reasons); *Sherron Assocs. Loan Fund V (Mars Hotel) LLC v. Saucier*, 157 Wn. App. 357, 361, 237 P.3d 338 (2010) (trial court "acts for untenable reasons if it uses an incorrect standard of law or the facts do not meet the requirements of the standard of law").

The same analysis applies to the trial court's ruling denying Plaintiffs' post-trial motion for a new trial. Similar to his deposition testimony, Mr. Stoddard did not provide at trial the required foundation for his industry standard testimony. Instead, his trial testimony focused primarily on *ski resorts*, not sledding areas, where there is no evidence of a risk that someone would accidentally sled (or even accidentally ski) into the roadway at the base of an access path. 5/28 RP at 101-08. Moreover, the access path at the base of those ski resorts either funneled into a *parking lot* (*id.* at 129-30) or *zigzagged* toward the roadway (*id.* at 154). None of these situations is sufficient, as a matter of law, to establish a relevant "industry standard" or "industry best practices" for sledding operations with access paths that funnel directly into a roadway.

Although Mr. Stoddard identified at trial two sledding operations, that evidence is likewise insufficient to establish the required foundation

for his industry standard testimony. The first sledding operation was "Summit Central," where, as Mr. Stoddard admitted, individuals park their vehicles "in the parking lot." *Id.* at 127, 129. In addition, the access trails at this location had "zig-zag access ramps" (*id.* at 154) and therefore approached the road at an angle (similar to Dr. Gill's proposed snow bank to direct customers parallel to the highway (5/20 RP at 128-30)). The second sledding operation was "Hyak," where "the sledding hill is actually down below the parking lot" so the access road there funneled into the sledding hill rather than into a roadway. 5/28 RP at 135. Here too, these access paths are not similar to the access path at issue and are therefore insufficient, as a matter of law, to establish a relevant "industry standard" or "industry best practices."

In denying Plaintiffs' motion for a new trial, the trial court once again applied the wrong legal standard. This time, the trial court explained that "the evidenced rules provide a simple framework for the Court's decision whether to allow expert witness testimony: Whether the testimony will assist the trier of fact to understand the evidence or determine a fact in issue, and whether the witness is qualified to form such an opinion." CP 968 (citing ER 702). Applying that legal standard, the

trial court found that "Stoddard's testimony was qualified expert testimony, and it assisted the trier of fact." *Id.* As can be seen, the trial court completely overlooked the *additional requirements* that there be a factual basis (foundation) for Mr. Stoddard's testimony, that he address what other sledding area operators have done "under the same or similar circumstances," and that he identify more than one other sledding area operator that did not construct a barrier at the base of an access path that funneled directly into a roadway. *See* discussion on pages 20-23 above. The trial court thereby abused its discretion in denying Plaintiffs' motion for a new trial. *See* discussion on pages 26-27 above.

It is equally clear that the trial court's error was prejudicial to Plaintiffs. As noted above, the jury was instructed that negligence "is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances" and that "ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances." CP 899-902. As discussed at length above, Mr. Stoddard could not – and did not – satisfy the "same or similar circumstances" requirement because

he could not identify any sledding area operators that failed to construct a barrier at the base of an access path that funneled directly into a roadway. But because of the trial court's erroneous ruling denying Plaintiffs' motion in *limine*, Mr. Stoddard was able to testify that he had performed 300-400 inspections of ski areas and had inspected "50 different snow tubing facilities" and that, based on those inspections, the access path at the Snoqualmie Campus was "very typical of what I've seen all over the place" and "was a good example of industry best practices" (*id.* at 73-74, 109, 111) and thereby suggest to the jury that The Mountaineers' conduct was precisely the same as what others have done under the same or similar circumstances. The jury was thus misled with regard to *the central standard of care issue* in the case.

Nor does it matter for purposes of the prejudice analysis that Plaintiffs' counsel was able to cross-examine Mr. Stoddard regarding his industry standard testimony. The trial court, in its post-trial ruling, found it significant that Plaintiffs' counsel "conducted this cross-examination with stinging effectiveness." CP 967. That reasoning is both legally and factually flawed. Legally, the trial court did not identify any case law holding that a trial court's error in admitting highly prejudicial evidence

can somehow be considered harmless merely because the opponent of the evidence has an opportunity to counter the impact of the inadmissible evidence through cross-examination. If that were the law, the rules of evidence would be largely advisory because improper and prejudicial testimony is always subject to cross-examination. In this respect as well, the trial court applied an incorrect legal standard and exercised its discretion on untenable grounds.

Factually, the trial court's comment regarding cross-examination ignores the fact that Plaintiffs' counsel was only able to cross-examine Mr. Stoddard on the critical differences between the access road at The Mountaineers' facility and the access roads at the few winter recreation areas in Washington *that Mr. Stoddard identified.* 5/28 RP at 126-35. When Mr. Stoddard identified those facilities, it was easy to establish on cross-examination – with "stinging effectiveness" – that they do not involve the "same or similar circumstances" as the access road at The Mountaineers' facility. *Id.* But the trial court's ruling completely ignores the 300-400 inspections of ski areas and "50 different snow tubing facilities" that, according to Mr. Stoddard, formed the basis of his opinion that the access path at the Snoqualmie Campus was "very typical of what

I've seen all over the place" and "was a good example of industry best practices." *Id.* at 73-74, 109, 111. As to those critical facilities, Plaintiffs' counsel was not able to effectively cross-examine Mr. Stoddard, which is the precise concern that Plaintiffs' counsel identified at oral argument. 5/15 RP at 106, 119 (quoted on page 18 above). The resulting prejudice is a direct result of the trial court's ruling permitting Mr. Stoddard to testify regarding a purported industry standard without identifying the sledding areas, if any, that were the basis for his testimony. The trial court consistently overlooked this prejudice to Plaintiffs and, as a result, exercised its discretion on untenable grounds and for untenable reasons.

Moreover, the trial court's reasoning effectively reverses the applicable burden of proof. Under Washington law, it was The Mountaineers' burden to show that Mr. Stoddard's industry standard testimony was admissible *before* the testimony was permitted. *See* discussion on pages 25-26 above. To do that, Mr. Stoddard was required to identify two or more sledding area operators that did not construct a barrier at the base of an access path that funneled directly into a roadway and thereby attempt to satisfy the "same or similar circumstances" in the trial court's jury instructions. Instead of requiring The Mountaineers to do

so, the trial court required Plaintiffs to establish that the other winter recreation areas – including those that Mr. Stoddard was never required to identify – are *not* the same or similar and that The Mountaineers' industry standard defense therefore failed. That is an impossible burden, and one that should never have been placed on Plaintiffs.

Finally, the ultimate proof of prejudice is that the jury found in favor of The Mountaineers despite Dr. Gill's testimony. In response to Dr. Gill's testimony that a reasonably careful person would have eliminated the risk of sledding directly into SR 906 by creating a curved bank to direct customers parallel to the highway or by using hay bales or fencing to guard against the hazard (5/20 RP at 128-37), Mr. Stoddard complained that such a bank would impede access to the sledding hill (a sad case of profits over safety) and that customers might get injured if they sledded into the snow bank, hay bales, or fencing. 5/28 RP at 80-92. This testimony ignores Dr. Gill's testimony that these precautions could have been designed to work *safely*. 5/20 RP at 129, 135-36. But even putting that aside, *Mr. Stoddard never compared the risk of injury that he identified to the alternative*, which is the certainty of speeding across the

highway at the base of the access path and the risk of being hit by an oncoming vehicle as Jacob was. 5/28 RP at 80-92.

Despite the above flaws in his testimony, Mr. Stoddard was able to bolster his criticism of Dr. Gill's testimony by asserting that the access path was "very typical of what I've seen all over the place" and "was a good example of industry best practices." *Id.* at 109, 111. Indeed, in response to defense counsel's questioning, Mr. Stoddard *expressly* relied on his experience regarding other – *undisclosed* – winter recreation areas to undermine Dr. Gill's testimony:

> Q. And, Mr. Stoddard, I'm going to ask you on a more-probable-than-not basis, *based on your experience, your professional experience in winter recreation and tubing and sledding specifically*, can you tell the jury more probably than not whether the changes proposed by Richard Gill would be reasonable and appropriate for an access path like The Mountaineers' Snoqualmie Campus.
>
> A. Well, they would not be appropriate.

Id. at 91-92 (emphasis added). Mr. Stoddard testified, in other words, that "no one else has adopted Dr. Gill's precautions so he must be wrong and I am right." Mr. Stoddard was able to bolster his testimony in this manner only because the trial court, *contrary to controlling legal principles*, allowed him to testify regarding a purported industry standard even though

he could not identify other sledding area operators that did not construct a barrier at the base of an access path that funneled directly into a roadway. For that reason too, the trial court's error was prejudicial to Plaintiffs.

In sum, the trial court abused its discretion by admitting Mr. Stoddard's industry standard testimony and its error was highly prejudicial. The Court should therefore vacate the trial court's judgment and remand the matter for a new trial. *See, e.g., Miller*, 58 Wn.2d at 885, 888 (holding that "evidence as to the custom of policing in the bar of the Eagles Lodge was inadmissible and prejudicial to the fair consideration by the jury of the adequacy of care exercised by the defendants for their patrons' safety" and vacating judgment on jury verdict). Plaintiffs should be permitted to litigate their negligence claim – and a jury should decide that claim – without Mr. Stoddard's improper and highly prejudicial testimony regarding an industry standard that does not exist.

B. Better Yet, The Court Should Vacate The Trial Court's Judgment And Remand The Matter For A New Trial On The Issue Of Damages Only Because Undisputed Evidence Establishes That The Mountaineers Was Negligent As A Matter Of Law *Irrespective* Of Any Alleged Industry Standard.

Regardless of how this Court decides the industry standard issue above, there is a more systemic problem here: The Mountaineers did not construct a barrier at the base of an access path that funneled directly into

a roadway *even though it could have done so at no ongoing cost*. Based on controlling case law and undisputed facts – as discussed below – this Court should rule that The Mountaineers was negligent as a matter of law and remand the matter for a new trial on the issue of damages only *irrespective* of any alleged industry standard. As noted previously, such a ruling would not only allow Plaintiffs to seek appropriate compensation for their losses, it would ensure that sledding area operators in Washington do not let what happened to Jacob happen to anyone else.

The Washington Supreme Court's opinion in *Helling* is directly on point. The issue in *Helling* was "whether the defendant ophthalmologist's compliance with the standard of the profession of ophthalmology, which does not require the giving of a routine pressure test to persons under 40 years of age, should insulate them from liability under the facts of this case where the plaintiff has lost a substantial amount of her vision due to the failure of the defendants to timely give the pressure test to the plaintiff." 83 Wn.2d at 517. The defendant there, much like The Mountaineers here, argued that the standard of the profession should "insulate the defendants from liability." *Id.* The jury agreed and found for

the defendants. *Id.* at 516. The trial court then entered judgment on the verdict, and the court of appeals affirmed. *Id.*

The Washington Supreme Court reversed the judgment of the trial court and the court of appeals, found liability *as a matter of law*, and remanded the case "for a new trial on the issue of damages only." *Id.* at 519. Consistent with bedrock tort principles, the court first compared the cost of the additional precaution to the probability and magnitude of harm:

> The incidence of glaucoma in one out of 25,000 persons under the age of 40 may appear quite minimal. However, that one person, the plaintiff in this instance, is entitled to the same protection, as afforded persons over 40, essential for timely detection of the evidence of glaucoma where it can be arrested to avoid the grave and devastating result of this disease. The test is a simple pressure test, relatively inexpensive. There is no judgment factor involved, and there is no doubt that by giving the test the evidence of glaucoma can be detected.

Id. Thus, although the risk of harm appeared "minimal," it was more than offset by the "grave and devastating result" if glaucoma is not timely detected – particularly given the "relatively inexpensive" pressure test. *Id.*

The court then turned to whether it had the power to find negligence as a matter of law *even though* the defendant ophthalmologist had acted in compliance with the applicable industry standard and even though the jury had found in favor of the defendant. The court concluded

that it had that power and, in support of its holding, reiterated the rule, first announced by Justice Hand in 1932, that "'*[c]ourts in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.*'" *Id.* (quoting *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932)) (emphasis in original). The court then held that giving the pressure test "to detect the incidence of glaucoma to patients under 40 years of age is so imperative that irrespective of its disregard by the standards of the ophthalmology profession, it is the duty of the courts to say what is required to protect patients under 40 from the damaging results of glaucoma." *Id.*

Turning again to the individual defendant, the court concluded: "We therefore hold, *as a matter of law*, that the reasonable standard that should have been followed under the undisputed facts of this case was the timely giving of this simple, harmless pressure test to this plaintiff and that, in failing to do so, *the defendants were negligent*, which proximately resulted in the blindness sustained by the plaintiff for which the defendants are liable." *Id.* (emphasis added). The Court then added: "There are no disputed facts to submit to the jury on the issue of the defendants' liability. Hence, a discussion of the plaintiff's proposed

instructions would be inconsequential in view of our disposition of the case. The judgment of the trial court and the decision of the Court of Appeals is reversed, *and the case is remanded for a new trial on the issue of damages only. Id.* (emphasis added; paragraph break omitted).[6]

The same analysis and result are equally applicable here. There is undisputed evidence – as conceded by The Mountaineers' witnesses – that The Mountaineers could have instructed its grooming contractor (Ski Lifts) to create a snow berm at the base of the access path, *at no ongoing cost to The Mountaineers*, to safely prevent sleds from entering the roadway. 5/20 RP at 130. But rather than do so, The Mountaineers directed Ski Lifts to "to *avoid* the creation of a berm." 5/21 RP at 19 (emphasis added); *see also* 5/22 RP at 118-19 and 5/28 RP at 50 (quoted on page 7 above). Undisputed evidence also establishes that The Mountaineers could have simply left in place orange vinyl fencing that it already had on site and was using after business hours. 5/20 RP at 132-37. Each of these precautions was "easily doable." *Id.* at 137.

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[6] The Ninth Circuit reached a similar result in *State of Oregon v. Tug Go-Getter*, 468 F.2d 1270 (9th Cir. 1972). Confronted with evidence that 40-50% of the barge traffic under a particular bridge was accomplished with a single tug, the court held that this evidence "seems only to suggest that 40 to 50 percent of the vessels navigating the river were guilty of negligence." *Id.* at 1275.

Also similar to *Helling*, The Mountaineers would argue that the risk of sledding into the roadway at the base of an access road that funnels directly into that roadway "may appear quite minimal." 83 Wn.2d at 518. Perhaps it is even "one out of 25,000 persons," just as it was with glaucoma in persons under 40 years of age in *Helling*. *Id.* But also like *Helling*, if the anticipated risk occurs, the result is both "grave and devastating" (*id.*) – as the facts in this case demonstrate. On this record, "[t]here are no disputed facts to submit to the jury on the issue of the defendants' liability." *Id.* at 519. Instead, as in *Helling*, it is so "imperative" to construct a barrier at the base of sledding area access paths that funnel directly into a roadway that "it is the duty of the courts to say what is required" *irrespective* of any alleged industry standard. *Id.* Plaintiffs respectfully request that the Court announce such a rule, vacate the trial court's judgment, and remand the matter, as in *Helling*, "for a new trial on the issue of damages only." *Id.*

VI. CONCLUSION

For the foregoing reasons, this Court should vacate the trial court's judgment and remand the matter for a new trial on the issue of damages only. At the very least, the matter should be remanded so that a jury can

decide Plaintiffs' negligence claim without Mr. Stoddard's improper and highly prejudicial testimony.

RESPECTFULLY SUBMITTED this 30th day of January, 2015.

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CERTIFICATE OF SERVICE

I certify that on the date shown below a copy of this document was sent as stated below.

Ruth Nielsen Keating, Bucklin & McCormack 800 Fifth Avenue, Suite 4141 Seattle, WA 98104	☐ via efiling/email ☒ via messenger ☐ via US Mail ☐ via fax

SIGNED in Seattle, Washington this 9th day of January, 2015.

Mary Monschein