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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/Cross-Appellant.

REPLY BRIEF OF APPELLANTS/CROSS-RESPONDENTS

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I. INTRODUCTION

In their opening brief, Plaintiffs established that Mr. Stoddard's industry standard testimony was not admissible unless he could establish that at least two other sledding area operators did not construct a barrier at the base of an access path that funneled directly into a roadway. Opening Br. at 20-23.[1] Despite these foundational requirements, Mr. Stoddard did not identify in the trial court any such sledding operation. Without that critical foundational evidence, Mr. Stoddard's testimony regarding an alleged "industry standard" was inadmissible under Washington law and the trial court therefore abused its discretion in allowing that testimony.

The Mountaineers does not even attempt to argue that Mr. Stoddard identified another sledding area operator that did not construct a barrier at the base of an access path that funneled directly into a roadway. Instead, it argues that Plaintiffs failed to preserve this error by objecting at trial and that their only recourse was to cross-examine Mr. Stoddard on this issue. But as Plaintiffs also established (Opening Br. at 25-26), it was *The Mountaineers'* burden, as the proponent of Mr. Stoddard's testimony, to establish admissibility *before* Mr. Stoddard

[1] This reply uses the same abbreviations as Plaintiffs' Opening Brief. In addition, "Opening Br." refers to Appellants' Opening Brief and "Respondent Br." refers to the Opening Brief of Respondent/Cross-Appellant.

testified at trial, and it was not possible to effectively cross-examine Mr. Stoddard because he was permitted to testify regarding a purported industry standard without identifying a factual basis for that testimony. That is the precise objection that Plaintiffs asserted in their motion in limine, and by filing that motion they properly preserved the issue for this Court's review.

The Mountaineers' cross-appeal arguments are no better. The Mountaineers claims that the trial court erred in granting partial summary judgment on its defense of express release. The trial court granted Plaintiffs' motion because it *correctly* concluded that the release, by its terms, applies only to injuries arising out of or connected with participation in the activities offered by The Mountaineers, which in this case is *sledding* in the *designated sledding area.* Here, in contrast, Jacob Ponce's injuries were caused by The Mountaineers' failure to construct a barrier at the base of its access path. On these facts, the release that The Mountaineers drafted does not apply. Moreover, there are several alternative grounds to affirm the trial court's ruling on this issue – one of which The Mountaineers has conceded. Its cross-appeal therefore fails.

II. COUNTERSTATEMENT OF ISSUES ON CROSS-APPEAL

1. Whether the trial court erred in granting partial summary judgment on The Mountaineers' defense of express release because the asserted release applies only to injuries – unlike Jacob's – arising out of or connected with sledding in the designated sledding area.

2. Whether the trial court's summary judgment ruling regarding The Mountaineers' express release defense should be affirmed, in whole or in part, on one or more of the following alternative grounds (one of which is conceded):

a. the release does not apply to Plaintiffs' claims because Jacob's mother did not designate Jacob as the "participant" as required to release the claims at issue;

b. the release violates public policy as applied here because it purports to release The Mountaineers from its duty to ensure that its access path was reasonably safe for invitees;

c. under Washington law, Jacob's mother could not release Jacob's future cause of action for personal injuries (The Mountaineers has conceded this point); and

d. Jacob's mother also could not, and did not, release The Mountaineers from liability for the separate claims of Jacob's father.

III. REPLY ARGUMENT ON APPEAL

A. The Court Should Vacate The Trial Court's Judgment And Remand The Matter For Trial Because Mr. Stoddard's Industry Standard Testimony Was Both Inadmissible And Highly Prejudicial.

1. Mr. Stoddard's Industry Standard Testimony Was Both Inadmissible And Highly Prejudicial.

As noted in Section I above, the overarching principle that follows from the four additive legal requirements that Plaintiffs discussed at pages 20-23 of their opening brief is that Mr. Stoddard's industry standard testimony was not admissible unless and until he could establish that at least two other sledding area operators did not construct a barrier at the base of an access path that funneled directly into a roadway. Plaintiffs represented to this Court that Mr. Stoddard did not make any such showing (Opening Br. at 24), *and The Mountaineers do not argue otherwise*.

Because The Mountaineers recognizes, as it must, that Mr. Stoddard did not identify any other sledding area operator that did not construct a barrier at the base of an access path that funneled directly into

a roadway, it attempts to argue that there is no *legal support* for Plaintiffs' argument – going so far as to claim that "Plaintiffs have cited no authority" supporting their argument and adding that "[w]here no authorities are cited in support of a proposition, the court will ordinarily not consider such assignments...." Respondent Br. at 24 (internal quotation marks omitted). Contrary to The Mountaineers' argument, Plaintiffs cited *numerous* authorities in support of their argument. Starting with the "same or similar circumstances" requirement in WPI 10.01 and 10.02 (*see* Opening Br. at 13), Plaintiffs relied on the following:

- In *Queen City Farms, Inc. v. The Central Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 103-04, 882 P.2d 703 (1994) (Opening Br. at 21-22), the Washington Supreme Court held that an underwriting 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."

- In *State v. J-R Distributors, Inc.*, 82 Wn.2d 584, 644, 512 P.2d 1049 (1973) (Opening Br. at 22), the Washington Supreme Court held that evidence regarding acceptance of other films was not admissible in an obscenity case because the questioned film and the proffered film must be "similar" and "there was no way for the jury to have compared similarity, or lack thereof."

- In *Puget Sound Elec. Ry. v. Carstens Packing Co.*, 76 Wash. 364, 366, 136 P. 117 (1913) (Opening Br. at 22), the Washington Supreme Court held that evidence that another railroad loaded cars in the same manner as the defendant was not admissible because

the tracks at issue had greater curves and side wash and therefore were not sufficiently similar.

- In *Grand Trunk R. Co. v. Richardson*, 91 U.S. 454, 469-70 (1875) (Opening Br. at 22 n.3), the Court held "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."

Then, turning to the *additional* requirement that to establish an industry standard there must be evidence regarding the conduct of more than one other actor, Plaintiffs relied on several additional authorities:

- In *Young v. Key Pharmaceuticals, Inc.*, 130 Wn.2d 160, 174-75 922 P.2d 59 (1996) (Opening Br. at 23, the Washington Supreme Court held that the trial court correctly excluded evidence that another drug manufacturer had provided in its advertising additional information about a product and its potential dangers because there was no showing that this "single post-incident statement" was the industry standard.

- In *Haysom v. Coleman Lantern Co.*, 89 Wn.2d 474, 489, 573 P.2d 785 (1978) (Opening Br. at 23), the Washington Supreme Court 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."

- In *Miller v. Staton*, 58 Wn.2d 879, 885, 365 P.2d 333 (1961) (Opening Br. at 23 n.4), the Washington Supreme Court held that even when the 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."

Remarkably, The Mountaineers does not distinguish *or even mention* any of the above authorities in its response brief.

Rather than attempt to refute Plaintiffs' discussion of applicable case law, The Mountaineers claims that the evidentiary issue in this case is governed by ER 705, which generally allows an expert to give opinion testimony "without prior disclosure of the underlying facts or data." Respondent Br. at 28. The Mountaineers' argument is based on a fundamental misunderstanding of ER 705. While that rule allows experts to give opinion testimony without first disclosing the underlying facts or data at trial, the issue here is not whether the underlying facts should have been presented to the jury at trial but rather whether Mr. Stoddard had a sufficient foundational basis for his opinion. That issue is governed by ER 702 and the other authorities that Plaintiffs cited – and which The Mountaineers ignores – and not by ER 705.

The Washington Supreme Court addressed this interplay between ER 702 and ER 705 in *Queen City Farms.* The court there expressly recognized that "under ER 705 the expert need not disclose the facts and data underlying his or her opinion." 126 Wn.2d at 103. But having recognized that point, which is the centerpiece of The Mountaineers' ER

705 argument, the court *also* recognized that (a) the expert is required to disclose those facts and data to the opposing party and (b) expert testimony should "be excluded" if there is "no basis" for that testimony. 126 Wn.2d at 103. The court further noted that "there is no value in an opinion that is wholly lacking some factual basis" and ultimately held, *based on ER 702*, that the trial court abused its discretion when it admitted expert testimony that "lacked sufficient foundational facts." *Id.* at 102-04. The Mountaineers ignores *Queen City Farms* even though Plaintiffs discussed the opinion in their opening brief (at pages 21-22) and even though it is fatal to its ER 705 argument.

State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994), cited by The Mountaineers (Respondent Br. at 31), does not support its argument. The State in *Russell*, unlike The Mountaineers here, "allowed the defense to review the *same data* on which [its expert] relied." *Id.* at 75 (emphasis added). In addition, the trial court expressly "reasoned that meaningful cross examination was possible by pointing out that [the expert] was basing his conclusions on data interpreted by another person." *Id.* at 74. On these facts, the Washington Supreme Court concluded that the trial court did not abuse its discretion in admitting expert testimony based on

that data. *Id.* at 75. Consistent with *Plaintiffs'* analysis, *Russell* confirms that expert testimony must be supported by facts or data that are both *identifiable* and *made available* to opposing counsel.

Legal commentators agree with this analysis. The Washington Practice deskbook, for example, emphasizes that, because ER 705 does not require disclosure of underlying facts and data on direct examination at trial, opposing counsel must "make maximum use of pretrial discovery in order to learn *the facts upon which the expert will base his or her opinion.*" 5B Washington Practice § 705.9, at 304 (emphasis added). As the deskbook confirms, an expert must base his or her testimony on *facts* and those facts are subject to pretrial discovery.

Because ER 705 parallels Fed. R. Evid. 705, the Federal Practice and Procedure treatise also is instructive. *See* 5B Washington Practice § 705.2, at 289 (describing "minor differences" between ER 705 and Fed. R. Evid. 705 and adding: "Despite these minor differences ... federal treatises may be helpful in interpreting the Washington rule."). A leading treatise regarding federal practice explains that in cases, like this one, where the court must determine whether an expert's opinion testimony satisfies Rule 702's "assist the trier of fact" standard, the facts that support

the expert's testimony must be disclosed so that the court can properly determine whether the testimony is admissible under this standard. 29 Federal Practice and Procedure § 6293, at 419. Contrary to The Mountaineers' argument, nothing in ER 705 allows an expert to testify without an adequate factual basis for his or her testimony. Yet that is precisely what the trial court permitted Mr. Stoddard to do.

Finally, in addition to ignoring the legal authorities cited by Plaintiffs, The Mountaineers also ignores Plaintiffs' lengthy argument that the trial court's error was prejudicial. Opening Br. at 29-35. As Plaintiffs explained, the trial court's error allowed Mr. Stoddard to testify that The Mountaineers' conduct was precisely the same as what others have done under the same or similar circumstances – *the central standard of care issue in the case* – 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. *Id.* at 29-30. The trial court's error also prevented any meaningful cross-examination regarding the critical differences between The Mountaineers' facility and the 300-400 *undisclosed* ski area inspections and 50 *undisclosed* snow tubing facilities that Mr. Stoddard repeatedly referenced in his testimony. *Id.* at 31-35.

The Mountaineers does not dispute *any* of this analysis, thereby conceding that the trial court's error was prejudicial.

2. Plaintiffs Did Not Waive Their Objections To Mr. Stoddard's Industry Standard Testimony.

Unable to contest Plaintiffs' discussion of the applicable legal principles and their detailed showing of prejudice, The Mountaineers turns to waiver principles. First, it argues that Plaintiffs waived their objection to Mr. Stoddard's industry standard testimony by failing to preserve the objection at trial. Respondent Br. at 26-29. Second, it claims that Plaintiffs had an alternative remedy available at trial and waived their objection to Mr. Stoddard's industry standard testimony by allegedly failing to pursue that remedy. *Id.* at 29-31. Both arguments easily fail.

a. Plaintiffs Preserved Their Objection To Mr. Stoddard's Industry Standard Testimony By Filing A Motion In Limine Regarding That Testimony.

Starting with The Mountaineers' argument that Plaintiffs waived their objection to Mr. Stoddard's industry standard testimony by failing to preserve the objection at trial, the controlling authority is *State v. Powell*, 126 Wn.2d 244, 893 P.2d 615 (1995). The Washington Supreme Court there began by addressing "whether the evidence issues have been properly preserved for appeal." *Id.* at 256. Much like The Mountaineers

here, the State in *Powell* argued "that when no objection is made to the evidence at trial, an evidentiary error is not preserved for appeal." *Id.* The court rejected that argument as follows:

> A different situation is presented, however, when, as here, evidentiary rulings are made pursuant to motions in limine. Because the purpose of a motion in limine is to avoid the requirement that counsel object to contested evidence when it is offered during trial, the losing party is deemed to have a standing objection where a judge has made a final ruling on the motion, unless the trial court indicates that further objections at trial are required when making its ruling.

Id. (internal quotations marks and brackets omitted). Because the trial court in *Powell* had conclusively ruled that the contested testimony was admissible, the Washington Supreme Court rejected the State's preservation of error argument and held instead that "Powell had standing objections" to the evidence and "further objection was not required to preserve error." *Id.* at 258. Other Washington courts have similarly held.[2]

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[2] *See, e.g., Millican v. N.A. Degerstrom, Inc.*, 177 Wn. App. 881, 889, 313 P.3d 1215 (2013) ("estate's motion in limine was sufficient to raise and preserve its objection"), *review denied,* 179 Wn.2d 1026, 320 P.3d 718 (2014); *State v. McDaniel*, 155 Wn. App. 829, 853, 230 P.3d 245 (2010) ("unless the trial court indicates further objections are required when making its ruling, its decision is final, and the party losing the motion in limine has a standing objection") (internal quotation marks omitted); *State v. Stein*, 140 Wn. App. 43, 70, 165 P.3d 16 (2007), *as amended* (Aug. 21, 2007) ("Where a party moves in limine before trial to exclude evidence and the trial court makes a final ruling on the motion, the party is deemed to have a standing objection to the evidence.") (citing *Powell*).

The same reasoning and result apply here. Like the plaintiff in *Powell*, Plaintiffs here filed a motion in limine in which they specifically raised their foundational objection to Mr. Stoddard's industry standard testimony. CP 322-26. And similar to the trial court in *Powell*, the trial court here conclusively ruled that the contested testimony was admissible. CP 713. Applying *Powell*, Plaintiffs had a "standing objection" to Mr. Stoddard's industry standard testimony and "*further objection was not required to preserve error.*" 126 Wn.2d at 258 (emphasis added). Although *Powell* is the controlling opinion on this point, The Mountaineers does not discuss, attempt to distinguish, or even acknowledge the case.

Instead, The Mountaineers cites two cases that do not apply here. In *DeHaven v. Gant*, 42 Wn. App. 666, 713 P.2d 149 (1986) (Respondent Br. at 29), the court held that DeHaven (the appellant) was required to specifically object at trial to preserve an objection for appeal because his earlier motion in limine was "general" and the trial court did not conclusively decide the motion. *Id.* at 670. In sharp contrast to the trial court in *Powell*, the trial court in *DeHaven* ruled only that "[w]hat you can ultimately bring in will be subject to further determination." *Id.* On those

specific facts, the court held that DeHaven was required to object again at trial in order to preserve her objections for appeal. *Id.*

In the other case cited by The Mountaineers – *Miller v. Kenny*, 180 Wn. App. 772, 325 P.3d 278 (2014) (Respondent Br. at 27) – Safeco argued in its motion in limine that the trial court should preclude the plaintiff from asserting "golden rule arguments" and "send-a-message arguments," but the trial court's ruling on the motion only precluded "golden rule arguments." *Id.* at 817. The plaintiff's counsel then asserted in closing an argument that was "close to the line separating the two." *Id.* On these facts, where the trial court's ruling regarding a motion in limine was not clearly applicable and where any prejudicial effect of counsel's argument could be cured "by the trial court instructing the jury to disregard the argument," the court rejected Safeco's argument that its motion in limine alone preserved error. *Id.* at 816-17.

This case is markedly different. Here, Plaintiffs filed a motion in limine in which they *specifically* raised their foundational objection to Mr. Stoddard's industry standard testimony:

> 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. Far from being "general" in nature or otherwise imprecise, Plaintiffs raised the specific issue that they are now asserting on appeal.

In addition, the trial court scheduled oral argument regarding Plaintiffs' motion in limine a few days before opening statements, and Plaintiffs' counsel *again* asserted that Mr. Stoddard's "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 (emphasis added); *see also id.* at 119 (objecting to Mr. Stoddard's industry standard testimony "without giving us some sort of foundation to test whether ... what he's saying is true"). In this respect as well, Plaintiffs specifically preserved the precise argument that they are now asserting on appeal.

Nor does this case raise any of the additional circumstances that were critical to the court's holding in *Miller*. Unlike in *Miller*, the trial court's ruling here denying Plaintiffs' motion in limine did not preclude some of Mr. Stoddard's industry standard testimony and permit the rest. To the contrary, the trial court denied Plaintiffs' motion *in its entirety* and specifically ruled that Mr. Stoddard could "refer to 'industry standards' in

describing his understanding of what other recreation areas do in similar situations." CP 713. Given the trial court's ruling, there was no requirement that Plaintiffs object again at trial so that the trial court could consider whether to instruct the jury to disregard testimony that it had already concluded was admissible. On the record presented here, *Miller* is inapposite. Instead, *Powell* is controlling. The Mountaineers' first waiver argument therefore fails.

b. The Mountaineers' Argument That Plaintiffs' Only Recourse Was To Cross-Examine Mr. Stoddard Erroneously Assumes Admissibility.

The Mountaineers' second waiver argument – that Plaintiffs had an alternative remedy available at trial and waived their objection to Mr. Stoddard's industry standard testimony by allegedly failing to pursue that remedy (Respondent Br. at 29-31) – also fails. According to that argument, "ER 705 stands for the proposition that it was up to plaintiffs to inquire and point out any deficiencies in the facts or data underlying Mr. Stoddard's opinions" and Plaintiffs somehow failed to do so – resulting in waiver. *Id.* at 31. This argument is both legally and factually incorrect.

Legally, The Mountaineers are confusing admissibility of expert testimony – an issue that courts decide – with the weight to be given that testimony once admitted – an issue that juries decide. The Third Circuit

expressly addressed this distinction in *Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408 (3rd Cir. 2002), as follows: "*Once Bell's expert met the foundational requirements for admissibility*, the burden shifted to plaintiffs to explore any deficiencies in the expert's sources." *Id.* at 414 (emphasis added). As *Stecyk* shows, the burden does not shift to the opposing party to show that the testimony is not entitled to significant weight until *after* the proponent of expert testimony has established the foundational requirements for admissibility. Indeed, if The Mountaineers' argument were accepted, cross-examination would obviate any need to ensure admissibility. That makes no sense.

Nor have Washington courts adopted any such rule. In *Queen City Farms*, for example, the Washington Supreme Court held that the trial court abused its discretion when it admitted expert testimony that "lacked sufficient foundational facts" even though the opposing party, like Plaintiffs here, was presumably able to cross-examine the expert at trial. 126 Wn.2d at 104. In addition, Washington courts have repeatedly held that the *proponent* of evidence must establish foundation and other

requirements of admissibility.[3] No court has ever held that the opportunity to cross-examine experts and other witnesses somehow changes these evidentiary requirements.

The cases cited by The Mountaineers on this point are consistent with Plaintiffs' analysis. In *State v. Eaton*, 30 Wn. App. 288, 293, 633 P.2d 921 (1981) (Respondent Br. at 29-30), the court recognized that before an expert can testify the trial court must ensure that "a proper foundation has been laid." In *Newell Puerto Rico, Ltd. v. Rubbermaid Inc.*, 20 F.3d 15 (1st Cir. 1994) (Respondent Br. at 30), the First Circuit likewise recognized: "*Once admitted*, Rules 703 and 705 *then* place the full burden of exploration of the facts and assumptions underlying the testimony of an expert witness squarely on the shoulders of opposing counsel's cross-examination." *Id.* at 20 (internal quotation marks and footnote omitted; emphasis added). These cases confirm that cross-

[3] *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."); *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."). *See also 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.").

examination occurs only *after* the court correctly determines admissibility; it is not a substitute for that determination.[4]

Factually, The Mountaineers' argument also fails. Contrary to The Mountaineers' assertion that Plaintiffs somehow failed to "inquire and point out any deficiencies in the facts or data underlying Mr. Stoddard's opinions" (Respondent Br. at 31), Plaintiffs *inquired* at Mr. Stoddard's deposition (CP 290-313) and proceeded to *point out* in their subsequent motion in limine that "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" (CP 325).

Plaintiffs then reviewed the briefing and declaration that The Mountaineers submitted in response to their motion in limine. But once again, The Mountaineers acknowledged that Mr. Stoddard's industry standard testimony would be based on "his professional experience" (CP 429 n.2), including, according to Mr. Stoddard, "hundreds of inspections

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[4] The Mountaineers also cites *Russell* in this portion of its brief (at page 31). Its reliance on *Russell* is misplaced for the reasons set forth on page 8-9 above.

across the country" (CP 460 ¶ 16). At that point, any further inquiry was unnecessary because The Mountaineers had effectively conceded that Mr. Stoddard would not, and could not, identify any other sledding area operator that did not construct a barrier at the base of an access path that funneled directly into a roadway.

Plaintiffs then *pointed out* again, this time at oral argument, that Mr. Stoddard's industry standard testimony was inadmissible under ER 702, WPI 10.01 and 10.02, *Queen City Farms*, and the other authorities discussed above because Mr. Stoddard – admittedly – "couldn't identify a specific area that he was referring to" and, as a result, "there's no way for us to cross him on that." 5/15 RP at 106. The trial court then rejected that argument. CP 713 (quoted on pages 15-16 above). Applying *Powell*, Plaintiffs were not required to do anything further to preserve their foundational objection for appellate review. The Mountaineers' second waiver argument, like its first, therefore fails.

3. The Trial Court Abused Its Discretion By (a) Applying The Wrong Legal Standard, (b) Ignoring Critical Legal Requirements That Applied To Mr. Stoddard's Industry Standard Testimony, And (c) Exercising Any Discretion On Untenable Grounds.

Lastly, The Mountaineers also emphasizes in its brief that the standard of review is abuse of discretion and that trial courts "are

generally in the best position to evaluate an expert's qualifications and the reliability of an expert's methodology." Respondent Br. at 22. But Plaintiffs' arguments have nothing to do with Mr. Stoddard's qualifications or the reliability of his methodology. Rather, the issue is whether his industry standard testimony should have been excluded because it lacked sufficient foundational facts. The Washington Supreme Court squarely addressed that issue in *Queen City Farms* and concluded that "the trial court *abused its discretion* by admitting" such testimony. 126 Wn.2d at 103 (emphasis added). In *Stecyk*, the Third Circuit likewise recognized that "[i]t is an *abuse of discretion* to admit expert testimony which is based on assumptions lacking any factual foundation in the record." 295 F.3d at 414 (emphasis added).

In addition, as Plaintiffs also established (Opening Br. at 20-29), the trial court applied the wrong legal standard and overlooked the requirements (i) that there be a factual basis (foundation) for Mr. Stoddard's testimony, (ii) that Mr. Stoddard address what other sledding area operators have done "under the same or similar circumstances," and (iii) that Mr. Stoddard 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. As a result, the trial court exercised any discretion it may have had on untenable grounds and for untenable reasons. These circumstances constitute an abuse of discretion under Washington law. [5] Because the trial court's error was admittedly prejudicial, the Court should vacate the trial court's judgment and remand the matter for trial.

B. Alternatively, The Court Should Hold That The Mountaineers Is Liable As A Matter Of Law and Thereby Ensure That Sledding Area Operators In Washington Do Not Let What Happened To Jacob Happen To Anyone Else.

The issue in this case that raises the most significant public policy considerations is that 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*. Where, as here, there is a potential risk of "a grave and devastating result" and the cost of preventing that harm is minimal, numerous courts – including the Washington Supreme Court – have not hesitated to "say what is required." *Helling v. Carey*, 83 Wn.2d 514, 519, 519 P.2d 981 (1974) (internal quotation marks omitted);

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[5] *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 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").

State of Oregon v. Tug Go-Getter, 468 F.2d 1270, 1272 (9th Cir. 1972) (same). The Court should do so here and thereby ensure that sledding area operators in Washington do not let what happened to Jacob happen to anyone else.

The Mountaineers opposes this argument – apparently leaving open the possibility of another accident like Jacob's – on two principal grounds. First, it claims that "Plaintiffs did not raise *Helling* to the trial court." Respondent Br. at 32. That is true, but it is also immaterial. In *Helling*, not only did the plaintiff fail to raise the substantive standard of care issue in the trial court, he also failed to raise it on appeal – arguing instead that the trial court did not properly instruct the jury. 83 Wn.2d at 516-17. The Washington Supreme Court found that issue "inconsequential" in light of its broader analysis and held instead that giving a 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.* at 519 (emphasis added). The court's holding in *Helling* has likely prevented grave harm to innumerable individuals both

in this state and elsewhere. The circumstances in this case are no less compelling.

Second, The Mountaineers argues that the holding in *Helling* "is restricted to its facts" and does not apply where, as alleged by The Mountaineers, the proposed precaution is not simple, inexpensive, reliable, and risk-free. Respondent Br. at 34-38. To be clear, Plaintiffs are not suggesting any particular precaution – whether a snow berm, hay bales, or fencing. Rather, Plaintiffs are asking this Court to rule that (a) The Mountaineers is liable as a matter of law because it did not construct *any barrier whatsoever* to prevent sleds from entering the roadway, and (b) sledding area operators must construct *some sort of barrier* at the base of sledding area access paths that funnel directly into a roadway to *safely* prevent sleds from entering the roadway. Because such a ruling would allow Plaintiffs to seek appropriate compensation for their losses and would ensure that sledding area operators in Washington do not let what happened to Jacob happen to anyone else, Plaintiffs respectfully request that the Court so rule.

IV. RESPONSE TO CROSS-APPEAL

A. The Trial Court Correctly Rejected The Mountaineers' Express Release Defense On Summary Judgment Because Plaintiffs' Claims Do Not Arise Out Of Nor Are They Connected With *Sledding* In The *Designated Sledding Area.*

For its cross-appeal, The Mountaineers argues that the trial court erred in granting partial summary judgment rejecting its express release defense. Respondent Br. at 39-47. As The Mountaineers notes, that defense is based on a "User Form" that Jacob's mother, Karim Zapana, signed when she paid the user fee at the base of the access road. *Id.* at 40. That form states:

> GUEST RELEASE AND INDEMNITY AGREEMENT
>
> I, Karim Zapana hereby state that I wish to participate in courses and/or activities offered by The Mountaineers, a non-profit corporation. I recognize any outdoor activity may involve certain dangers, including but not limited to the hazards of travelling in mountainous terrain, accidents or illness in remote places, force of nature, and the actions of participants and other persons. I further understand and agree that without some program providing protection of its assets and its leaders, The Mountaineers would not be able to offer its courses and activities.
>
> In consideration of and as part payment for the right to participate in the activities offered by The Mountaineers, I agree to RELEASE, HOLD HARMLESS AND INDEMNIFY The Mountaineers and its members from any and all liability, claims and causes of action arising out of or in any way connected with my participation, or the participation of any minor that I am signing on behalf of, in any activities offered by The Mountaineers. I personally assume all risks in connection with these activities. If I am signing on behalf of a minor, I further agree to HOLD HARMLESS AND INDEMNIFY The Mountaineers and its members from all liability, claims and causes of action which the minor may have arising from the

minor's participation in activities. The terms of this agreement shall serve as a release and indemnity agreement for my heirs, personal representative, and for all members of my family, including any minors. (Parents or legal guardians must sign for all persons under eighteen (18) years of age.) **I have read this release and indemnity agreement and have fully informed myself of its contents before I have signed it.**

Karim Zapana	*2/19/2012*	*David, Karim, Shaina, Jacob, Janelle*
Signature of Participant	Date	Name of family members and guardians
Signature of Parent or Guardian if Participant Is Under 18 Years of Age	Date	Name of family members and guardians

CP 1057. Applying this release to the facts at issue, the trial court rejected The Mountaineers' express release defense as follows:

> The Mountaineers' Guest Release and Indemnity Agreement does not apply to the facts of this accident because the accident is not "arising out of or in any way connected with" any activities offered by the Mountaineers as stated by the Release. Rather, the accident resulted from The Mountaineers [sic] failure to maintain reasonably safe premises by failing to erect a barrier at the bottom of the hill of the snow-covered pathway which provided access to the activities offered by Mountaineers.

CP 1140. Plaintiffs agree with The Mountaineers that this ruling "is reviewed de novo." Respondent Br. at 38.

Whether this ruling is correct turns on whether the language of the release encompasses the circumstances of Jacob's death. That issue can properly be determined as a matter of law. Starting with the circumstances of Jacob's death, the operative facts are not in dispute and can be taken from *The Mountaineers'* own appellate brief. As described

there, Jacob sat on a sled being pulled up the access road by a "family member" who was "surprised by this sudden action and let go of the sled." *Id.* at 10. At that point, "[t]he sled started sliding backwards down the snow-covered path." *Id.* The sled "went back down the path and out into the road." *Id.* "Sadly, a car was coming down the road at that precise moment and the driver was unable to stop." *Id.* Lastly, "Jacob was hit by the car and killed." *Id.* Even when the Court views the facts in The Mountaineers' favor, as The Mountaineers repeatedly emphasizes (*e.g., id.* at 3, 39, 42), these are the operative facts for purposes of The Mountaineers' express release defense.

The scope of the release, in turn, presents a pure question of law. *See, e.g., Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 490, 834 P.2d 6 (1992) ("[t]he sufficiency of the language to effect a release is generally a question of law"). In deciding whether a release provides a defense to negligence claims, Washington courts have repeatedly emphasized that "agreements that purport to exculpate an indemnitee from liability for losses flowing solely from his own acts or omissions are not favored and are to be clearly drawn and strictly construed, with any doubts therein to be settled in favor of the indemnitor." *Snohomish Cnty. Pub. Transp.*

Benefit Area Corp. v. FirstGroup Am., Inc., 173 Wn.2d 829, 836, 271 P.3d 850 (2012); *Scott*, 119 Wn.2d at 490 ("[e]xculpatory clauses are strictly construed"). In addition, "if ambiguity exists, the doubt created thereby will be resolved against the one who prepared the contract." *Jones v. Strom Const. Co., Inc.*, 84 Wn.2d 518, 520, 527 P.2d 1115 (1974). None of these legal principles is in dispute.

Based on these undisputed facts and legal principles, the trial court *correctly* rejected The Mountaineers' express release defense. For the release to apply, Plaintiffs' claims must arise out of or be connected to "*participation* ... in any *activities offered by The Mountaineers*." CP 1057. The Mountaineers offered two such activities at the Snoqualmie Campus: sledding and snowshoeing in the designated sledding and snowshoe areas. CP 1029. But it is undisputed that Jacob was not sledding in the designated sledding area, nor was he snowshoeing. Instead, as The Mountaineers' own brief makes clear (as set forth above), the accident occurred when Jacob and his family were climbing the access road *before* he had an opportunity to participate in the activities offered by The Mountaineers. The trial court correctly ruled that the release does not apply on these undisputed facts. CP 1140. That is particularly so when

the release – including the critical terms "participation" and "activities" – is strictly construed with any doubts or ambiguity resolved in Plaintiffs' favor, as Washington law requires.

Contrary to The Mountaineers' argument (Respondent Br. at 42-43), the Washington Supreme Court's opinion in *Scott* does not undermine the trial court's analysis. In *Scott*, Justin Scott's mother submitted an application for Justin to participate in ski racing lessons. 119 Wn.2d at 488. The application included an exculpatory clause that encompassed "all claims arising out of the instruction of skiing or in transit to or from the ski area." *Id.* Justin later suffered serious injuries as a result of a ski accident that occurred when "Justin was attempting to ski on a slalom course which had been laid out by the ski school owner." *Id.* In other words, Justin was engaged in the very same activity that he had been taught by his instructor on the course that the instructor had laid out for that purpose.

The operative facts in this case are, as noted above, markedly different. Unlike the skier in *Scott*, Jacob was not injured as a result of a sledding accident that occurred when he "was attempting to [sled] on a [sledding] course which had been laid out by [The Mountaineers]." *Id.*

Nor are Plaintiffs here attempting to distinguish between two indistinguishable activities like skiing on a "race course" and "ski racing lessons" as the plaintiffs attempted to do in *Scott*. *Id.* at 492 (discussed by The Mountaineers at page 43 of its response brief). Instead, Jacob was killed *before* he even began sledding in the designated sledding area. As a result, The Mountaineers' reliance on *Scott* is misplaced.

Moreover, in addition to ignoring the rule in *Scott* that "[e]xculpatory clauses are strictly construed" (*id.* at 490), The Mountaineers ignores two other respects in which *Scott* undermines its arguments. First, *Scott* shows that The Mountaineers *could have* drafted its release, like the release in *Scott*, to include accidents that occurred "in transit to or from the [sledding] area." *Id.* The Court should not add that language to The Mountaineers' release when it failed to do so. *See, e.g., Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 913, 874 P.2d 142 (1994) ("We decline to add language to the words of an insurance contract that are not contained in the parties' agreement."); *Jarstad v. Tacoma Outdoor Recreation, Inc.*, 10 Wn. App. 551, 555, 519 P.2d 278 (1974) ("We are not permitted to reform that agreement or add to its terms in the guise of interpretation.").

Second, the Court in *Scott* also recognized a distinction, in a closely related legal context, between injuries that occur as a result of risks inherent in sports like skiing or sledding and injuries that arise out of a property owner's "negligent acts which unduly enhance such risks," including "the failure of the property owner to provide reasonably safe facilities." 119 Wn.2d at 501-02. Addressing the defense of primary implied assumption of risk, the court held that the skier in *Scott* "did assume the risks inherent in the sport (primary assumption of risk), but he did not assume the alleged negligence of the operator." *Id.* at 503. Although the issue here is express release rather than implied primary assumption of risk, the same reasoning applies because The Mountaineers' release refers to "participation" in "activities offered by The Mountaineers" (CP 1057) and says nothing about accidents that are caused by The Mountaineers' failure to provide reasonably safe facilities.

The other cases cited by The Mountaineers also do not support its argument regarding the scope of the release. According to The Mountaineers, the courts in *Nielsen v. Port of Bellingham*, 107 Wn. App. 662, 27 P.3d 1242 (2001), and *Plano v. City of Renton*, 103 Wn. App. 910, 14 P.3d 871 (2000), rejected attempts to treat access to recreational areas

as distinct from the recreational location itself. Respondent Br. at 43. The courts in these cases did not interpret a contractual release, nor did they decide whether the plaintiffs had expressly released the defendants from liability. Instead, they were applying the Washington recreational use statute (RCW 4.24.210), which provides immunity for landowners for unintentional injuries to users of lands or water areas that are made available to the public for recreational use "without charging a fee of any kind." *Nielsen*, 107 Wn. App. at 666-67; *Plano*, 103 Wn. App. at 912. The cases turned on whether the owners charged a fee to use the portion of their property where the plaintiffs' injuries occurred (which both did). *Nielsen*, 107 Wn. App. at 668-69; *Plano*, 103 Wn. App. at 915. No such issue is presented here.

Equally important, the underlying reasoning in both *Nielsen* and *Plano* significantly undermines The Mountaineers' express release defense. Because the recreational use statute in *Nielsen* and *Plano* creates immunity and is therefore "in derogation of common law rules of liability of landowners," the statute is "to be strictly construed." *Nielsen*, 107 Wn. App. at 667. The courts ruled consistently with that legal principle in both *Nielsen* and *Plano*, finding *liability* in both cases. *Nielsen*, 107 Wn. App.

at 669; *Plano*, 103 Wn. App. at 916. In this case, that legal principle (preserving the common law rules of landowner liability) requires that the release be strictly construed, similar to the recreational use statute, so as to *preserve* the common law rules of landowner liability and The Mountaineers' corresponding liability. The Mountaineers ignores this bedrock legal principle as well.

Finally, The Mountaineers devotes the final portion of its brief to the proposition that the trial court "erred in adopting the plaintiffs' theory of the case on summary judgment" and that causation and duty of care are fact issues "for the jury." Respondent Br. at 45-47. These arguments likewise fail. As set forth on page 27 above, the dispositive facts are not in dispute. The trial court did not need to – nor did it – resolve any fact issues, nor did it resolve any fact issues regarding causation or duty of care. Instead, the trial court ruled that "the accident is not 'arising out of or in any way connected with' any activities offered by the Mountaineers *as stated by the Release*." CP 1140 (emphasis added). That issue – whether the release, strictly construed, applies to the undisputed facts – is a *legal issue*, and the trial court correctly decided it on summary judgment. For that reason as well, the ruling should be affirmed.

B. The Trial Court's Summary Judgment Ruling Regarding The Mountaineers' Express Release Defense Can Also Be Affirmed, In Whole Or In Part, On Several Alternative Grounds – One Of Which Is Conceded By The Mountaineers.

Even if the Court were to conclude that Plaintiffs' claims arise out of or are connected with participation in the activities offered by The Mountaineers, that would not allow The Mountaineers to avoid liability because there are several alternative grounds to affirm the trial court's summary judgment ruling regarding the express release defense. The Court can properly affirm, at least in part, on any of those grounds. *See, e.g., Grange Ins. Ass'n v. Roberts*, 179 Wn. App. 739, 757, 320 P.3d 77 (2013) ("an appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court") (internal quotation marks omitted); *Mudarri v. State*, 147 Wn. App. 590, 600, 196 P.3d 153 (2008), *as corrected* (Jan. 21, 2009) ("We may also affirm the trial court on any alternative ground that the record adequately supports."). There are four such alternative grounds, as set forth briefly below.

First, even if the claims at issue here arose out of or were connected to the activities offered by The Mountaineers, the signed release does not in any event apply to *Jacob's* participation in those activities. The release includes two signature lines: one for "Signature of

Participant" and another for "Signature of Parent or Guardian if Participant Is Under 18 Years of Age." CP 1057. For the release to apply here, where Jacob was the alleged participant, Jacob must have signed as "Participant" and his mother or father must have signed as "Parent or Guardian if Participant Is Under 18 Years of Age" That did not happen. Instead, the signed release indicates that the participant is Jacob's mother, and she signed the release *solely* as the participant and *not* as the parent of a participant who was under 18 years of age. *Id.*[6] The release therefore does not apply to Plaintiffs' claims and, on this alternative ground, the trial court's summary judgment ruling regarding The Mountaineers' express release defense can be affirmed *in its entirety*.

Second, even if Jacob were the designated participant, the release is not enforceable as to Plaintiffs' claims because it violates public policy as applied to The Mountaineers' affirmative obligation to ensure that its access path was reasonably safe for invitees. In *Vodopest v. MacGregor*, 128 Wn.2d 840, 848-49, 913 P.2d 779 (1996), the Washington Supreme

[6] Although the release refers to "the participation of any minor that I am signing on behalf of," that still requires that Jacob's name appear on the line designated "Signature of Participant." That did not occur. *Id.* The fact that Jacob's mother listed Jacob's name on the line asking for "Name of family members or guardians" (*id.*) is likewise irrelevant because, there too, he is not the designated participant.

Court recognized that outside of "the setting of adults engaging in high-risk sporting activities," Washington courts "have often found preinjury releases for negligence to violate public policy." Relevant here, the Washington Supreme Court in *McCutcheon v. United Homes Corp.*, 79 Wn.2d 443, 447, 486 P.2d 1093 (1971), held that a disclaimer of liability agreement that purported to release a landlord from liability arising out of its negligent maintenance of common areas "not only lowers the standard imposed by the common law, it effectively destroys the landlord's affirmative obligation or duty to keep or maintain the 'common areas' in a reasonably safe condition for the tenant's use." Such a waiver, the court held, "offends the public policy of this state and will not be enforced by the courts." *Id.* at 450. The same reasoning and result apply here as well, because Jacob's injuries were not caused by a risk inherent in sledding but rather by The Mountaineers' failure to ensure that its access path was reasonably safe for invitees. As in *McCutcheon*, the release should not be enforced as applied to Plaintiffs' claims.

Third, even if Jacob were the designated participant and the release does not violate public policy as applied to The Mountaineers' affirmative obligation to ensure that its access path was reasonably safe for invitees,

Jacob's mother could not release *Jacob's* future cause of action for personal injuries. The Washington Supreme Court squarely addressed that issue in *Scott*: "We hold that to the extent a parent's release of a third party's liability for negligence purports to bar a child's own cause of action, it violates public policy and is unenforceable." 119 Wn.2d at 495. The Mountaineers conceded this point in the trial court as follows: "Plaintiffs are correct that in [*Scott*] the Supreme Court concluded that parents lack the legal authority to waive their child's future cause of action for personal injuries. Accordingly, the signed Release does not preclude Jacob's estate from asserting a claim." CP 1091. Thus, regardless of how the Court interprets and applies the release with regard to Jacob's participation in the activities offered by The Mountaineers, it should, at the very least, affirm the trial court's ruling dismissing the express release defense with regard to the claims of Jacob's Estate.

Lastly, Jacob's mother also did not, and could not, sign for Jacob's father. The release, by its plain terms, indicates that "*I* agree to RELEASE, HOLD HARMLESS AND INDEMNIFY The Mountaineers and its members...." *Id.* (emphasis added). And while it was drafted to allow a minor to sign as the designated "Participant" in combination with

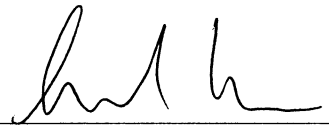
a "Signature of Parent or Guardian if Participant Is Under 18 Years of Age," nowhere does it indicate that one parent's signature can operate as a release of the other parent's claims. Moreover, when the Washington legislature created a civil action for wrongful death of a minor child, it provided that cause of action "to a mother *or* father, or both." RCW 4.24.010 (emphasis added). By signing the release as "participant," Jacob's mother did not, and could not, waive the separate claims of Jacob's father. Those claims, too, cannot be dismissed based on The Mountaineers' express release defense.

V. CONCLUSION

The Court should remand the matter for trial on the issue of damages only. At the very least, the jury should be permitted to decide Plaintiffs' negligence claim without Mr. Stoddard's improper and highly prejudicial testimony. In either case, the trial court's summary judgment ruling dismissing The Mountaineers' express release defense should be affirmed.

RESPECTFULLY SUBMITTED this 4th day of May, 2015.

PETERSON | WAMPOLD | ROSATO | LUNA | KNOPP

By 

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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.

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SIGNED in Seattle, Washington this 4th day of May, 2015.

Dana Vizzare

Dana Vizzare, Paralegal