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No. 72415-1-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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

Appellants,

vs.

THE MOUNTAINEERS,

Respondent/Cross-Appellant.

OPENING BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. INTRODUCTION

This case involves the tragic death of 7 year old Jacob Ponce who was killed when the sled he was sitting on carried him out onto the roadway where he was hit by a car. Jacob was with his family in the Snoqualmie Pass area where the family intended to go sledding. The family was walking up a snow-covered access trail that led to a sledding area operated by the Mountaineers. Jacob was not in a designated sledding area at the time of this accident. Unfortunately, while no one was paying attention to young Jacob, he sat on a sled being pulled up the trail by another family member because he was tired. The family member let go of the sled, and the sled carried Jacob out into the road.

Jacob's parents, David Ponce and Karim Zapana, individually and as co-personal representatives of the Estate (referred to in this brief as Ponce) sued the Mountaineers for negligence claiming that the access trail where the family was walking should have had a barricade at the bottom to block the trail from the road. The case was tried to a jury in King County. The Mountaineers offered testimony that the access trail on its property was typical of trails used at other winter recreation operations, and argued to the jury that this accident, while heartbreaking, was not due to any breach of duty by the Mountaineers. The jury returned a verdict finding that the defendant Mountaineers was not negligent. Plaintiffs filed

a Motion for New Trial that was denied.

Plaintiffs then filed this appeal claiming that the trial court committed reversible error allowing the testimony of defense expert witness Chris Stoddard. Mr. Stoddard, a risk management consultant in winter recreation, testified that he had conducted 300-400 inspections of winter recreation areas, and that the Mountaineers' operation was typical of what he had seen all over the country. Plaintiffs now argue that Mr. Stoddard should not have been allowed to offer his opinions at trial because he did not identify by name the other winter recreation areas that he had inspected. *Appellants' Opening Brief,* pp. 21, 26, 29, 32. Plaintiffs' appeal must be denied because the trial court properly exercised its discretion in allowing expert testimony, plaintiffs did not adequately preserve their objections at trial, and because the arguments plaintiffs make on appeal were not raised before the trial court.

The Mountaineers filed a cross-appeal based on the trial court's erroneous ruling granting partial summary judgment in favor of the plaintiffs on the defense of express release. When the plaintiffs went to the Mountaineers' property to go sledding, Karim Zapana, Jacob Ponce's mother, signed a RELEASE that would release the claims of David Ponce and Karim Zapana for the death of their child. Plaintiffs moved for partial summary judgment asking the court to dismiss the Mountaineers

affirmative defense of express release based on the Release signed by plaintiff. Trial court judge Theresa Doyle, (who was not the judge presiding over the jury trial) granted Plaintiffs' Motion for Partial Summary Judgment on Defendant's Affirmative Defenses of Express and Implied Primary Assumption of Risk. Judge Doyle ruled that the Release did 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. Rather, the accident resulted from the Mountaineers failure to maintain reasonable 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.

This ruling was in error because it contradicted the plain language of the Release, contradicted controlling case law, and failed to construe all reasonable inferences in favor of the Mountaineers, the non-moving party. The court's ruling granting partial summary judgment should be reversed. However, assuming that this appellate court affirms the jury verdict in favor of the Mountaineers, need not be reached.

II. ASSIGMENT OF ERROR ON CROSS-APPEAL

1. The trial court erred in granting Plaintiffs' Motion for Partial Summary Judgment on Defendant's Affirmative Defenses of

Express Release and Implied Primary Assumption of Risk and denying Defendant's Motion for Reconsideration. CP 1122-1123; CP 1139-1141.

III. STATEMENT OF THE CASE

A. The Mountaineers and the Snoqualmie Campus

The Mountaineers is a volunteer-based organization whose mission is to help get people outside and connect with nature by living a healthy, active lifestyle. The Mountaineers has over 13,000 members and guests and offers 3,500 different activities each year, including outdoor education in mountaineering, avalanche safety, wilderness first aid, navigation, hiking and conservation advocacy. 5/28 RP 12: 22-13: 10.

The Mountaineers own a piece of recreational property at Snoqualmie Pass referred to as the Snoqualmie Campus that was purchased in 1948. A lodge was built on the property, and the Snoqualmie Campus was traditionally used for skiing and snow play activities. Unfortunately, a trespasser set fire to the lodge and it was destroyed by arson in 2006. 5/28 RP 16: 10-18.

At the time of Jacob Ponce's accident, the Snoqualmie Campus was open to the public for snow play on the weekends, and was used primarily for educational activities by the Mountaineers. The Campus was also rented to groups such as the Boy Scouts, Girl Scouts, and church groups for winter activities like snow play (including sledding),

snowshoeing and winter camping. These activities had been going on historically for a number of years. 5/28 RP 16: 22-17:12.

The Snoqualmie Campus snow play area was accessed by a path or trail that abutted State Route 906. 5/21 RP 15:14-18. When guests arrived to use the snow play area, they were greeted by a volunteer who explained to them they had to walk up the path to reach the snow play area, and when they got to the top of the path they would be greeted by another volunteer. 5/28 RP 18. Guests were also asked to sign a form when they paid the fee to use the snow play area. 5/21 RP 73:9-19.

The Snoqualmie Campus was located between two ski areas. The Mountaineers had an agreement with the ski areas to allow skiers to use a recognized ski trail on the upper level of the Snoqualmie Campus to ski between the two ski areas. 5/21 RP 29: 12-21; 30:4-31:18. In exchange for the right to have skiers use a ski trail across the upper portion of the Mountaineers' property, the ski areas provided grooming services on the Snoqualmie Campus, including grooming the access path. 5/27 RP 140:21-141: 9.

As part of the agreement with the ski areas, the Mountaineers required the ski areas to maintain "no trespassing" signage and fencing to keep skiers from leaving the upper ski trail and skiing onto the Mountaineers' property. The ski area also agreed to have the ski patrol

monitor the area and clip the ski tickets of any ski area patrons caught trespassing on the Mountaineer's property. 5/28 RP 21:17-25.

Mary Lynch was a volunteer member of the Mountaineers who was the chair of the volunteer committee responsible for the day-to-day operations of the Snoqualmie Campus at the time of Jacob Ponce's accident. 5/21 RP 9:8-14; 10:1-7. Ms. Lynch's professional background included a degree in Mechanical Engineering. She had a long history of employment as a mechanical engineer in manufacturing facilities where her job involved safety, risk management and signage; and also included collecting information from other similar industries. *Id.* at 38-41.

Ms. Lynch was concerned that people who trespassed onto the Snoqualmie Campus when the Campus was closed – particularly skiers from the neighboring ski areas – might hurt themselves by misusing the property. Her personal worries included speculating that a trespasser might get hurt "like Jacob Ponce." *Id.* at 29-33. Ms. Lynch told Martinique Grigg, the Mountaineers' Executive Director, about her concerns that trespassers might be injured or even killed while misusing the Snoqualmie Campus property. *Id.* at 33; 84: 17-21.

In response to Ms. Lynch's concerns, Ms. Grigg asked the ski area to provide increased ski patrol vigilance in keeping trespassers off the property. 5/28 RP 23:2-9. The Mountaineers also hired a caretaker to be

on the property during the week when the property wasn't open. The caretaker was tasked with discouraging trespassers and replacing signage, and contacting Ms. Grigg if he saw anything out of the ordinary. 5/21 RP 62: 25-63:14; 5/28 RP 23:10-20.

The Snoqualmie Committee also increased the number of volunteers who would be on the property when the Campus was open to the public to make sure that members of the public were greeted and informed of where to go to access the sledding and snow play area by walking up the access trail. 5/21 RP 61:3-10; 5/28 RP 23:21-24. The Committee placed signage to prohibit trespassing and to prohibit snow play, sledding, skiing or snowshoeing on or near the access trail. 5/21 RP 53:18; 61:20-62:2.

Both Ms. Grigg and Ms. Lynch believed that Ms. Lynch's concerns that someone trespassing might be injured by misusing the property had been appropriately addressed. 5/21 RP 84:17-85:25; 5/28 RP 25:21-26:2. Ms. Lynch believed the property – including the access path – was safe to open to the general public or she would not have opened it on the day of Jacob Ponce's accident. 5/21 RP 86. No one had ever reported any accidents or injuries on the access path, and no one had ever reported guests misusing the access path (such as using the path itself for sledding). 5/28 RP 25:4-15.

B. The Plaintiffs and the Accident

Plaintiffs David Ponce and Karim Zapana were originally from Peru. 5/22 RP 11. After they moved to the United States, they went skiing on one or two occasions, and David Ponce went sledding once and thought it was very hard to walk uphill. *Id.* 14:17-15:6; 43:20-46:10.

At the time of the accident, the plaintiffs had three children – Shaina who was 15 or 16 years old, Jacob who was 7 years old, and Janell who was 4 years old. *Id.* 48:1-6. On the day of the accident, the Ponce family decided to go skiing at Snoqualmie Pass. They had never been to any of the ski areas or snow play areas at Snoqualmie Pass, and didn't know of any places to go sledding. *Id.* 73:16-24. Since none of the children had ever been skiing before, they stopped along the way to buy plastic sleds so they could go sledding if the plan to go skiing did not work out. *Id.* 74:4-12. They did stop at one of the ski areas but decided they would go sledding instead. They had no idea where to go and someone directed them to the Mountaineers Snoqualmie Campus. *Id.* 76-77. They drove along SR 906 to reach the Snoqualmie Campus, and parked on the road and walked along the side of the road to reach the Campus. 5/27 RP 49:13-25.

The family was greeted by Jennifer Hampton, a volunteer for the Mountaineers. Ms. Hampton gave plaintiffs a form to sign that included

warnings about the hazardous nature of outdoor recreation. Ms. Hampton also directed plaintiffs to walk up the access path to reach the sledding hill and explained they would be greeted by another volunteer wearing an orange vest when they reached the sledding/snow play area. Plaintiffs did not ask any questions about the form Ms. Zapana signed, or the location of the snow play area. They did not seem confused about where to go or what they were supposed to do. 5/27 RP 83-86.

Shaina started up the path ahead of the rest of the family because she had her two dogs with her and she was concentrating on watching her dogs. 5/20 RP 8:10-16. Janelle, the youngest child, ran ahead with one of the sleds. *Id.* 9:3-10. David Ponce was focused on Janelle because she was the most active of the three children and she wasn't listening to him or paying attention. 5/22 RP 85:22-88:10. Shaina testified that she was holding the two dogs with one hand and had a sled with the other hand as she walked up the access path. 5/20 RP 8:10-20. There was also evidence that David Ponce, not Shaina, was the one pulling the sled that Jacob suddenly sat down on. 5/28 31:16-32:17.

Jacob was walking along the path near his father, but his father was distracted and paying attention to Janelle and not Jacob. Jacob had recently had surgery for a heart condition and would get tired easily. As they walked up the path, Jacob suddenly announced that he was tired and

abruptly sat down in the sled. The family member pulling the sled was surprised by this sudden action and let go of the sled. The sled started sliding backwards down the snow-covered path. *Id.*; 5/28 RP 34:8-23. Once Mr. Ponce realized what was happening, he tried to stop the sled by stepping on the rope and yelled at Jacob to jump out of the sled. His efforts were unsuccessful and the sled went back down the path and out into the road. Sadly, a car was coming down the road at that precise moment and the driver was unable to stop. Jacob was hit by the car and killed. *Id.*; 5/22 RP 29:10-30:14.

Plaintiffs brought this lawsuit against the Mountaineers claiming that the Mountaineers were negligent in the operation of the Snoqualmie Campus. CP 1-4. Defendant's Answer included the defense of "Express Release" based on the form that Karim Zapana signed when plaintiffs arrived at the Snoqualmie Campus. CP 5-8. That form was a GUEST RELEASE and INDEMNITY form which provided in part:

> I agree to RELEASE, HOLD HARMLESS AND INDEMNIFY the Mountaineers…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 am I signing on behalf of, in any activities offered by the Mountaineers. I personally assume all risks in connection with these activities…

CP 1057.

Plaintiffs moved for partial summary judgment asking trial Judge Teresa Doyle to dismiss the defense of "express release." CP 1001-1071. Judge Doyle granted plaintiffs' motion dismissing that defense. Defendant filed a Motion for Reconsideration of Judge Doyle's decision, which was denied. Judge Doyle entered an Order on the Motion for Reconsideration clarifying her ruling as follows:

> The Mountaineers Guest Release and Indemnity Agreement does not apply to the facts of the accident because this accident is not "arising out of or in any way connected with" any activities offered by the Mountaineers as stated in the Release. Rather, the accident resulted from the Mountaineers' 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 the Mountaineers.

CP 1139 – 1141. Defendant filed a cross-appeal based on Judge Doyle's erroneous rulings. CP 992-998.

C. Pre-Trial Evidentiary Motions

The case proceeded to trial before the Honorable Roger Rogoff. The plaintiffs focused their negligence claims on the access path to the snow play/sledding area. CP 29-30. Plaintiffs relied on human factors expert Richard Gill to offer the opinion that the Mountaineer's access path was "unreasonably dangerous." CP 91. Defendant moved *in limine* to

exclude Gill's testimony based on his lack of knowledge regarding the operation of sledding and snow play areas. CP 90-101. Richard Gill described his qualifications as Human Factors Engineering. CP 345. He acknowledged that in forming his opinion that the Mountaineer's access path was unreasonably dangerous, he did not look at the access paths to other ski resorts or sledding areas because he considered them irrelevant to his opinions. CP 352. Gill did no research on snow tubing or sledding operations and did nothing to compare the Mountaineers' Snoqualmie Campus – including the access path – to the operation of any other winter recreation/sledding area. CP 92-93. Gill offered the opinion that the Mountaineers should have placed barricades on the access pathway, but he had never seen this done, had no personal experience with the type of barricades he suggested, and did no investigation or testing to determine if the barricades he proposed would be effective. CP 92-94.

Defendant relied on winter recreation expert Chris Stoddard, and plaintiffs moved *in limine* to exclude Mr. Stoddard's testimony. CP 319-328. In the motion to exclude Mr. Stoddard's testimony, plaintiffs argued that the courts "disfavored" industry standard testimony or looked skeptically at the notion of an industry standard outside of the products liability arena. CP 324, 325. Defendant's opposition to plaintiff's motion to exclude Stoddard pointed out the cases plaintiffs relied on did not stand

for the proposition that industry standard testimony was "disfavored". CP 434-435. Defendant also outlined Mr. Stoddard's credentials and expertise in support of his opinions. CP 428-432; CP 455-460.

Mr. Stoddard had worked professionally in the winter recreation industry for 39 years. He explained based on his professional experience that snow tubing and sledding were closely similar activities and could be equated for purposes of his opinions. CP 455. Mr. Stoddard's professional experience included conducting safety inspections at ski areas across the country. He estimated that he had conducted 300-400 inspections at over 100 locations and that the majority of those locations included areas designated specifically for snow-tubing or sledding. CP 456. He also conducted accident investigations at ski areas and snow-tubing facilities. *Id.* He taught college courses on ski and snow-tubing facility management in three states. CP 358. He wrote a booklet on snow-tubing operations and was an active member of an ANSI committee that developed signage for ski area operations that has been adopted by statute in Washington state. *Id.* Based on his 39 years of professional experience, including hundreds of inspections and accident investigations, Mr. Stoddard was prepared to offer opinions about the standard of care in the operation of winter recreation areas and how the Mountaineers' Snoqualmie Campus compared in its operations – including the access

trail – to other winter recreation sledding and tubing areas across the country. CP 460.

The trial court denied both the plaintiffs' motion to exclude Chris Stoddard and the defendant's motion to exclude Richard Gill. Judge Rogoff allowed each side to call its liability expert, ruling on the motion to exclude Mr. Stoddard's testimony 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.
>
> As always, Plaintiff will have every opportunity during cross-examination to attack any loose language that Stoddard uses. They can delve into his definition of "industry standards" and in all other ways insure that the jury is not misled by any definitions or language he chooses.
>
> The Court notes that the two sides have chosen to use expert witnesses in this case in two very distinct ways. To simplify: Defendant has chosen to present an expert who is incredibly qualified to opine regarding, "the way everyone does it". Plaintiff, on the other hand, has chosen to

> present an expert who is incredibly qualified to opine regarding, "the way it should be done, regardless of how the industry handles it." The Court finds both approaches helpful to the jury here in determining what constitutes "ordinary care" in this premises liability case.

CP 713-14.

D. Testimony at Trial

Trial testimony in this case started on May 19, 2014. 5/19 RP 127. Richard Gill testified to the jury on May 20, 2014. He acknowledged that the Ponce family knew that SR 906 was next to the Snoqualmie Campus because they parked along the road and walked on the road to get to the Campus; they knew they had to walk up the access path to get to the sledding hill, and they knew their children were in an unfamiliar environment. 5/20 RP 173:9-174:5. There is no evidence that anyone anticipated that Jacob Ponce would sit down on a sled being pulled up the path by another family member.

Gill was aware the Mountaineers had a policy that encourages reports of complaints of any nature, including "near misses" and there were no complaints about the access path. The pathway was intended for walking, and Gill personally did not have any problems walking up the access path and had no information that anyone else ever had any problems walking up the access path. 5/20 RP 158:12-159:3.

However, it was Gill's opinion that the Mountaineers should have done something to barricade the path to prevent a sled from going out in the road following the unanticipated act of Jacob Ponce sitting on a sled and the family member letting go of that sled. Richard Gill testified that the Mountaineers should have done one of three things to create a barrier at the point that the access path abutted SR 906. One alternative Gill proposed was building a snow berm or snow pile on the access path. 5/20 RP 123:13-125:11. Another alternative was to put up orange plastic fencing. 5/20 RP 123:13-125:11. Gill's third alternative was to use hay bales as a method of placing some kind of barricade on the access path. 5/20 RP 136:7-137:3.

On cross-examination Gill acknowledged that he did not have any work history that involved snow tubing or sledding; he did not visit any commercial tubing or sledding areas prior to forming his opinions in the case; he did not do any internet research that involved tubing or sledding operations, and didn't look at any handbooks, articles or other written materials on the operation of snow tubing or sledding facilities. 5/20 RP 154: 20-155:21. In summary, he did not do any comparison of the access to the Mountaineers' sledding hill with the access to any other commercial or public sledding hills, and did not compare the steepness of the Mountaineers access path to other trails used for winter recreation. 5/20

RP 156:1-9. Gill admitted on cross-examination that there was a potential for these three types of barricades he proposed – snow berms, fencing, or hay bales – to cause injuries. 5/20 RP 169:13-21. Although Gill was critical of the signage posted by the Mountaineers, he acknowledged that warning signage was not the solution, 5/20 RP 149:9; that no one in the Ponce family recalled seeing any of the signs that *were* posted. 5/20 RP 168:13-17; and the Ponce family was not confused about where the sledding hill was located. 5/20 RP 167:6-8.

Chris Stoddard testified in rebuttal to Richard Gill. Mr. Stoddard described his long history of employment in the ski industry – 39 years – that included working for ski areas in management positions, working for the National Ski Areas Association, and then starting his own business called Mountain Management Services, LLC. As Mountain Management Services, Mr. Stoddard develops and sells employee training materials and risk management related materials for use by the ski industry. His services include risk management inspections where he inspects winter recreation facilities and provides guidance on how the facilities can do a better job being aware of various national and industry standards and requirements that affect their operations. 5/28 RP 67:18-72:10. Mr. Stoddard explained that a lot of the work he does is with snow tubing operations, and that snow tubing and sledding are very similar because

they take place in the same kind of locations, and the risks and dangers for the activities are pretty much the same. 5/28 RP 25: 25-26:16.

Mr. Stoddard testified that he had conducted somewhere between three and four hundred inspections, that he had inspected over 50 different snow tubing facilities and had done some additional inspections of sledding hills separately. 5/28 RP 73:21-74:11. Mr. Stoddard also detailed his professional experience as a member of national standard committees dealing with winter recreation, including the American National Standards Institute (ANSI) and the American Society for Testing and Materials (ASTM), the college courses he taught related to winter recreation, and the litigation consulting services he provided relating to winter recreation. 5/28 RP 75:3-76:23.

Mr. Stoddard provided his opinions in opposition to those opinions offered by Richard Gill. 5/28 RP 80:4-14. At no time during his trial testimony did plaintiffs object to Mr. Stoddard's testimony or defense counsel's questions based on a lack of foundation or lack of qualification. Mr. Stoddard disagreed with Gill's opinion that the Mountaineers should have built a snow berm on the access path for several reasons, including the fact that a berm could encourage people to misuse the path for sledding, that the berm itself could cause injuries if someone on a sled hit the berm, that someone could actually go up and over the berm and be

injured as opposed to being stopped by the berm, and that the berm would create a hazard for people who were using the path appropriately to simply walk up the path. Mr. Stoddard referred to accidents he had investigated where people were injured using sledding facilities with the type of berm proposed by Gill. 5/28 RP 81:20-85:5.

Mr. Stoddard also described why he disagreed with Gill's opinion that orange plastic fencing should have been installed as a method of "guarding". Based on his investigation and research such fencing would be dangerous if someone ran into the fence. He had investigated accidents where people skiing or snow tubing were injured running into that type of fencing. Generally that type of fencing is used as a visual warning to stay away, not as something to hit. 5/28 RP 87:11-88:23.

Mr. Stoddard explained why Gill's suggestion to put hay bales on the access path would not be appropriate since hay bales collect moisture, freeze, and become solid bricks and thus create an obstacle that would cause injury if someone ran into it on a sled. 5/28 RP 89:6-90:18. As Mr. Stoddard elaborated, if someone riding a sled runs into an obstacle such as a snow berm, a fence, or a hay bale, the sled is going to stop. However, since the person riding the sled is not fastened to the sled, that person's momentum will drive him forward, potentially causing a very severe injury if the person hits the obstacle head first. The most typical way that

people get hurt sledding is either hitting a fixed object or a person. 5/28 RP 90:19-91:23.

In summary of his opinions, Mr. Stoddard testified that based on his 39 years of experience and his hundreds of inspections, it was not at all uncommon to have a steep, snow-covered slope or trail that comes directly onto a roadway, and that such a trail would be considered a normal, appropriate and even necessary part of winter recreation. He considered the type of access that was provided by the Mountaineers at the Snoqualmie Campus to be an "industry best practice," very typical of what he has seen all over the country. 5/28 RP 108:21-109: 21. In his years of experience and hundreds of inspections Mr. Stoddard had never seen any of the ideas proposed by Richard Gill in practice as barricades separating a trail from a roadway, and he testified that Gill's ideas would not be considered an industry norm or best practice. 5/28 RP 109:22-110:22. He concluded that the Mountaineers' management of the access trail to the Snoqualmie Campus was a very good way of managing the trail and was not the cause of the accident. 5/28 RP 112: 9-16.

On redirect examination Mr. Stoddard reiterated that his opinions were based on the investigations he has done at 50-plus snow tubing and snow play areas along with the ski area investigations, and that all of those prior investigations and inspections formed a basis for his opinions. 5/28

RP 148:21-149:2. Plaintiffs made no foundational or evidentiary objections during Mr. Stoddard's testimony. Nor did plaintiffs ever ask Mr. Stoddard to identify by name any of the tubing/snow play/sledding areas that he had inspected or investigated.

The jury heard testimony from all the witnesses in addition to the experts and ultimately returned a verdict in favor of defendant, finding that the Mountaineers were not negligent. CP 918. Plaintiffs subsequently filed a Motion for a New Trial, arguing in part that the trial court erred in allowing the testimony of defense expert Chris Stoddard. CP 934-944. The court denied that Motion. CP 965-969. Plaintiffs now bring this appeal claiming that the trial court abused its discretion in allowing Mr. Stoddard to testify. CP 970-971.

IV. ARGUMENT IN OPPOSITION TO PLAINTIFFS' APPEAL

A. The Trial Court Did Not Abuse Its Discretion in Allowing the Testimony of Chris Stoddard

Plaintiffs argue that the trial court erred in admitting the testimony of defense expert Chris Stoddard. The admissibility of expert testimony in Washington is governed by Evidence Rule 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

A trial court's determination of an expert's qualifications will be upheld absent an abuse of discretion. *See Bernal v. American Honda Motor Co.,* 87 Wn.2d 406, 413, 553 P.2d 107 (1976) ("The qualifications of an expert are to be judged by the trial court, and its determination will not be set aside in the absence of a showing of an abuse of discretion."). "A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds," such as basing "its ruling on an erroneous view of the law." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.,* 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

In the area of admitting expert testimony, appellate courts have acknowledged that trial courts are generally in the best position to evaluate an expert's qualifications and the reliability of an expert's methodology. *See, e.g., State v. Flett*, 40 Wn. App. 277, 286, 699 P.2d 774, 780 (1985) ("The trial court was in the best position to assess the reliability of the theory, methodology, procedure, and probative value of the expert testimony and we will not disturb its discretionary admission absent abuse.") (internal citation omitted).

In this case, the trial court carefully weighted Mr. Stoddard's qualifications and found, "...Defendant has chosen to present an expert who is incredibly qualified to opine regarding, 'the way everyone does it.' Plaintiff, of the other hand, has chosen to present an expert who is

incredibly qualified to opine regarding, 'the way it should be done, regardless of how the industry handles it.'" CP 714. The trial court allowed both parties to take different approaches to expert testimony. Both approaches helped the jury to determine ordinary care. The fact that plaintiffs disagree with the testimony offered by Mr. Stoddard does not convert the trial court's reasoned decision into an abuse of discretion.

Plaintiffs argue that the trial court abused its discretion in allowing Chris Stoddard to testify regarding "industry standards". *Appellant's Brief* pp. 24-25. Richard Gill testified on behalf of plaintiffs that in his opinion the Mountaineers should have placed a barricade at the base of the access trail to the Snoqualmie Campus, proposing three different alternatives: (1) a snow berm; 5/20 RP 123-125; (2) orange fencing; *Id.* 132-136; or (3) bales of hay. *Id.* 136-137. Gill did not investigate other commercial sledding or tubing areas or do any research regarding commercial sledding or tubing areas. *Id.* 154-155. Mr. Stoddard disagreed with Gill's opinion based on 39 years of professional experience in winter recreation that included inspections over the years of approximately 50 different commercial snow tubing areas and sledding areas. 5/29 RP 148-149.

The basis for the argument that the Court abused its discretion appears to be that while Mr. Stoddard testified that he had inspected numerous other tubing/sledding/winter recreation areas, he did not identify

by name 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. *Appellant's Brief* at pp. 18, 26, 29, 32. Allowing Stoddard to testify is not an abuse of discretion on the court's part, since the court was in the best position to evaluate Mr. Stoddard's years of experience and numbers of inspections and investigations he conducted over those years in determining that Mr. Stoddard was qualified to testify "about the way everyone does it." CP 713-14. The court has wide discretion to determine whether expert testimony is proper, and the limitations of an expert's opinions and examination of the evidence go to weight, rather than admissibility. *Torkarz v. Ford Motor Co.,* 8 Wn. App. 645, 653, 508 P. 2d 1370, 1375 (1973). Plaintiffs have cited no authority for the proposition that an expert who describes his years of experience and the numbers of investigations he has conducted must provide the name of each facility inspected in order to qualify as an expert pursuant to ER 702. There is no such requirement. *See, e.g.*, *Wagner v. Wagner*, 1 Wn. App. 328, 331, 461 P2d, 577, 579 (1969) ("Where no authorities are cited in support of a proposition, the court will ordinarily not consider such assignments unless it is apparent, without further research, they are well taken.").

In oral argument on the motion *in limine* plaintiffs' counsel argued that Mr. Stoddard's opinion was a generalization of all his years of

experience and looking at different sledding areas "...this is what is done." Plaintiffs' counsel further claimed that "...he couldn't identify a specific area that he was referring to." 5/15 RP 106:10-107:24. However, in response defense counsel pointed out that plaintiffs' counsel had not even asked the question to support their argument. Mr. Stoddard testified that the three to four hundred different inspections he had done formed the basis for his opinions – *and no one asked him to name any of the facilities that he inspected, nor did anyone ask him to name or list which of those areas he inspected were near roads.* 5/15 RP 116:20-117:6. Having never even asked the question, plaintiffs' counsel had no support for the argument that Mr. Stoddard "*could not*" identify the areas he referred to.[1]

The trial court's ruling that an expert who had conducted over 300 inspections of winter recreation areas could testify about the Mountaineers' operation of the Snoqualmie Campus compared to other similar areas was well within "the range of acceptable choices" and thus not an abuse of the court's broad discretion. *See, e.g., In re Marriage of Littlefield,* 133 Wn.2d 39, 46–47, 940 P. 2d 1362 (1997).

[1] By contrast, plaintiffs argued that no one operated a facility similar to the Mountaineers facility and that the Snoqualmie Campus was "unique" 5/15 RP 117:21 – 118:5. There was no evidence to support that argument since plaintiffs' expert's had no basis to form an opinion about "uniqueness." Richard Gill admitted that he had never gone to look at other commercial tubing or sledding operations, didn't do any research, and didn't do any comparison of the Snoqualmie Campus to any other facility. 5/20 RP 154 – 155.

B. Plaintiffs Waived the Objection to Mr. Stoddard's Testimony by Failing to Preserve the Objection at Trial

Plaintiffs claim that the trial court erred in allowing Mr. Stoddard to testify because his opinions lacked foundation. However, no foundation objection was made during Mr. Stoddard's testimony, and thus the objection has not been preserved for appeal. Error raised for the first time on appeal will generally not be considered. *See* RAP 2.5(a); *Eldredge v. Kamp Kachess Youth Servs.*, Inc., 90 Wn.2d 402, 583 P.2d 626 (1978); *In re Welfare of Young*, 24 Wn. App. 392, 397, 600 P.2d 1312, 1315 (1979) ("general rule requires that the alleged error first be brought to the trial court's attention at a time that will afford that court an opportunity to correct it"); *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 333–34, 858 P.2d 1054 (1993) ("failure to make contemporaneous objections usually waives any error").

In order to preserve review of the trial court's ruling admitting evidence, a party must make a timely objection or motion to strike stating the specific ground of the objection if the specific ground was not apparent from the context. ER 103(a)(1). Although it was *plaintiffs'* burden to challenge Mr. Stoddard's foundation if they believed it was lacking, ER 103(a)(1), no timely foundation objection was made during Mr. Stoddard's testimony.

Plaintiffs are expected to argue that they preserved the issue through a denied motion *in limine* that asked the trial court to prohibit defense expert Mr. Stoddard from testifying. CP 319. But a denied motion *in limine* to exclude an expert is not a cure-all for a party's failure to contemporaneously object at trial. *DeHaven v. Gant*, 42 Wn. App. 666, 670, 713 P.2d 149, 152 (1986) ("It should be noted that the making of a pretrial motion to exclude certain evidence does not necessarily preserve any claim of error."). While it is true that plaintiffs did challenge Mr. Stoddard's qualifications to render an opinion in this case, it did *not* relieve them of their burden to make a specific, contemporaneous objection to his testimony based on his visitation of other sledding areas over the course of his decades in the field. They should have made that objection if they wished to preserve the issue on appeal. Because they did not do so, they have waived any right to challenge it here.

Division I dealt with an analytically similar issue in *Miller v. Kenny*, 180 Wn. App. 772, 817, 325 P.3d 278, 300 (2014). In that case, the defendant's motion *in limine* was granted, but, "Under these circumstances, the ruling *in limine* did not excuse Safeco from making a more contemporaneous objection." *Id.* The *Miller* court reasoned that there was a distinction between the argument made in the motion *in limine* and the argument made at trial, which put the onus on the defendant to

contemporaneously object. The trial court here qualified Mr. Stoddard (and Richard Gill) to give expert opinions; the court's ruling did not relieve counsel of the burden of laying a foundation for the expert's testimony at trial, and by the same token did not relieve opposing counsel of the duty to object to a perceived lack of foundation.

Plaintiffs argue on appeal that in order for Mr. Stoddard's opinions to be admissible at trial, 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. *Appellants' Brief* at p. 32 (also pp. 21, 26, 29). However, ER 705 demonstrates that plaintiffs' position is incorrect. ER 705 states:

> The expert may testify in terms of opinion or inference and give reasons therefor *without prior disclosure of the underlying facts or data,* unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination. [Emphasis added.]

As noted by the court in *Cornejo v. State,* 57 Wn. App. 314, 329, 788 P.2d 554 (1990), "Modern evidence rules permit an expert to state an opinion without prior disclosure of the underlying facts, leaving to the opposing party the responsibility of questioning the basis of the opinion."

Mr. Stoddard testified at trial that it was not at "uncommon" to have a steep, snow covered slope or trail that comes directly out onto a

highway 5/28 RP 108:21-109:3, and that based on his *39 years of experience and investigations* he had never see any of the ideas proposed by Richard Gill in use on a trail, that Gill's ideas would not be considered an industry norm or best practice, and that the Mountaineers' trail was a good example of industry best practices. *Id.* at 110; 111:12-20. Pursuant to ER 705, it was up to plaintiffs' counsel to inquire further on cross-examination. Having failed to make any timely objections while Mr. Stoddard was testifying at trial (ER 103(a)(1)), and having failed to ask the expert to disclose the underlying facts or data on cross examination (ER 705), plaintiffs' objections to Mr. Stoddard's testimony have been waived.

C. Plaintiffs Had a Remedy Easily Available at Trial and Thus Have Waived the Objections

It is well established that a party waives error on an issue on appeal when the appealing party had a remedy easily available to it at trial. *See, e.g., State v. Van Auken*, 77 Wn.2d 136, 144, 460 P.2d 277, 282 (1969) (failure of party to bring the claimed error to the trial court's attention waived issue where the error could have been "cured at trial if the court had been given the opportunity."); *Adair v. Weinberg*, 79 Wn. App. 197, 204, 901 P.2d 340, 344 (1995) ("In the absence of a correctly worded curative instruction, we conclude the Adairs inadequately preserved the

error arising from the improper defense argument."); *State v. Eckenrode*, 159 Wn.2d 488, 491, 150 P.3d 1116, 1117 (2007) (refusing to consider alleged error that "could have been cured at trial.").

The critical importance of the plaintiffs' failure to raise a foundation objection to Mr. Stoddard's testimony at trial is highlighted here. Plaintiffs could have easily cured (or asked the Court to cure) the alleged foundation defect at trial but chose not to. The argument is that Mr. Stoddard was required to "identify" by name, the other areas that were the basis for his testimony. *Appellants' Brief,* pp. 21, 24, 26, 29, 32. That objection is waived because plaintiffs never raised that objection at trial when there was an available remedy, and more importantly, never asked the witness to "identify" those areas. Plaintiffs remained silent – both failing to make a timely objection at trial, and failing to ask the question they now claim was critical to effective cross-examination. *Appellants' Brief*, p.32.

If, as plaintiffs argue, there were questions to be asked of Mr. Stoddard that were important to plaintiffs' effective cross-examination, then plaintiffs should have asked those questions. *See, e.g., State v. Eaton,* 30 Wn. App. 288, 294, 633 P. 2d 921 (1981) ("The assumption underlying ER 703, however, is that opposing counsel will forcefully bring that point to the jury's attention during cross examination of the

expert.").

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. If plaintiffs wanted to know the names of the areas that Mr. Stoddard inspected and investigated, they should have asked. The Washington Supreme Court notes that ER 705 is identical to Federal Rule of Evidence 705, authorizing the admission of expert testimony without the prior disclosure of the facts or data that underlie the opinion. *State v. Russell,* 125 Wn.2d 24, 74, 882 P. 2d 747 (1994). ER 705 puts the onus for exploring the facts and assumptions underlying the expert's opinion "squarely on the shoulders of opposing counsel's cross-examination." *Newell Puerto Rico, Ltd. v. Rubbermaid Inc.,* 20 F.3d 15, 20 (1st Cir. 1994).[2] Plaintiffs have waived their objections to Mr. Stoddard's testimony by failing to take advantage of the remedies available at trial.

D. The Court Should Reject Plaintiffs' Newly Raised Argument Based on *Helling v. Carey*

Finally, the Court should decline plaintiffs' invitation to define the standard of care for sledding areas relying on a medical malpractice case called *Helling v. Carey*, 83 Wn.2d 512, 519 P.2d 981 (1974). The reliance is misplaced for three reasons: (1) the *Helling* case—or any argument

[2] Rule 705 shifts the burden to the cross-examiner to ferret out whatever empirical deficiencies may lurk within an expert's opinion. *See* FRE 705, Adv. Comm. Notes; *Smith v. Ford Motor Co.,* 626 F.2d 784, 793 (10th Cir. 1980).

stemming from the case—was never presented to the trial court; (2) *Helling* "was intended to be restricted solely to its own unique facts [;]" and (3) installing a barricade is not simple, harmless, or without a judgment factor.

1. Plaintiffs Did Not Raise *Helling* to the Trial Court.

The crux of plaintiffs' *Helling* argument is that even if the Mountaineers complied with the standard of care, the Court should hold the standard of care is wrong and substitute the plaintiffs' proposed standard of care (mandating barriers where pathways that ultimately lead to sledding areas meet roadways). That argument was never made to the trial court. It is being advanced for the first time on appeal.

Helling was decided in 1974. The jury rendered its verdict in this case in 2014. Plaintiffs had an opportunity to use the *Helling* case in the trial court phase but did not. They could have moved for summary judgment, citing *Helling*; they did not. They could have asked for a *Helling* jury instruction; they did not.[3] They could have raised the case to the trial court's attention in their post-trial motions; they did not. Not once in the record does the *Helling* case or a *Helling*-style argument appear.

[3] Indeed, if a party wants to argue "that reasonable prudence may require a standard of care higher than that exercised by the relevant professional group," nothing prevents them from proposing a jury instruction on that point. *See Gates v. Jensen,* 92 Wn.2d 246, 247, 595 P .2d 919 (1979) (citing *Helling,* 83 Wn.2d 514).

The absence is due to the fact that plaintiffs are raising the case (and the issue) for the first time to the Court of Appeals.

"The case must be decided on the record made in the court below; and an appellant cannot seek a reversal here on a theory never presented to or considered by the trial court." *Muck v. Snohomish Cnty. Pub. Util. Dist. No. 1*, 41 Wn.2d 81, 88, 247 P.2d 233, 237 (1952) (internal citations omitted); *Prater v. City of Kent*, 40 Wn. App. 639, 642, 699 P.2d 1248, 1251 (1985) ("Having failed to raise this claim below, Prater may not now argue it on review."). An argument raised for the first time on appeal will normally not be reviewed absent unusual circumstances. *Savage v. State,* 72 Wn. App. 483, 495 n. 9, 864 P.2d 1009 (1994), reversed in part on other grounds, 127 Wn.2d 434, 899 P.2d 1270 (1995); RAP 2.5(a). The "unusual circumstances" addressed in Rule of Appellate Procedure 2.5 are: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. No unusual circumstances relieved plaintiffs of their duty to present the *Helling* argument to the trial court for consideration.

In *Helling,* medical experts had established during trial that the standards of the profession did not require routine glaucoma tests for patients under 40 years of age. The *Helling* plaintiff argued that the trial court's refusal to give her proposed instructions prevented her from

arguing her theory of the case to the jury that the standard of care for ophthalmologists was inadequate to protect her, at age 32, from glaucoma. 83 Wn.2d at 519. The appropriate time for Plaintiffs to have raised the *Helling* issue would have been prior to the jury's verdict, or, at the very latest, in one of plaintiff's post-trial motions. But they did not. Plaintiffs gambled on the outcome of the trial, and, disappointed with the result, present a theory to this Court they failed to present to the trial court. The Court's decision on plaintiffs' *Helling* argument on appeal can and should end with a finding that plaintiffs waived the argument by failing to first present it to the trial court.

2. The *Helling* Holding is Restricted to its Facts.

At least two Court of Appeals cases have held that the *Helling* holding should not be used outside of that particular case. "The ruling in Helling was intended to be restricted solely to its own unique facts." *Swanson v. Brigham*, 18 Wn. App. 647, 651, 571 P.2d 217, 219 (1977). "A thorough analysis of that [*Helling*] decision leads us to conclude the holding there was intended to be restricted solely to its own 'unique' facts, *i.e.*, cases in which an ophthalmologist is alleged to have failed to test for glaucoma under the same or similar circumstances." *Meeks v. Marx*, 15 Wn. App. 571, 576-77, 550 P.2d 1158, 1162 (1976). In line with those decisions, the *Helling* case has been cited infrequently since 1977 and

never again for the extraordinary[4] proposition that the judiciary can change and define the standard of care for an industry. This Court should not be the first to use the *Helling* case as an opportunity to re-define the standard of care for sledding area operators.

3. Installing a Snow Berm or Barrier is Nothing Like Doing a Test for Glaucoma.

If *Helling* is considered to have some impact on the law as it applies to this case at all, it would stand generally for the proposition that industry custom is not conclusive on the issue of negligence. However, no one argued to the jury that industry custom was dispositive of the negligence issue, only that industry custom was evidence of what should be done by a sledding area operator exercising reasonable care. While an industry custom may not conclusively establish reasonable care, a jury verdict that the Mountaineers was not negligent *is* conclusive on the issue. There are numerous reasons why plaintiffs' *Helling* argument breaks down under scrutiny. First, the pressure tests in *Helling*, which were then routinely given to persons over 40, are simple, inexpensive, reliable and risk-free. In this case there was heavily disputed testimony about whether constructing a berm or barrier was a simple, reliable, and "risk-free"

[4] The Supreme Court has since described *Helling* case as a product of "exceptional circumstances[.]" *Harris v. Robert C. Groth, M.D., Inc., P.S.*, 99 Wn.2d 438, 451-52, 663 P.2d 113, 120 (1983). *See also Gates v. Jensen*, 92 Wn.2d 246, 252-54, 595 P.2d 919, 923-24 (1979) ("Helling v. Carey was an unusual case.").

method for preventing the outcome in this case.

Mr. Stoddard referred to accidents he had investigated where people were injured using sledding facilities with the type of berm proposed by Gill. 5/28 RP 81:20-85:5. He had also investigated accidents where people skiing or snow tubing were injured running into the orange fencing that Gill proposed. 5/28 RP 87:11-88:23. Finally, Mr. Stoddard explained why Gill's suggestion that the Mountaineers put hay bales on the access path would not be appropriate since hay bales collect moisture, freeze, and become solid bricks and thus create an obstacle that would cause injury if someone ran into it on a sled. 5/28 RP 89:6-90:18. If someone riding a sled runs into an obstacle such as a snow berm, a fence, or a hay bale, there is the potential for a *very severe* injury. 5/28 RP 90:19-91:23. Even plaintiffs' expert Richard Gill admitted that the methods of barricading the path he proposed using snow berms, fencing, or hay bales could cause accidents or injuries. 5/20 RP 169:13-21. Since plaintiffs' expert acknowledged on cross-examination that the barriers he proposed were all capable of causing harm to guests, these measures cannot be equated to the "simple, harmless" pressure test for glaucoma that was discussed in *Helling*.

Second, the *Helling* trial featured "undisputed medical expert testimony" on the standard of care for eye pressure tests. 83 Wn.2d at

517-19. Contrary to plaintiff's assertions that "undisputed evidence" established the Mountaineers was negligent, nothing about the trial was "undisputed." The parties' respective experts expressed divergent views on the standard of care and whether installing a barrier was a safe, reasonable solution. The experienced volunteers who oversaw the operations of the Snoqualmie Campus believed it was safe to be open to the public. 5/21 RP 84:17- 85:25; 5/28 RP 25:21-26:2; 5/21 RP 86. The evidence was unlike *Helling*, where the parties' experts agreed on the standard of care (ophthalmological standards did not require glaucoma testing for patients under the age of 40).

Third, the *Helling* case depended on there being "no judgment factor involved" in the glaucoma test. 83 Wn.2d at 518. Even under the most generous review of the record, there is simply no way the construction of a berm or other types of barriers has "no judgment factor involved," much less in the same way that a uniform eye pressure-test could be subject to judgment-free precision. There is significant liability associated with berm construction. *See, e.g, Jewels v. City of Bellingham*, 180 Wn. App. 605, 608, 324 P.3d 700, 702 *review granted,* 181 Wn.2d 1001, 332 P.3d 985 (2014) (berm caused bicyclist to lose control of his front wheel); *DiBlasi v. City of Seattle*, 136 Wn.2d 865, 875, 969 P.2d 10, 14 (1998) (berm giving rise to issue of material fact in flooding case). A

property owner exercises judgment whenever they decide to construct a berm or barricade. Therefore, constructing a berm and doing an eye test is not a persuasive analogy.

It was plaintiffs' burden to establish a breach of the duty of reasonable care. They failed to do so, and the *Helling* case does not relieve them of that burden. The Court should decline plaintiffs' unprecedented invitation to ignore the evidence at trial and reverse the jury's verdict and impose its own standard of care on sledding area operators.

V. ARGUMENT ON CROSS-APPEAL

A. The Court Erred in Granting Partial Summary Judgment on the Defense of Express Release

The Mountaineers have filed a cross-appeal based on the decision of trial court Judge Theresa Doyle to grant partial summary judgment in favor of plaintiffs, dismissing the Mountaineers's defense of "express release." CP 1139 -1141. Assuming this court affirms the evidentiary rulings made at trial by the Honorable Roger Rogoff, thus affirming the jury verdict, then this court need not reach the issue raised on cross-appeal. Should the appellate court reach this issue, then Judge Doyle's decision on partial summary judgment must be reversed. A granting of partial summary judgment is reviewed de novo. *Attwood v. Albertson's Food Centers, Inc.*, 92 Wn. App. 326, 330, 966 P.2d 326 (1998).

Plaintiffs sued the Mountaineers over the accident involving the death of Jacob Ponce. Defendant pled in its Answer the affirmative defense of express release based on a Guest Release that was signed by Jacob's mother, Karim Zapana. CP 1057. Plaintiffs filed a Motion for Partial Summary Judgment on Defendant's Affirmative Defenses of Express Release and Implied Primary Assumption of Risk. CP 1001-1071. The court granted plaintiffs' motion, dismissing the defense of express release. CP 1122-1123; CP 1139-1142. This decision should be reversed, particularly in light of the requirement that *all facts and reasonable inferences* must be viewed in the light most favorable to the non-moving party, the Mountaineers. *Woodal v. Freeman School Dist.*, 136 Wn. App. 622, 628, 146 P.3d 1242 (2006) (emphasis added).

Plaintiffs argued that the Guest Release signed by Karim Zapana should not apply "because it did not apply to the activity Jacob was doing when he died." CP 1009. Plaintiffs reasoned that "Jacob's death was not a result of his participating in sledding at the designated sledding area [and] Jacob was not engaged in any recreational activity at all at the time of his death." The facts, however, do not support plaintiffs' argument, and any doubts as to the existence of a genuine issue of material fact is properly resolved against plaintiffs, the moving party. *Atherton Condo Assoc. v. Blume Dev. Co.,* 115 Wn.2d 506, 516, 799 P. 2d 250 (1990).

The plaintiffs went to the Mountaineers property for the purpose of going sledding. Jacob Ponce was riding a sled – sledding – at the time of his accident. Signing the Guest Release was required before the plaintiffs were even allowed access to the Mountaineers property *for the purpose of going sledding*. CP 1112. The plaintiffs claim that the Mountaineers owed them a duty to maintain the property in a reasonably safe manner. That "reasonably safe manner" in this case applies to the activity of *sledding*, since Jacob was sliding down the path on a sled. That precise event – sledding down the access path – is what plaintiffs claim the Mountaineers should have anticipated and guarded against by having a fence or barrier at the end of the pathway. CP 1010.

The Guest Release states in plain language that it applies to "...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."* (Emphasis added.) The first paragraph of the Release also states "I recognize that any outdoor activity may involve certain dangers, including, but not limited to *the hazards of traveling in mountainous terrain..."* The Guest Release does not state that it only applies to an accident that might happen while sledding at the designated sledding hill. CP 1057.

Plaintiffs in their Partial Summary Judgment Motion argued that

the Release only applied to injuries "arising out of" or "connected with" the activities offered by the Mountaineers. CP1010. This argument misquotes the actual language of the Release, since the Release contains the much broader phrase "***in any way connected with…"*** the participation in activities offered by the Mountaineers. CP 1057. The trial court erred in failing to construe this very broadly worded language in favor of the Mountaineers, the non-moving party. *Woodal v. Freeman School Dist.*, 136 Wn. App.at 628.

The Mountaineers access path is private property, open only those who are on the property with permission to take part in the activities offered by the Mountaineers. CP 1112. Plaintiffs cannot argue on one hand that the Mountaineers had a duty to protect them from a sledding accident by erecting a barrier or fence, and then argue on the other hand that the accident was "*in no way connected with"* being allowed to access the Mountaineers' property for the purpose of sledding. As defendant argued to the trial court:

> If Jacob Ponce's accident is not a "sledding accident" – then the Mountaineers cannot have a duty to protect Jacob from being injured while on a sled. And if the plaintiffs were not on the Mountaineers private property participating in activities offered by the Mountaineers – then they were not business invitees. Absent Jacob's being on a sled (sledding) – and absent the plaintiffs

> having entered the Mountaineers private property for the very purpose of going sledding – the accident would not have happened.

CP 1132. Again, the trial court erred in failing to draw all reasonable inferences in favor of the Mountaineers. *Woodal* at 628.

While plaintiffs cited no cases to support their argument that the Release does not apply to this accident, the Washington court has rejected arguments similar to those raised by plaintiffs. In *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992), Justin Scott was a young skier enrolled in ski racing lessons. The Release signed by his mother stated simply in broad terms "…I hereby hold harmless Grayson Connor and the Grayson Connor Ski School …*from all claims arising out of the instruction of skiing*…" (Emphasis added.) *Id.* at 488. Twelve year old Justin was injured while practicing on a race course when he left the course and collided with the supports of an unused rope tow shack. *Id.* There was no evidence that Justin was in ski class at the time of his accident or that he was actually receiving any instruction at the time he was injured. The plaintiffs argued that the Release did not apply to Justin's particular accident because the claim was not one "arising out of the instruction of skiing"; rather, plaintiffs alleged that the accident was caused by placement of the race course too close to the shed. The court

noted that since it was clear from the application form that Justin was enrolled in ski racing lessons, a race course would be an integral part of teaching ski racing. The court rejected the plaintiffs' argument as "factually strained and unconvincing." *Scott* at 492. The court did not require that Justin Scott actually be receiving ski instruction at the time of the accident, or that the cause of the accident be negligent instruction. Instead, the court ruled that the very general and broad language of the exculpatory clause was "...sufficiently clear to release the ski school from liability for negligent conduct." *Id.*

The Washington courts have also rejected attempts to treat necessary access to a recreational location as separate and distinct from the recreational location itself when analyzing the duty owed by the landowner. In *Plano v. City of Renton,* 103 Wn. App. 910, 14 P.3d 871 (2000), and in *Nielsen v. Port of Bellingham*, 107 Wn. App. 662, 664-65; 669, 27 P.3d 1242 (2001), the defendants argued that the ramps leading to the moorage areas on docks should be treated differently for purposes of recreational immunity than the actual moorage areas themselves. In both cases the courts disagreed that the ramps accessing the moorage area involved a different duty than the moorage areas – and in both cases viewed the access ramps as necessary and integral to the moorage. *Plano* at 915; *Nielsen* at 669. Plaintiffs' claim in this case that the private access

pathway to the designated sledding area is NOT "*in any way connected*" to the recreational activities offered by the Mountaineers should have been similarly rejected.

The plaintiffs did not enter the Mountaineers' property for some unspecified personal reasons, nor did they wander there by accident. The plaintiffs were allowed on the Mountaineers private land ONLY after Ms. Zapana had signed the Guest Release agreeing to the terms of use specified by the Mountaineers, and they were on the property SOLELY for the purpose of engaging in the recreational opportunities that were offered by the Mountaineers. The only logical way to view the facts of this case is to conclude that this accident **is** "*connected in any way*" with participation in the activity offered by the Mountaineers, which includes the access to its private property for sledding. Signing the Guest Release was the first step in the process of using the Mountaineers' recreational property, and walking up the access path was the second step. The plaintiffs could not have used the Mountaineers' property for sledding or for any other activity without first going through those two steps.

The entire focus of the plaintiffs' liability case was that the Mountaineers should have done something to prevent a sled on the access trail from going out into SR 906. Since the only way to reach the designated sledding hill was via the access trail, the trial court's ruling that

this accident was "not in any way connected with" the activities offered by the Mountaineers flies in the face of common sense. Courts should use common sense in interpreting releases, *Scott v. Pacific West Mountain Resort,* 119 Wn.2d. at 491, and the trial court failed to do so here.

B. The Court Erred in Adopting the Plaintiffs' Theory of the Case on Summary Judgment

Judge Doyle's order dismissing the defense of express release went beyond even an incorrect legal ruling, as the judge's order essentially made a finding on causation and ordinary care in favor of the plaintiffs based on nothing more than the arguments raised in plaintiffs' briefing. Plaintiffs stated simply in their brief:

> Jacob was not participating in any activity that the Mountaineers offered as stated in the exculpatory clause when he was killed....Jacob's death resulted from the Mountaineers' failure to exercise ordinary care in the maintenance of its facilities – it needed only to have placed a fence or other barrier at the end of the pathway and Jacob would be alive today.

CP 1010.

The statement in plaintiffs' briefing on summary judgment that the Mountaineers failed to exercise ordinary care was not based on expert testimony or any other supporting testimony; there was no testimony or evidence regarding causation or the duty of care, only plaintiffs' argument on their theory of the case. *Id.* Defendant's responsive pleadings

addressed the arguments raised by plaintiffs and pointed out that the cause of the accident was **not** the lack of a barrier as plaintiffs argued, citing to relevant case law directly on point. CP 1090-1091. The court was obligated to construe all reasonable inferences in favor of the Mountaineers, and failed to do so.

Even more importantly, the question of proximate cause is for the jury. *Attwood v. Albertson's Food Centers, Inc.*, 92 Wn. App. at 330. Judge Doyle nonetheless parroted plaintiffs' argument and theory of the case in her Amended Order clarifying her initial granting of partial summary judgment, handwriting in the very language plaintiffs argued in their brief. Judge Doyle's handwritten addition to the proposed Order states:

> Rather, the accident resulted from the Mountaineers 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 [*sic*].

CP 1140.

Judge Doyle committed reversible error by simply adopting plaintiffs' *theory* of the case (unsupported by evidence or testimony in the record) as a basis for granting partial summary judgment dismissing one of the Mountaineers affirmative defenses. CP 1140. Partial summary

judgment dismissing the Mountaineers' defense of express release was not appropriate since the language of the Release must be interpreted using common sense, and all reasonable inferences must be drawn in favor of the Mountaineers. *Scott* at 491; *Woodall* at 628. Additionally, the issues of causation and breach of duty are questions for the jury and not the court, and Judge Doyle erroneously relied on the plaintiffs' theory of the case as to both causation and the duty of reasonable care in reaching her decision. CP 1141.

Assuming that the appellate court affirms the decision of trial judge the Honorable Roger Rogoff and affirms the jury verdict in this case, then this court need not reach the issue of Judge Doyle's erroneous ruling on partial summary judgment. However, should the matter be remanded then Judge Doyle's decision must be reversed and the Mountaineer's defense of express release reinstated.

VI. CONCLUSION

Plaintiffs' appeal in this case should be denied, and the decision of the trial court to allow testimony at trial of defense expert Chris Stoddard

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should be affirmed for the reasons set out in this brief. Assuming the jury's verdict below is affirmed then the court need not consider the issue raised on cross-appeal.

Respectfully submitted this 11TH day of March, 2015.

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

By: _____
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DECLARATION OF SERVICE

I declare that on March 11, 2015, a true and correct copy of the foregoing document was sent to the following parties of record via method indicated:

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DATED this 11th day of March, 2015.

Cathy Hendrickson, Legal Assistant