

NO. 64558-7-I

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

RONALD PACE,

Appellant,

vs.

JAMES H. DAVIS and "JANE DOE" DAVIS, individually and on behalf of the marital community, SCOTT DAVIS and "JANE DOE" DAVIS, individually and the marital community comprised thereof; and TYLER DAVIS, individually,

Respondents,

and

"JOHN DOE #1" and "JANE DOE #1", individually and the marital community comprised thereof,

Defendants.

APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT
Honorable Gerald Knight, Judge

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I. NATURE OF THE CASE

Plaintiff could not positively identify the rider of a jet ski who caused the accident that injured him. So plaintiff sued a grandfather whom plaintiff believed owned the jet ski as well as the grandfather's son and minor grandson. Plaintiff claimed the grandfather had allowed the father or son or both to ride the jet skis.

The claims against the grandfather and grandson were dismissed on summary judgment. After hearing evidence that the son was not on a jet ski at the time of the accident and that neither of the grandfather's two jet skis was involved, the jury returned a verdict for the son.

II. ISSUES PRESENTED

A. Was summary judgment for the grandfather proper, where—

1. The evidence was undisputed he never entrusted anyone with a jet ski that could have been involved in the accident;

2. Even if he had entrusted someone with a jet ski, he never entrusted it to anyone he knew or should have known should not have ridden one;

3. The family car doctrine does not apply to jet skis;

4. Even if the doctrine applied to jet skis in general, it would not apply under the facts of this case;

5. The rebuttable presumption of agency does not apply to jet skis and even if it did, it was rebutted by undisputed evidence?

B. Was summary judgment for the grandson proper, where there was no evidence he was riding one when the accident occurred?

C. Did the trial court properly deny a new trial, where—

1. The refusal to give proposed instructions 13 and 17 was not prejudicial;

2. The trial court was within its discretion in refusing to give proposed instructions 13 and 17;

3. The trial court did not comment on the evidence;

4. Plaintiff urged the trial court to adopt the standard it used in allowing the jury to ask questions of witnesses;

5. Even had plaintiff objected to the trial court's standard for jury questions, that standard was consistent with CR 43(k)?

III. STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS.

1. THE DAVIS FAMILY ON JUNE 30, 2006.

In late June 2006 respondents/defendants Jim and Carol Davis were at their vacation cabin at Sunland Estates on the Columbia River for the long Fourth of July weekend. (RP 79, 453-54, 459-61, 504, 541) Their son, respondent/defendant Scott Davis, then 36, and Scott's 14-year-

old son, respondent/defendant Tyler Davis, arrived on Thursday, June 29. Jim and Carol's friends, Bruce and Ann Thompson, arrived around 7:30 a.m., Friday, June 30. (RP 301, 345, 461, 462, 498, 499, 538-39, 552)

Jim and Carol¹ owned two jet skis, a small 1997 model and a larger, more powerful 2006 model. The 1997 model was partly yellow in color. The 2006, a supercharged three-seater, was white with bronze or light tan stripes. (RP 307, 350, 361, 456, 491)

Jim and Carol had bought the jet skis for their family and friends' entertainment. They did, however, have rules for their use. Permission to ride had to be given, even to family members. (RP 397-98, 481, 482, 520, 528, 531-32) Tyler could use only the smaller, 1997 model, and only if accompanied by an adult. (RP 322, 350-51, 567-68, 576) On busy weekends or holidays, when Sunland was crowded with boats and there was a lot of alcohol consumption, neither jet ski was to be used at all. (RP 346-47, 484-85, 508-09) In addition, Jim had told Scott and Tyler to be extremely careful, watchful, and not do anything stupid. (RP 307-08, 519)

Tyler wanted to jet ski that Friday morning, June 30. Since the holiday crowds had not yet arrived, Jim agreed. Jim, Scott, and Tyler took

¹ To differentiate amongst defendants, they will be referred to by their first names. No disrespect is meant.

the jet skis to the boat launch, and Scott and Tyler went jet skiing for an hour or two. (RP 346, 349-50, 373, 388-89, 463-64, 500-01, 539, 569-70)

When Scott and Tyler returned, they tied up the jet skis on buoys in front of a neighbor's property near the elder Davises' cabin and hung up their life jackets with the jet ski keys. Jim then gave Bruce Thompson and Tyler permission to use the jet skis. They were gone about an hour. When they returned, they tied up the jet skis at the buoys. By this time, it was early afternoon. (RP 309-10, 352, 358-60, 500-04, 540-42, 569-70)

Scott had been doing repairs to his boat, but took a scooter and left for several hours. Asked three years later where he had gone, he could not remember, but said he would normally ride one of his father's scooters to cruise around Sunland. He also believed he might have visited friends. (RP 319-20, 345-46, 348-49, 363-64, 368-69, 502-03, 510, 543, 547)

Jim had been helping Scott on the latter's boat, but left to go find scooter parts. Bruce stayed at the Davises' property, since he had a steel plate in his leg and his ankle was starting to swell from the heat. Bruce wanted to just sit in the shade and read. (RP 398, 504-05, 543, 553, 555)

Significantly, three years earlier, when the elder Davises and Bruce were vacationing at Lake Chelan, a rare and exclusive boat owned by Jim had come loose from its buoy. Bruce had discovered it missing and woke Jim at 4:30 or 5:00 a.m. to report the loss. Fortunately, the boat was

found, but for the rest of their stay, Bruce would periodically swim out to the boat to make sure that its mooring was secure. (RP 528-30, 544)

Now, on June 30, 2006, Bruce—the last person to tie up Jim’s jet skis at the buoys—wanted to ensure they did not come loose. He was especially concerned because water had been released from a nearby dam, causing the river to run. Consequently, Bruce periodically got up to see whether the jet skis were still tied up. (RP 529-30, 543-44, 560-62) He would later testify (RP 558):

[B]ottom line is the jet skis never left the buoy from the time I tied them up, tied up the big jet ski, Tyler tied up the small one, until they took them back to the cove that night. Them jet skis never left

Tyler spent the afternoon around the cabin and possibly the pool. Bruce saw Tyler that afternoon “quite a bit”, riding his bike in the street. (RP 466, 556-57, 570)

Around 8:00 p.m. or shortly thereafter, sirens sounded. Bruce and Carol Davis, Jim’s wife, saw an ambulance come down the hill. Carol and Ann, Bruce’s wife, walked down to see where it was going. Tyler joined them. (RP 261-62, 470-71, 546, 570-71)

Scott also heard the sirens and rode his scooter to where the ambulance was. Someone said there had been a boat/jet ski accident. At some point, Scott saw Carol, Ann, and Tyler. They all eventually returned

to the elder Davises' cabin, with Tyler hitching a ride with Scott. (RP 365-70, 376, 475, 479, 557, 571, 578)

Later that evening, Jim and Tyler moved the jet skis to a more sheltered cove. Although plaintiff views this as suspicious (Brief of Appellant 18), the Davises never left the jet skis at the buoys overnight. If they had and water was released from the dam below, the water level change could ground them in the sand. Or if the jet skis broke loose from the buoys, the river could carry them down to the dam. And frequent storms required a more sheltered area. (RP 404, 410-11, 512, 530, 547-48)

2. PLAINTIFF'S JUNE 30, 2006, ACCIDENT.

There had been an accident between a boat and a jet ski early the evening of Friday, June 30, 2006. (RP 259-61) Plaintiff/appellant Ronald Pace had taken two friends, Sean Putnam and Trevor Korn, out in Pace's boat. Three jet skiers came within 50-100 feet and asked if they could jump the boat's wake. Plaintiff agreed. (RP 84-85, 92-95)

As plaintiff started to accelerate, spray from one of the jet skis hit him. Then another jet ski cut in front of the boat. Plaintiff turned sharply to get out of the way. As a result, one of his passengers lost his balance and fell against plaintiff, slamming him against the boat. (RP 96-98, 149)

Plaintiff screamed, crying he thought his back was broken. He was in shock. One of the jet skiers asked if everything was all right. When advised of the injury, the jet skier offered to get help. Plaintiff's party, however, decided not to wait.² (RP 149-50,178-79, 188, 210-11, 226)

By this time, plaintiff was lying at the bottom of his boat in extreme pain. Putnam elevated his legs and held his neck stable while Korn, who had no experience in piloting a boat, sought to take them back to shore. When they arrived, Putnam ran to plaintiff's cabin to tell plaintiff's wife to call 911. (RP 181-83, 190-91, 226, 260)

Plaintiff had a broken left clavicle, bilateral shoulder strains, a right sternoclavicular strain, and bruised ribs. He was discharged from the hospital that night. (RP 273; CP 564)

B. STATEMENT OF PROCEDURE.

1. INITIAL COMPLAINT AND SUMMARY JUDGMENT MOTION.

In March 2007, 8 months after the accident, plaintiff sued Jim and "Jane Doe" Davis as well as several John and Janes Does. The complaint alleged that on June 30, 2006, "John Doe #1" had negligently operated a 2006 jet ski with hull number WN7704NT, cutting off plaintiff's boat,

² Thus, plaintiff's characterization of his accident as a "hit and run" is inaccurate. (Brief of Appellant 1)

causing him to veer sharply, and causing him injury. (CP 1540-47) Jim Davis' large 2006 jet ski had hull number WN7704NT. (RP 318)

The complaint did not claim Jim had been on the jet ski. Instead, it alleged on information and belief that "John Doe #1" had been operating the jet ski with the actual, express, or implied permission of its owners, Jim and his wife. The complaint alleged negligent entrustment, agency, and family car doctrine theories. (CP 1544-45)

The trial court granted Jim and Carol summary judgment. (CP 1015-16)

2. Second Complaint and Summary Judgment Motion.

Nearly three years after the accident, plaintiff filed a separate suit against Jim and Carol's adult son, Scott Davis, Scott's wife, and their son, Tyler. That suit and the suit against the elder Davises were consolidated. (CP 1012-14)

Plaintiff first identified Scott Davis as the jet skier who cut him off at Scott's deposition, nearly three years after the accident. (CP 1041)

Summary judgment in favor of Scott's wife and Tyler was granted, but denied as to Scott's marital community. (CP 923-24, 946-1011)

3. The Jury Trial.

The case proceeded to a jury trial against Scott Davis and his marital community. Scott testified that to the best of his recollection he

had ridden a jet ski only once the day of the accident—in the morning with his son, Tyler. Scott denied being on the water that day with two other people, denied spraying water on, or cutting off, a motor boat at any time that weekend, and flatly denied spraying plaintiff's boat or cutting him off. (RP 371-74, 409-10)

Bruce Thompson testified that he had stayed at the elder Davises' property the entire afternoon the day of the accident and had periodically checked on the jet skis to make sure they were still tied to the buoys. He testified that the jet skis were there the entire afternoon. (RP 542-46)

Carol Davis testified that she and her husband did not want anyone riding the jet skis the afternoon and evening of the accident because of the holiday weekend crowds. (RP 484-85, 509) Jim Davis testified that so far as he knew, no one used his jet skis at a time when they could have been involved in the accident. (RP 531) He also testified (RP 520, 531-32):

Q. . . . if your son Scott had used one or both your Sea-Doos, he would have had your permission to use your Sea-Doos; correct?

A. He would have had to ask me to use them. That has been a family rule since day one.

. . . .

Q. You wouldn't know if Scott used your jet skis without your knowledge because you wouldn't have the knowledge; right?

. . . .

A. My son would ask me before he used them.

....

Q. Has your son Scott ever taken your jet skis out without asking your permission?

A. Absolutely not. It would not happen.

Jim candidly admitted telling the investigating officer that his jet skis were never used on the date of the accident. He told the jury that he had misspoken and what he had meant was that they had not been used during the time frame of the accident. (RP 521-22)

Plaintiff testified that until the accident, he had not looked at the jet skiers so he could identify them. (RP 147) He did not recall seeing Tyler Davis. (RP 104, 160) He did, however, say there was some yellow somewhere, possibly on a jet ski or on a rider's vest.³ (RP 102, 104, 146)

Plaintiff said that after the accident, he got a 5-10 seconds look at the rider of the jet ski that had cut him off. At the time, that jet ski was about 50-100 feet away. (RP 99, 151, 154) Plaintiff claimed the rider reminded him of Brian Bosworth, the former football player:⁴ stocky, with light-colored short hair sticking straight up, and sunglasses.

³ The claims at pages 6 and 10 of Brief of Appellant that plaintiff noticed yellow "on one of the jet skis" are not what he claimed in the trial court. In the summary judgment proceedings, he claimed to have associated yellow with the jet ski or skier who had cut him off. (CP 935, 1359) At trial, he testified he did not know whether yellow was on the jet ski or the rider's vest. (RP 102, 146)

⁴ Plaintiff admitted not telling anyone the jet skier looked like Brian Bosworth until his deposition, nearly two years after the accident. (RP 166)

Presented with a photo of Scott Davis on a jet ski, plaintiff identified him as the jet skier who had tried to cut him off. (RP 100-01, 103-04, 151-52, 314-16)

Despite being unable to describe the jet ski, plaintiff said he had seen that its hull number was WN7704NT. Although there was a pen or paper in the boat, he did not write down the number or ask his companions to do so. Instead, he claimed that to remember the number, he and his friends had recited it all the way back to shore. (RP 101, 146, 151, 154-55)

Defense counsel elicited the following testimony to show the men might have gotten the hull number wrong: On the way back to shore, Putnam was holding plaintiff's head and neck straight, while trying to comfort him by telling him he would be all right. Korn was operating the boat. Plaintiff was coaching Korn how to do it because Korn had never piloted plaintiff's boat before. Plaintiff gave Korn instructions on how start the boat, keep it away from a nearby island and a shallow spot in the river, how to get it to the shore near plaintiff's cabin, and how to pull up the motor when they arrived. Moreover, Korn and Putnam had imbibed enough alcohol before arriving, and again during their boat outing, that plaintiff candidly admitted he would not have loaned either his car.

Plaintiff himself had had two rum and Cokes. (RP 88, 90, 155-57, 191-92, 227-28)

Although all three agreed they had recited the hull number on their way back to shore, Korn and Putnam told a somewhat different story than plaintiff.⁵ Plaintiff had said *he* observed the jet ski's hull number. (RP 154) Korn and Putnam both testified that as they were lowering him to the boat's floor, plaintiff told *them* to get the hull number. Korn said plaintiff did not say he already had the hull number. Korn himself never saw it, but got it from Putnam. (RP 179, 189, 226-27) Brief of Appellant 14, that "Mr. Putnam verified Mr. Pace's version of the events", is thus not inaccurate.

Korn also said that the jet skier who stopped to ask if anyone needed help was only 10 feet away, not 50-100 feet as plaintiff had testified. Yet, except to say he was male, Korn could not describe the rider, let alone identify him as Scott Davis. (RP 151, 223-24)

Moreover, Korn first said that jet ski was big enough to seat two. Then he said he did not know whether it was a one- or two-person jet ski. He was, however, sure it was not large enough to seat three or four:

⁵ Further, page 14 of the brief says the men were "able to acquire the hull number of one of Mr. James Davis' jet skis." No one at the time knew to whom the jet ski belonged, even assuming the men got the hull number right.

A. . . . I didn't see any, like the giant ones, you know what I'm talking about?

Q. No.

A. Like the ones that run like three or four people on them. I didn't see anything like that. . . .

(RP 224-25) There was no dispute that Jim Davis' jet ski with hull number WN7704NT, the 2006 super-charged one, was a three-seater, described as "the biggest one you can buy". (RP 307, 318)

Putnam said that he did not get a look at the jet ski that had cut off their boat because he was focused on his injured friend. He could not say what color(s) it was or describe its rider, let alone identify the rider as Scott Davis. He testified that when, after the accident, one of the jet skiers asked if everything was all right, it was that jet ski whose hull number he got. He did not testify that this was the same jet ski that had tried to cut them off or had splashed them. (RP 179, 186-90)

Putnam would later testify he gave the hull number to the sheriff's department. Plaintiff's wife said Putnam gave her the number, but she did not write it down until aid car workers gave her some paper. The aid car did not arrive until 20-30 minutes after plaintiff and his party returned to shore; the sheriff's department arrived even later. (RP 181, 183, 262-64)

The jury found for Scott. Judgment was entered for the defense. Plaintiff's motion for new trial was denied. (CP 196-97, 218, 1548-49)

IV. ARGUMENT

Preliminarily, this court should consider imposing sanctions on plaintiff's counsel. "A reference to the record should designate the page and part of the record." RAP 10.4(f). Many of plaintiff's record references are not accurate.⁶ In addition, several of the brief's factual statements do not refer to the record, in violation of RAP 10.3(a)(5)-(6). *E.g.*, Brief of Appellant 24, 26, 33-34, 37. The difficulty of determining to where plaintiff is referring in the 2,285-page record has inconvenienced the undersigned and presumably this court. Sanctions are appropriate. *See Hurlbert v. Gordon*, 64 Wn. App. 386, 399-401, 824 P.2d 1238, *rev. denied*, 119 Wn.2d 1015 (1992).

A. THE SUMMARY JUDGMENTS WERE CORRECT.

This court reviews summary judgments by engaging in the same inquiry as the trial court. *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 295, 996 P.2d 582 (2000). This means, *e.g.*, that "only evidence and issues called to the attention of the trial court" will be considered. RAP 9.12. Where, as here, the appeal is from both summary judgment orders *and* a judgment on a jury verdict, the court must

⁶ For example, Brief of Appellant 14 refers to RP 124-26 as presenting substantive evidence, but in fact they refer to proceedings outside the jury's presence. (RP 122-26) As another example, the clerk's papers citations in Brief of Appellant 8-11 are inaccurate.

distinguish between what was called to the trial court's attention on summary judgment and what occurred at trial. Plaintiff fails to do so, citing trial testimony to argue that summary judgment should be reversed.⁷

Although facts and reasonable inferences must be viewed in the light most favorable to plaintiff, plaintiff still had to set forth specific facts to create a genuine issue of material fact. *See Seiber v. Poulsbo Marine Center, Inc.*, 136 Wn. App. 731, 736-37, 150 P.3d 633 (2007); *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 305-06, 151 P.3d 201 (2006). He could not rely on speculation, conclusory statements, or argumentative assertions that factual issues remain. *Seiber*, 136 Wn. App. at 736-37. His affidavits or declarations are not to be taken at face value and he had to offer

⁷For example, although Brief of Appellant 27 n.7 is part of plaintiff's summary judgment argument, it cites RP 520 for the claim that Scott was allowed to use the jet skis "with or without express permission." *See also* Brief of Appellant 19. As RP 520 was not part of the summary judgment proceedings, it should not be considered, and does not support plaintiff's position in any event. At RP 520, Jim Davis testified:

- Q. However, if your son Scott had used one or both your Sea-Doos, he would have had your permission to use your Sea-Doos; correct?
- A. He would have had to ask me to use them. That has been a family rule since day one.

Plaintiff tried to impeach this testimony with Jim's deposition, where he answered "yes" to the question, "If your son Scott used your jet skis when you were not there, he would have had permission to use those jet skis; would he not?" (RP 520) But this was consistent with Jim's trial testimony: he was trying to say that if Scott had used his jet skis outside his presence, Scott must have had his permission. Even if the deposition testimony were a prior inconsistent statement, it was not substantive evidence and could be used only to impeach. *Gams v. Oberholzer*, 50 Wn.2d 174, 177, 310 P.2d 240 (1957).

more than merely colorable evidence or a scintilla of evidence. *Id.* at 736.

“Ultimate facts or conclusions of fact are insufficient.” *Id.* at 737.

Moreover, while credibility issues ordinarily cannot be decided on summary judgment,⁸ plaintiff here—

“must be able to point to some facts which may or will entitle him to judgment, or refute the proof of the moving party in some material portion, and that the opposing party may not merely recite the incantation, ‘Credibility,’ and have a trial on the hope that a jury may disbelieve factually uncontested proof.”

Laguna v. Washington State Department of Transportation, 146 Wn. App. 260, 266-67, 192 P.3d 374 (2008) (quoting *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 627, 818 P.2d 1056 (1991)).

Plaintiff Pace relied on speculation and conjecture, failing to produce specific facts to show a genuine issue of material fact.

1. Grandfather Jim Was Entitled to Summary Judgment.

a. There Was No Evidence of Negligent Entrustment.

Plaintiff claims there is a genuine issue of material fact as to

⁸Although Brief of Appellant 23-24 quotes *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1996), this court has questioned its viability on his quote. *Laguna v. Washington State Dep’t of Transport.*, 146 Wn. App. 260, 266 n.12, 192 P.3d 374 (2008); *Kamla v. Space Needle Corp.*, 105 Wn. App. 123, 129-30, 19 P.3d 461 (2001), *overruled in part on other grounds*, 147 Wn.2d 114, 52 P.3d 472 (2002).

whether the grandfather, Jim Davis, negligently entrusted his jet skis to one or more persons involved in plaintiff's accident. Plaintiff is wrong.

“A party in control of a vehicle or other instrumentality may be held liable for damages resulting from the use of that instrumentality when it is supplied or entrusted to someone who is intoxicated or otherwise incompetent.” *Parrilla v. King County*, 138 Wn. App. 427, 441, 157 P.3d 879 (2007). Liability for negligent entrustment, however, requires showing that the person entrusting the instrumentality consented to relinquish control of it, **and** knew or should have known in the exercise of ordinary care that the person to whom the instrumentality was being entrusted was reckless, heedless or incompetent. *Id*; *Caouette v. Martinez*, 71 Wn. App. 69, 78, 856 P.2d 725 (1993).

The evidence on summary judgment was undisputed that Jim Davis, the owner of jet skis, never consented to relinquish control of them when they could have been involved in the accident. Further, the evidence was undisputed that even if he had and even if it had been his jet skis involved in the accident, Jim did not know and could not have known that the person or persons riding them would be negligent or reckless.

i. Jim Did Not Consent To Relinquish Control to Anyone Who Could Have Been in the Accident.

By the time Jim Davis moved for summary judgment, plaintiff's theory was that the jet skier who tried to cut him off was Jim's son, Scott. Jim submitted a declaration stating "I did not entrust the use of my jet skis to anyone at the time of the accident." In his deposition, Jim testified, "I did not give somebody the okay to use my jet skis." Scott testified in his declaration, "I was not on the jet ski at the time of the accident which is the subject of this lawsuit." (CP 1302, 1360, 1411, 1414)

Plaintiff presented evidence that the hull number of the jet ski in question was WN 7704NT, the hull number of Jim's 2006 jet ski. (CP 1035) Plaintiff claimed (CP 1361, 1362-63):

That Sea-Doo traced directly back to Defendant James Davis, who owns a Sea-Doo with that hull number . . . In addition, both Mr. Davis and Mr. Pace own vacation properties at the same development in Eastern Washington on the Columbia River. These facts standing alone warrant the denial of summary judgment.

. . . .

. . . . Mr. Davis admits that he left [t]he property for a good portion of the day, inclusive of the time when the accident would have occurred. Thus, he cannot say whether his son or grandson (and their friend or others) took the Sea-Doos out onto the Columbia River after James Davis left the property. . . .

Entrustment "requires some kind of agreement or consent, either express or implied, to relinquish control of the instrumentality in

question.” *Parilla*, 138 Wn. App. at 441. Plaintiff presented *no evidence* that Jim Davis gave his agreement or consent, express or implied, for anyone to use his jet skis when the accident in question occurred.

Parrilla is controlling. There a bus driver stopped his bus after an altercation developed between two passengers. Those passengers left, but a third then began acting strangely. The driver left the bus *with its motor running*. The remaining passenger took control and drove the bus into several vehicles.

The occupants of one of the vehicles sued the bus company for negligent entrustment. This court affirmed judgment on the pleadings for the bus company because there was “no indication that the bus driver affirmatively agreed to relinquish control of the bus” to the passenger. 138 Wn. App. at 442. *Cf. Cameron v. Downs*, 32 Wn. App. 875, 650 P.2d 260 (1982) (keys *actually given* to known bad driver).

Here, plaintiff presented *no facts* that Jim affirmatively agreed to relinquish control of his jet ski to anyone at a time when that jet ski could have been involved in the accident. Nor does plaintiff even acknowledge that negligent entrustment requires consent to relinquish control. Instead, plaintiff argues merely that Tyler, Jim’s grandson, was eager to ride and that Tyler or Scott had access to the keys. (Brief of Appellant 17, 24)

It is true that Jim's declaration said his jet skis had been tied up at his property and were not in use at the time. It is also true, as Jim readily admitted, that he did not have personal knowledge of these facts, since he was not at his property then. (CP 1301-02, 1411) But the fact remains that Jim testified he had not entrusted his jet skis to *anyone* around the time of the accident, a fact of which he must have had personal knowledge. (CP 1411) *See Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d 138 (1977) ("To hold that disputed facts about other issues preclude a summary judgment without facts related to the issue in point would abrogate the summary judgment procedure").

Plaintiff failed to present a shred of evidence that Jim consented to relinquish control of either of his jet skis to anyone at any relevant time. Summary judgment on the negligent entrustment claim was proper.

ii. Even Had Jim Entrusted the Jet Ski to Scott, He Did Not Do So Negligently.

Even had plaintiff presented evidence that Jim had entrusted his jet ski to Scott, there was no evidence Jim knew or should have known that Scott was reckless, heedless, or incompetent. Indeed, there was *no* evidence that Scott was reckless, heedless, or incompetent.

In his declaration, Jim testified his son had "never had an accident while riding on or driving jet skis" and that "I have never entrusted my jet

skis to anyone with a past conduct that would make entrusting the jet ski to said person negligent.” (CP 1411) Scott confirmed he had never been in an accident involving a jet ski, never recklessly driven a jet ski, and never was cited for any type of violation in driving a jet ski. (CP 1414)

Lacking contrary evidence, plaintiff claims merely that Jim had “concerns” Scott or Tyler would do something “stupid”. (Brief of Appellant 17, 37) But plaintiff cites solely to trial testimony, not the summary judgment record.⁹ (*Id.* at 17) This is improper. RAP 9.12. This court should refuse to review the negligent entrustment claim.

There was no evidence on summary judgment that Jim was “concerned” about Scott’s using his jet skis. Scott testified merely that one of his father’s rules was not to do anything stupid. (CP 1319) This is no different than a vehicle owner telling a permissive user to be careful and cannot support a negligent entrustment claim.

In short, plaintiff presented *no* evidence that Jim *knew or should have known* that Scott was “reckless, heedless or incompetent,” let alone that Scott *was in fact* “reckless, heedless or incompetent”. *See Caouette*,

⁹Page 17 of Brief of Appellant mischaracterizes the testimony. Although Scott may have disagreed with his father, there was no evidence he “resisted” Jim’s directive not to use the jet skis the afternoon of the accident. Nor is there evidence that he left his father’s property because of any disagreement. (RP 319-21, 363, 507, 509)

71 Wn. App. at 78. Summary judgment on the negligent entrustment claim was correct.

b. There Was No Principal-Agent Relationship.

Plaintiff also claims summary judgment for Jim should be reversed because the rider of the jet ski involved in the accident was presumed to be Jim's agent and that even if Jim rebutted the presumption, there were factual issues. To the extent plaintiff is claiming that anyone other than Scott is Jim's presumed agent, this court should not consider the argument because it was not raised below. RAP 9.12. In the summary judgment proceeding, plaintiff argued, "Based on agency principles, there is a rebuttable presumption that Scott Davis . . . was operating as an agent of the owner of the vehicle . . ., James Davis." (CP 1372; *see also* CP 1365)

Agency is generally not presumed. *Stockdale v. Horlacher*, 189 Wash. 264, 267, 64 P.2d 1015 (1937); *Blodgett v. Olympic Savings & Loan Association*, 32 Wn. App. 116, 128, 646 P.2d 139 (1982). When, however, ownership of a land motor vehicle involved in an accident is shown, the driver is presumed to be the owner's agent acting within the scope of his authority. *Callen v. Coca-Cola Bottling, Inc.*, 50 Wn.2d 180, 182, 310 P.2d 236 (1957).

The presumption can be overcome by the testimony of either interested or disinterested witnesses. *Id.* If the rebuttal evidence is

uncontradicted, unimpeached, clear and convincing, the defendant is entitled to a directed verdict. *Id.* If, however, the evidence is not of the quality required for a directed verdict, the jury must decide. *Id.*

As will be discussed, the presumption does not apply to jet skis as a matter of law. And even if it did, the presumption was rebutted with uncontradicted, unimpeached, clear and convincing evidence.

i. Owning a Jet Ski Does Not Give Rise to a Presumption of Agency.

As with the family car doctrine, to be discussed *infra*, there is no Washington case extending the presumption of agency to boats, let alone to jet skis. Washington cases involving the presumption of agency involve land motor vehicles driven on public roads. *See, e.g., Murray v. Corson*, 55 Wn.2d 733, 350 P.2d 468 (1960); *O'Brien v. Hafer*, 122 Wn. App. 279, 93 P.3d 930 (2004), *rev. denied*, 153 Wn.2d 1022 (2005). In fact, the undersigned is unaware of any case anywhere that has extended the presumed agency rule to boats or jet skis.

Given that the presumption of agency for land motor vehicles is *an exception* to the general rule that agency is not presumed and that it appears no court has extended the presumption to boats or jet skis, there is no reason for this court to do so.

ii. Even If There Were a Presumption of Agency, It Was Rebutted.

Even if the presumption of agency applied to the jet skis, it was rebutted. Jim, the jet skis' owner, declared, "I did not entrust the use of my jet skis to anyone at the time of the accident." (CP 1411) In his deposition, Jim also testified, "I did not give somebody the okay to use my jet skis." (CP 1302)

“ “[A]n agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control.” *O’Brien v. Hafer*, 122 Wn. App. 279, 283, 93 P.3d 930 (2004), *rev. denied*, 153 Wn.2d 1022 (2005) (quoting *Moss v. Vadman* 77 Wn.2d 396, 402-03, 463 P.2d 159 (1969)). Jim Davis’s testimony was undisputed that he did not approve anyone to use his jet skis or entrust them to *anyone*. He thus rebutted the presumption of agency by clear, cogent and convincing evidence.

Plaintiff claims Jim can be liable even if someone other than Scott or Tyler used the jet skis. (Brief of Appellant 27) But if someone entered Jim’s property to take the jet skis and keys, that person would have committed trespass and theft. “The general rule at common law is that a private person does not have a duty to protect others from the criminal acts

of third parties.”” *Nivens v. 7-11 Hoagy’s Corner*, 133 Wn.2d 192, 199, 943 P.2d 286 (1997); *see Perdue v. Mitchell*, 373 So.2d 650 (Ala. 1979); *Mackey v. Dorsey*, 104 Md. App. 250, 655 A.2d 1333 (1995) (negligent entrustment and agency theories inapplicable to stolen vehicle).

iii. Even If Scott Were Presumed To Have Been Jim’s Agent, the Jury Found Scott Not Liable.

Even if Scott were presumed to have been Jim’s agent, there would be no need for reversal. After a 4-day trial, a jury found in Scott’s favor. (CP 218, 850) If the agent is not liable, neither is the principal. *See Brink v. Martin*, 50 Wn.2d 256, 258, 310 P.2d 870 (1957). Because the jury found the alleged agent, Scott, not liable (CP 218), the alleged principal, Jim, could not be liable.

The purpose of summary judgment is to avoid a useless trial. *See Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). Reversing summary judgment to allow a jury to determine whether Scott was Jim’s agent would be useless. This court should affirm.

c. The Family Car Doctrine Does Not Apply.

Plaintiff also claims that the family car doctrine, a/k/a the family purpose doctrine, should apply. Under that doctrine, family members permitted to drive an automobile are viewed as agents of the automobile owner, so long as they are using the vehicle in furtherance of a family

purpose for which it was maintained. *Kaynor v. Farline*, 117 Wn. App. 575, 72 P.3d 262 (2003). The doctrine is not based on the family relationship, but on the relation of agency or service. *Id.* at 584.

The family car doctrine has been much criticized. *See, e.g.*, 79 A.L.R. 1161 (1932) (“its soundness from a legal standpoint is doubtful”); *Van Blaricom v. Dodgson*, 220 N.Y. 111, 115 N.E. 443, 444 (1917) (theory “is more illusory than substantial”); *Hackley v. Robey*, 170 Va. 55, 195 S.E. 689, 693 (1938) (“novel and attenuated application of the principles of agency”). Hence, Washington is one of just sixteen states to apply the doctrine. *See Birch v. Abercrombie*, 74 Wash. 486, 133 P. 1020, 135 P. 821 (1913); Annot., 8 A.L.R.3D 1191, 1200-01 (1966 & Supp.) At least 32 states have rejected it. Annot., 8 A.L.R.3D 1191, 1221-22 (1966 & Supp.).

i. The Doctrine Does Not Apply to Jet Skis.

The vehicle at issue here was not a land motor vehicle. It was a jet ski. Plaintiff asks this court to extend the family car doctrine to jet skis.

There is no reported Washington decision applying the doctrine to boats, let alone to jet skis. Indeed, the Washington Supreme Court has refused to extend the doctrine to bicycles. *Pflugmacher v. Thomas*, 34 Wn.2d 687, 209 P.2d 443 (1949). Since the family car doctrine does not apply to bicycles in this state, it should not apply to jet skis.

In fact, none of the 15 other jurisdictions that have adopted the doctrine appears to have applied it to jet skis. Only Georgia courts have extended the doctrine to boats. *See, e.g., Stewart v. Stephens*, 225 Ga. 185, 166 S.E.2d 890 (1969). Thus, it is no surprise that the only case plaintiff cites to support his position is a Georgia case. (Brief of Appellant 28)

Georgia is an anomaly. Courts in at least two other states that employ the family car doctrine have refused to extend it to boats. For example, the Minnesota Supreme Court has explained:

The number of motorboats, even in the state of Minnesota with its more than 10,000 lakes, is extremely limited when compared with the number of automobiles upon its highways. . . . It is evident that in practically all of the decisions the doctrine was applied to automobiles in the interest of justice and necessity. The situation as regards motorboats is in no way comparable to that of automobiles.

Felcyn v. Gamble, 185 Minn. 357, 241 N.W. 37, 38 (1932).

More recently, the North Carolina Supreme Court refused to extend the family car doctrine to boats. In *Grindstaff v. Watts*, 254 N.C. 568, 119 S.E.2d 784 (1961), the court ruled that absent legislative action, it would not apply the doctrine to instrumentalities other than motor vehicles operated on the public highways. The court explained:

The family purpose doctrine is an anomaly in the law. . . . In this State it is not the result of legislative action, but is a rule of law adopted by the Court. “The doctrine undoubtedly involves a novel application of the rule of respondeat superior and may, perhaps, be regarded as

straining that rule unduly.” 5 AM. JUR., Automobiles, s. 365, p. 705. It is a deviation from the ordinary principles of respondeat superior and has been severely criticized in some quarters. . . .

Id. at 787. This court should follow the Minnesota and North Carolina courts.

To bolster his family car doctrine argument, plaintiff appended Appendix 1, setting forth 2008 watercraft accident statistics, to his brief. This document is not part of the record, so the defense moved to strike it and all argument based thereon.¹⁰ A commissioner passed the motion to the panel. The motion to strike should be granted.

ii. Even if the Doctrine Applied to Jet Skis, It Does Not Apply Here.

Even if this court were to extend the family car doctrine to jet skis in general, the doctrine would not apply under the facts of this case.

Under the doctrine, a plaintiff must prove each of the following:

- (1) the car is owned, provided or maintained by the parent
- (2) for the customary conveyance of family members and other family business and
- (3) at the time of the accident the car is being driven by a member of the family for whom the car is maintained,
- (4) with the express or implied consent of the parent.

¹⁰ In any event, plaintiff miscites App. 1, overstating the number of open motor boats deaths by more than 572% and the number of personal watercraft deaths by more than 2140%. (Brief of Appellant 3) App. 1 does not say whether Washington had *any* personal watercraft deaths.

Cameron v. Downs, 32 Wn. App. 875, 879-80, 650 P.2d 260 (1982).

Plaintiff cannot show the last two requirements.

Even assuming *arguendo* that Scott and Tyler were riding the jet skis, they were not family members for purposes of the family car doctrine. Under that doctrine, family members consist of “all the members of the collective body of persons *living in [the vehicle owner’s] household.*” *McGinn v. Kimmel*, 36 Wn.2d 786, 788, 221 P.2d 467 (1950) (emphasis added). Neither Scott nor Tyler was living in Jim’s household.

The Washington Supreme Court has explained:

[W]hen a child leaves the family circle and establishes a home of his own, he ceases to be a member of the family within the meaning of the family purpose doctrine, and when he uses his parents’ automobile with their consent and for his own pleasure, he is a borrower of it and not an agent.

McGinn 36 Wn.2d at 789. Thus, emancipated children are not “members of the family” under the family car doctrine. An adult child who maintains his own household does not become a family member for purposes of the family car doctrine simply because he is vacationing with his parents. *See Piechota v. Rapp*, 148 Neb. 442, 27 N.W.2d 682 (1947).

Scott was an emancipated son no longer living with his parents. He was at their vacation home for only the holiday weekend. (CP 1189,

1291, 1316, 1414) Even if Scott had been piloting the jet ski, the family car doctrine would not apply to impose liability on Jim.

Plaintiff also claims the family car doctrine imposes liability on Jim for making the jet skis available to Tyler. (Brief of Appellant 33) But plaintiff never claimed below that Jim should be liable for Tyler under the family car doctrine. Instead, plaintiff argued (CP 1372)¹¹:

[U]nder the “Family Purposes Doctrine” it is clear that there [is] at a minimum questions of fact as to ***whether or not James Davis can be held liable for the actions of his son, Scott Davis***

(Emphasis added.) It is too late to raise whether the family car doctrine applies with respect to Tyler. RAP 9.12. This court should not review.

In any case, a grandchild who is not a member of his grandparents’ household is not a family member either. *McGee v. Crawford*, 205 N.C. 318, 171 S.E. 326 (1933); *Esco v. Jackson*, 185 Ga. App. 901, 366 S.E.2d 309 (1988). Tyler was no more a member of his grandparents’ household than was his father, Scott. (CP 1187-89, 1316, 1414) Even had plaintiff

¹¹ See also CP 1360 (“individual who was driving the jet-ski that cut him off was Scott Davis”); 1366 (as to family car doctrine, “that his son, Scott Davis, who more probably than not was the person driving the jet-ski, did not reside with his father, such a fact is not dispositive”); 1369 (“a Sea-Doo located at a parent-owned vacation property would be and was something generally made available to Scott Davis”); 1369-70 (“there was an implied and/or express consent that Scott Davis would be allowed to use the Sea-Doos”).

properly raised the family car doctrine as to Tyler, summary judgment in Jims' favor must be affirmed.

Kaynor v. Farline, 117 Wn. App. 575, 72 P.3d 262 (2003), does not require a contrary result. The driver there was not only a minor—a 17-year old, but he was under the joint custody of his divorced parents.

The family car doctrine also requires a showing that the family member was driving with the vehicle owner's express or implied consent. Jim Davis testified he "did not entrust the use of my jet skis to anyone at the time of the accident" and "I did not give somebody the okay to use my jet skis." (CP 1302, 1411)

Plaintiff presented *no* evidence to contradict this testimony. Thus, the evidence was undisputed that if Jim's jet ski had been used at the time of the accident, it was without his consent. Summary judgment on the family car doctrine was properly granted.

2. Grandson Tyler Was Entitled to Summary Judgment.

After plaintiff's claims against Jim were dismissed, grandson Tyler moved for summary judgment. In his declaration, Tyler admitted being at Sunland Estates over the pertinent weekend. However, he denied being on a jet ski or any other watercraft at the time of the accident and denied involvement in the accident. He testified he first learned of it when he

heard sirens and he and his grandmother walked down to the dock to find out what had happened. (CP 946-53, 1008)

In response, plaintiff cited, *i.e.*, pp. 23-25 and 48 of Tyler's deposition. (CP 938, 941) These pages were not in the record at the time. Moreover, Brief of Appellant 11 attempts to raise a factual issue by citing to deposition testimony of Tyler and his grandmother, Carol Davis. Not only are the cites inaccurate, but *no one ever cited to, let alone submitted, Carol's deposition as part of any summary judgment proceedings.* Her deposition and the entirety of Tyler's are in the record only because they were published *at trial*. (RP 460, 572-73) Evidence not brought to the trial court's attention *on summary judgment* and "on file" at the time may not be considered. RAP 9.12; CR 56(c); *see American Universal Insurance Co. v. Ranson*, 59 Wn.2d 811, 815-16, 370 P.2d 867 (1962).

Further, plaintiff has changed his theory from what he asserted in the summary judgment proceedings below. There he claimed he saw the color yellow *with respect to the jet skier who cut him off, i.e.*, the jet skier who rode the jet ski with the hull number plaintiff said was the hull number of Jim's larger 2006 jet ski. (CP 935, 1359) But in this appeal, he claims he associated yellow with either the vessel or clothing of the rider of one of the two *other* jet skis. (Brief of Appellant 6, 13, 24)

The reason for plaintiff's theory change is simple: the hull number plaintiff claims to have memorized of the jet ski that cut him off is the hull number of Jim Davis' large 2006 jet. (CP 1272) It is undisputed the 2006 jet ski has no yellow on it. (CP 1193) Therefore, in this appeal, plaintiff seeks to raise a factual issue as to Jim's 1997 jet ski—which Jim had bought for Tyler's use—which did have some yellow on it. (CP 1205, 1279) But plaintiff cannot change his theory for the first time on appeal. *See Brown v. Labor Ready Northwest, Inc.*, 113 Wn. App. 643, 655, 54 P.3d 166 (2002), *rev. denied*, 149 Wn.2d 1011 (2003).

Plaintiff also claims for the first time on appeal that *Tyler* should not have been granted summary judgment because there was a genuine issue of material fact as to a yellow life vest. (Brief of Appellant 24) But in the summary judgment proceedings below, plaintiff swore it was *Scott Davis* who was wearing a yellow life vest.¹² (CP 1042)

The only other argument plaintiff makes is that Tyler wanted to use the jet skis, was “rambunctious”, and the keys were in a place where

¹² The Brief of Appellant 18 cites RP 398 for the proposition that “Scott Davis admitted that the family had a yellow life vest.” What Scott really said was (RP 398):

Q. Was there a yellow life vest, too, that usually hung in the garage?

A. That's possible. There is quite a few life jackets that we have, all different sizes

he could have taken them. (Brief of Appellant 24) But plaintiff engages in mere speculation and conjecture when he asks this court to assume that Tyler disobeyed his grandfather and stole the keys and the jet ski. *See Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 309 n.14, 151 P.3d 201 (2006). “More than mere possibility or speculation is required to successfully oppose summary judgment.” *Doe v. State Department of Transportation*, 85 Wn. App. 143, 147, 931 P.2d 196, *rev. denied*, 132 Wn.2d 1012 (1997).

A party opposing summary judgment cannot rely on speculation and conjecture. Mere possibility is insufficient. *See Chamberlain v. State Department of Transportation*, 79 Wn. App. 212, 215-16, 901 P.2d 344 (1995). Instead, plaintiff must produce *specific facts* that sufficiently rebut the movant’s evidence and create a genuine issue of material fact. *See Seiber v. Poulsbo Marine Center, Inc.*, 136 Wn. App. 731, 736-37, 150 P.3d 633 (2007).

Plaintiff submitted only speculation and conjecture, not specific facts, to contradict Tyler’s testimony that *he* was not on the water at the time of the accident and had not been involved in the accident. Summary judgment for Tyler should be affirmed.

B. A NEW TRIAL FROM THE VERDICT FOR SON SCOTT IS UNNECESSARY.

A jury heard all the evidence and returned a verdict for Scott. Plaintiff seeks a new trial. The evidence must be viewed in the light most favorable to Scott. *Wines v. Engineers Limited Pipeline Co.*, 51 Wn.2d 487, 490, 319 P.2d 563 (1957). Only if the court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain the verdict, may a new trial be granted. *Kohfeld v. United Pacific Insurance Co.*, 85 Wn. App. 34, 41, 931 P.2d 911 (1997).

“The grant or denial of a motion for a new trial is a matter within the trial court's discretion and will not be disturbed on appeal absent a showing of a manifest abuse of that discretion.” *Kohfeld*, 85 Wn. App. at 40. A trial court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). Untenable grounds exist if the decision “rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *Id.* A decision is manifestly unreasonable if it is one no reasonable person would make and is outside the range of acceptable choices. *Id.*; see *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), *rev. denied*, 129 Wn.2d 1003 (1996).

Any abuse of discretion must also be shown to have resulted in prejudice. *Brown v. Spokane County Fire Protection District No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). Error is not prejudicial “unless it affects, or presumptively affects, the outcome of the trial.” *Id.*

The trial court did not abuse its discretion in denying a new trial.

1. Declining To Give Proposed Instructions 13 and 17 Was Not an Abuse of Discretion.

a. Plaintiff Cannot Show Prejudice.

Plaintiff claims the refusal to give his proposed instruction nos. 13 and 17 requires a new trial. Proposed instruction no. 13 (CP 776) purports to set forth the RCW 79A.60.030 prohibition against negligent operation of a vessel and the statutory definition of such negligence. Proposed instruction no. 17 (CP 780), based on RCW 5.40.050, would have told the jury that any violation of a statute is not necessarily negligence, but may be considered in determining whether there was negligence. If proposed instruction no. 13 is inapplicable, so is proposed instruction no. 17.

Instructional error does not require a new trial unless it was prejudicial. *Stiley v. Block*, 130 Wn.2d 486, 498-99, 925 P.2d 194 (1996). Error is prejudicial if it affects the outcome of the trial. *Id.* at 499. Even if the refusal to give the proposed instructions were error (which it was not), the refusal did not affect the outcome of trial.

Scott Davis testified (RP 322-23):

Q. And if you interfered with the operation of a boat coming up on to a plane such that it had to veer away to avoid a collision with a Sea-Dooer, that would also be negligent; would it not?

A. Yes, it would.

Q. So if in fact the jury finds that you did that, you are admitting that you were negligent; correct?

A. I am still not admitting that I did that.

Q. If the jury finds that you, as a matter of fact, that you were there and you did that, you would agree, sir, that you would have acted negligently; correct?

A. By the jury's decision, yes.

Plaintiff's counsel used Scott's testimony in his closing argument:

In this case, you have two issues. One [w]as Scott Davis negligent? And we've made it easier for you because we asked the question, and he admitted that if you find that he is negligent, he's admitted that he's responsible for all the harms and losses that he has caused.

And that if he has done the acts to cause the injuries, . . . he's admitted he is negligent.

. . . .

. . . Mr. Davis has conceded that if you find that he rode his Sea-Doo so that Mr. Pace had to veer to avoid that collision, that's negligence. So that's been made easier for you here

(RP 625, 630) In addition, in opening, defense counsel told the jury, "Scott Davis wasn't there on the water at the time that Mr. Pace was injured" (RP 70) and in closing:

And what are we down to now? The one question that you have to decide: Is Scott Davis involved in this?

....

So one choice is that Ron Pace, who seems like a lovely man, and who truly believes what he's telling everybody, Ron Pace and his family and friends are mistaken.

The other choice you can make is that Jim Davis, Carol Davis, Tyler Davis, Scott Davis, and Bruce Thompson got up here and not only lied to you, but they conspired to lie to you. Those are your two choices, and that's it. Those are the two choices.

(RP 658, 660) In rebuttal, plaintiff's counsel told the jury (RP 674):

Ms. Brown has helped us a little bit. Just told you if you believe Scott Davis did this, that Ron Pace is entitled to compensation for his injuries.

Consequently, the real question the jury decided was whether Scott had been the jet skier in question. Since the jury found in Scott's favor, it must have found that he was not.

At most the proposed instructions would have supplemented the negligence instructions. But since the jury must have decided Scott was not operating the jet ski that caused the accident, it never determined whether he was negligent. The refusal to give the instructions had no effect on the trial's outcome. *See Davis v. Globe Machine Manufacturing Co.*, 102 Wn.2d 68, 76, 684 P.2d 692 (1984).

b. Plaintiff Could Argue His Theory of the Case.

In any event, the trial court was within its discretion not to give the proposed instructions. A refusal to give an instruction is reviewable only for abuse of discretion. *Stiley*, 130 Wn.2d at 498. A trial court also has considerable discretion as to the wording and number of instructions. *State ex rel. Taylor v. Reay*, 61 Wn. App. 141, 146, 810 P.2d 512, *rev. denied*, 117 Wn.2d 1012 (1991). “Instructions are sufficient if they permit a party to argue his or her theory of the case, are not misleading, and, when read as a whole, properly inform the jury on the applicable law.” *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662, 935 P.2d 555 (1997).

“While it is proper for the court to instruct the jury in the language of a statute, *it is not required to do so.*” *Reay*, 61 Wn. App. at 147 (emphasis added); *accord Kastanis v. Educational Employees Credit Union*, 122 Wn.2d 483, 497, 859 P.2d 26, 865 P.2d 507 (1993). For example, in *Reay*, parents sued the medical examiner to compel him to change his conclusion that their daughter was a suicide. The parents had to prove the medical examiner had acted arbitrarily and capriciously. The jury was instructed that arbitrary and capricious action was willful and unreasoning action, without consideration and in disregard of the facts.

The parents claimed the jury should have also been instructed on the medical examiner's statutory duty to make his decision based on his best knowledge and belief. The court held the instructions were sufficient.

Here, Instruction Nos. 7-9 told the jury (CP 209-11):

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

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

Every person has a duty to see what would be seen by a person exercising ordinary care.

Under these instructions, plaintiff was able to argue his theory of the case. Indeed, the trial court correctly pointed out that the two proposed instructions were unnecessary, particularly since “[Scott] Davis[] acknowledged that if he was the driver, he drove negligently.” (RP 733)

Further, an ordinary juror would have understood *without the proposed instructions* that piloting a jet ski so close that the boat operator has to suddenly veer to avoid a collision is not something a reasonably careful person would do. The instructions given were sufficient.

Trueax v. Ernst Home Center, 70 Wn. App. 381, 853 P.2d 491 (1993), *rev'd on other grounds*, 124 Wn.2d 334, 878 P.2d 1208 (1994), does not compel a different result. There plaintiff claimed a commercial

sign violated a city ordinance requiring a 10-foot vertical clearance above sidewalks. The ordinance left no room for discretion: either the sign was at least 10 feet above the sidewalk in compliance with the ordinance or it was not.

In contrast, the statutes in *Reay* and the instant case were phrased in general terms that, like the instructions given, require the exercise of judgment and discretion. As in *Reay*, the trial court here did not abuse its considerable discretion in refusing to give the proposed instructions.

Kelsey v. Pollock, 59 Wn.2d 796, 370 P.2d 598 (1962), is also inapposite. There taxi passengers were injured in a collision. The other car's driver was favored under the rules of the road. Absent an instruction that the favored driver had a right to assume the disfavored driver would yield, the favored driver could not argue his theory of the case.

Neither *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998), nor *Joyce v. State, Dept. of Corrections*, 155 Wn.2d 306, 119 P.3d 825 (2005), applies because they did not involve refusing to give statutorily-based instructions.

Finally, proposed instruction no. 13 dealt primarily with excessive speed. (CP 776) Although Brief of Appellant 1, 6, and 12 refer to excessive speed, the record does not, because speed was not at issue. Plaintiff's claim was that the jet ski improperly cut in front of him. (RP

97) An instruction inapplicable to the issues need not be given. *Haysom v. Coleman Lantern Co.*, 89 Wn.2d 474, 481-82, 573 P.2d 785 (1978).

2. The Trial Court Did Not Comment on the Evidence.

After the claims against grandson Tyler were dismissed (CP 924), the case went to trial solely against Tyler’s father, Scott, and his marital community. (RP 41-42) During jury deliberations, the following note, signed by one juror, was given to the trial court clerk. (CP 198, 219):

In regards to Instruction #7 and for further clarification, does any negligence on the part of Tyler Davis constitute negligence on the part of Scott Davis, as his parent?¹³

At the trial judge’s direction and consistent with CR 51(i), the clerk telephoned both sides’ counsel to inform them of the question and the court’s intention to answer “no.” Plaintiff’s counsel said he wanted the jury told to read the instructions. Defense counsel agreed with the trial court’s proposed response, as Tyler was no longer a party. (CP 198)

The clerk advised the trial court of counsels’ responses. At the trial court’s direction, the clerk called plaintiff’s counsel to ask why a “no”

¹³ Instruction No. 7 (CP 209) was WPI 10.01, which reads:

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

response would be erroneous and adversely affect his case. Plaintiff's counsel said it would cut the link between father and son and, if the jury found Tyler responsible, would cut off liability completely. The record is unclear whether plaintiff's counsel said a "no" response would be a comment on the evidence. (CP 198, RP 714)

After considering plaintiff's counsel's concerns, the trial court answered the juror's question with the one-word response of "no." (CP 219) Plaintiff claims this was an impermissible comment on the evidence.

WASH. CONST. art. IV, § 16, provides:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

CR 51(j) similarly states:

Judges shall not instruct with respect to matters of fact, nor comment thereon.

By answering "no" to whether any negligence by Tyler could be imputed to the only defendant, Tyler's father, the trial court was not instructing with respect to matters of fact. The question was a legal one: whether a parent could be found negligent for the negligence of his child. As a matter of law, Tyler could not have been negligent because the claims against him had already been dismissed for want of evidence that he had been on jet skis at the time of the accident.

Plaintiff claims the “no” answer led the jury to believe Scott had not been at the accident. But to constitute a comment on the evidence, “the court’s attitude toward the merits of the cause [must be] *reasonably inferable* from the nature or manner of the court’s statements.” *State v. Carothers*, 84 Wn.2d 256, 267, 525 P.2d 731 (1974) (emphasis added). There is no way to reasonably infer that the trial court believed Scott was not at the accident. The jury did not ask whether Scott was there, and the trial court’s response did not suggest it, one way or the other.

The trial court did not impermissibly comment on the evidence. The judgment on the jury verdict should be affirmed.

3. Allowing Only Clarifying Jury Questions Does Not Require a New Trial.

Plaintiff also complains the trial court improperly restricted jury questioning of witnesses, as authorized by CR 43(k). But plaintiff did not object to the trial court’s allowing only clarifying questions from jurors until he moved for a new trial. (RP 167, 194, 236, 284, 413, 436, 451, 490, 536, 568, 581; CP 51-53) This was too late. *Sherman v. Mobbs*, 55 Wn.2d 202, 207, 347 P.2d 189 (1959).

Worse yet, plaintiff proposed an instruction, WPI 1.01, endorsing that approach:

You will be allowed to propose written questions to witnesses after the lawyers have completed their

questioning. You may ask questions in order *to clarify* the testimony, but you are not to express any opinion about the testimony or argue with a witness. If you ask any questions, remember that your role is that of a neutral fact finder, not an advocate.

(CP 167) (emphasis added). While the record does not show whether this instruction was given, proposing it invited any error. This court should not review. *See State v. Elmore*, 139 Wn.2d 250, 280, 985 P.2d 289 (1999), *cert. denied*, 531 U.S. 837 (2000).

Bennett v. Hardy, 113 Wn.2d 912, 784 P.2d 1258 (1990), is inapposite, as it did not involve a party who urged the court do what he now claims it should not have done.

In any event, plaintiff has not shown prejudice. “A procedure involving juror questioning must result in actual prejudice before an appellate court is justified in reversing a judgment.” *State v. Munoz*, 67 Wn. App. 533, 537, 837 P.2d 636 (1992), *rev. denied*, 120 Wn.2d 1024 (1993).

Even if this court were to reach the merits, CR 43(k)’s history indicates the intent was to authorize clarifying questions. Washington State Jury Commission, *Report to the Board for Judicial Administration Recommendation 33* (July 2000). Indeed, the trial court has discretion to disallow a given juror question. CR 43(k). The trial court did not abuse its discretion.

V. CONCLUSION

The credibility of plaintiff and his friends and family versus Scott Davis and his friends and family was put before the jury. The jury chose not to believe Scott was on the jet skis that caused the accident. Indeed, the jury could have concluded the jet skis did not even belong to Scott's father, Jim. Plaintiff has not shown any reason for a new trial.

Nor has plaintiff shown that summary judgment in favor of Jim Davis and Tyler Davis should be reversed. Plaintiff did not present specific facts to create a genuine issue of material fact.

The judgment and summary judgment orders should be affirmed.

DATED this 3rd day of September, 2010.

REED McCLURE

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