

No. 344339

COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON

**FILED**

OCT 08 2016

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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BRIAN PELLHAM,

Appellant-Plaintiff,

vs.

LET'S GO TUBING, INC., and

DAVID JOHNSON and JANE DOE JOHNSON,

Respondents.

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APPELLANT'S OPENING BRIEF

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## TABLE OF CONTENTS

|   |    |
|---|----|
| Table of Authorities .....  | ii |
| Assignments of Error.....   | 1  |
| 1. <u>The Trial Court Erred by Granting Summary Judgment Dismissing Plaintiff's Claims for Personal Injury Against Defendant Where Evidence Supports a Finding of Gross Negligence</u> .....  | 1  |
| Issue: Whether evidence that tubing excursion operator who chose site on river from which to begin excursion, knew of the existence of a hazard at that site, and failed to warn participant of the hazard or instruct participant how to avoid the hazard is sufficient to establish a material question of fact as to whether operator acted with gross negligence..... | 1  |
| Statement of the Case .....   | 2  |
| Standard of Review .....  | 4  |
| Argument.....   | 5  |
| 1. <u>Evidence that Defendant Chose the Location for Beginning of Tubing Excursion, Knew the Existence of a Hazard at that Location, and Failed to Warn Plaintiff of the Hazard, is Sufficient to Raise a Material Issue of Fact as to Whether Defendant Acted With Gross Negligence</u> .....  | 5  |
| Conclusion .....  | 9  |
| Certificate of Service .....  | 11 |

TABLE OF AUTHORITIES

CASES:

**Washington State Supreme Court:**

*Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).....4  
*Nist v. Tudor*, 67 Wn.2d 322, 326-331, 407 P.2d 798 (1965) .....5,6  
*Vodopest v. MacGregor*, 128 Wn.2d 840, 853, 913 P.2d 779 (1996).....5

**Washington Court of Appeals:**

*Boyce v. West*, 71 Wn.App. 657, 666, 862 P.2d 592 (1993) .....5  
*Johnson v. Spokane to Sandpoint, LLC*, 176 Wn.App. 453, 309 P.3d 528 (2013) .....5  
*Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).....4  
*Keck v. Collins*, 181 Wn.App. 67, 325 P.3d 306 (2014) .....4

STATUTES:

RCW 46.07.080.....6

## I. ASSIGNMENTS OF ERROR

1. The Trial Court Erred by Granting Summary Judgment Dismissing Plaintiff's Claims for Personal Injury Against Defendant Where Evidence Supports a Finding of Gross Negligence.

Issue: Whether evidence that tubing excursion operator who chose site on river from which to begin excursion, knew of the existence of a hazard at that site, and failed to warn participant of the hazard or instruct participant how to avoid the hazard is sufficient to establish a material question of fact as to whether operator acted with gross negligence.

## II. STATEMENT OF THE CASE

On July 30, 2011, Appellant Brian Pellham and several of his friends went for a tubing excursion on the Yakima River. CP 160. The excursion was conducted by Let's Go Tubing, Inc., which rents inner tubes to its customers and arranges "floats" on the river. CP 177-78. Pellham was severely injured when he became caught in a downed tree in the river immediately downstream from the launch site. CP 5-6, 163.

Let's Go Tubing rents inner tubes to its customers who then float down the Yakima River on the tubes. Customers either launch from the

site where they obtain their tubes or are transported by bus to another location to begin their float. CP 195.

Everyone who participates in a float is required to sign a release of liability. CP 194. Each group is also given a "safety talk." The talk includes instruction to stay in the middle of the river and to look downstream to avoid obstacles such as large rocks. CP 199-200. The Yakima is a "wild" river and can be hazardous due to logs, sticks, bushes, etc. CP 198. Participants are told to "Look downstream often and pay attention to what you are floating towards." CP 201.

The excursion in which Pellham participated started at the staging area where they were given their tubes and handed the liability waiver form, which Pelham and the other participants signed. CP 161, 165, 173, 179. They were then taken by bus to the launch site. The bus was operated by the company. The company also chose the launch site. CP 161, 165, 179.

Immediately downstream from the launch site was a large tree that had fallen into the river. The tree presented a hazard to the tubers in part because it was around a bend in the river and not visible from where the tubers were told to enter the river. CP 162, 166, 174, 179. The bus driver had warned some of the persons on the bus about the tree and told them to begin paddling toward the center of the river immediately upon launching

in order to avoid getting caught in the tree. CP 179. That warning was not given to Pellham or others who were sitting in the back of the bus. CP 162, 171.

At the launch site, Pelham and four of his friends were among the last to get into the river. CP 180. Those who had gone before them and who had been warned about the downed tree were able to avoid it. CP 179-80. Pelham and the four others who were with him did not become aware of the tree until it was too late. All of them were pulled into the tree by the current. CP 162, 166, 174.

When he hit the tree, Pellham tried to stay with his tube, but was unable to do so. CP 162. He also attempted to hold onto the tree to avoid being dragged under it, but the current was too strong and it pulled him under. CP 162. In trying to get back to the surface, Pellham was struck on the head and chest by the tree. Pellham eventually managed to get to the shore and was later taken to the hospital. CP 163. He sustained injuries to his neck, shoulder and lower back in addition to numerous cuts and bruises. Pellham was ultimately required to undergo surgery to repair damage to his neck, left shoulder, and lower back. CP 5-6.

After Pellham was able to get to the shore and make his way back to the staging area, he spoke with the driver of the bus, Steff Thomas. CP 58-59. Thomas told Pellham that he was aware of the downed tree in the

river below the launch site. When Pellham asked why Let's Go Tubing did not remove the tree, Thomas stated that they were not allowed to disturb the natural condition of the river by removing any obstructions. CP 82-83.

Pellham brought this action against Let's Go Tubing, Inc. for personal injury and damages. Let's Go Tubing moved for summary judgment as to all claims arguing that Pellham's claims were barred by the liability waiver he had signed and that Pellham had both expressly and impliedly assumed the risk that resulted in his injuries. CP 17-41. The trial court granted Defendants' motion and dismissed all claims. CP 249-51. (Plaintiff's CPA claim was dismissed by stipulation of the parties) Pellham timely filed his Notice of Appeal to this Court. CP 253-58.

### III. STANDARD OF REVIEW

The standard of review of an order granting summary judgment is de novo. The appellate court performs the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). In reviewing an order on summary judgment, the appellate court, like the trial court, construes all evidence and reasonable inferences in the light most favorable to the nonmoving party. *Keck v. Collins*, 181 Wn.App. 67, 325 P.3d 306 (2014).

#### IV. ARGUMENT

1. Evidence that Defendant Chose the Location for Beginning of Tubing Excursion, Knew the Existence of a Hazard at that Location, and Failed to Warn Plaintiff of the Hazard, is Sufficient to Raise a Material Issue of Fact as to Whether Defendant Acted With Gross Negligence.

A pre-injury waiver and release of liability will not exculpate a defendant from liability for damages caused by the defendant's gross negligence. *Johnson v. Spokane to Sandpoint, LLC*, 176 Wn.App. 453, 309 P.3d 528 (2013) citing, *Vodopest v. MacGregor*, 128 Wn.2d 840, 853, 913 P.2d 779 (1996). Gross negligence is negligence that is "substantially and appreciably greater" than ordinary negligence. *Id.* To overcome a waiver of liability, a plaintiff must provide substantial evidence that the defendant's acts or omissions represented care that is appreciably less than the care inherent in ordinary negligence. *Id.*, citing, *Boyce v. West*, 71 Wn.App. 657, 666, 862 P.2d 592 (1993).

In Washington, gross negligence is defined as the failure to exercise slight care, as opposed to ordinary negligence, which is defined as the failure to exercise reasonable care. *See, Nist v. Tudor*, 67 Wn.2d 322, 326-331, 407 P.2d 798 (1965). Whether an act or omission constitutes the failure to exercise slight care is usually a question for the

jury and is dependent upon the foreseeability of the hazard out of which the injury arises. *Nist.*, 67 Wn.2d at 331.

In *Nist*, the passenger in a vehicle was severely injured when the driver made a left-hand turn into the path of an oncoming truck. *Nist*, 67 Wn.2d at 324. The trial court granted defendant's motion to dismiss based on a challenge to the sufficiency of the evidence, holding that the plaintiff had proved only ordinary negligence, not gross negligence as required by the host-guest statute, RCW 46.07.080. The Washington Supreme Court reversed, reasoning that, because the danger posed by the oncoming truck was obvious, a reasonable jury could conclude that the driver failed to exercise even slight care by suddenly turning in front of the truck. *Nist*, 67 Wn.2d at 332.

In reaching that conclusion, the *Nist* court reviewed a number of Washington cases involving gross negligence claims. The court found that the determinative factor as to whether an act or omission could be construed as involving gross negligence as opposed to ordinary negligence was whether the defendant was aware of the hazard and the degree of foreseeability that failure to avoid the hazard would result in injury. *See, Nist*, 67 Wn.2d at 327-28.

Here, the evidence taken in the light most favorable to Pellham is that Let's Go Tubing was aware of the downed tree in the river just below

the launch site and also knew that failure to avoid the tree could result in injury to persons entering the river at that location. Nevertheless, Let's Go Tubing transported Plaintiff, along with others, to that site to begin the float. Although the bus driver warned some participants about the downed tree, Pellham and others at the back of the bus were not given any warning or instructed how to avoid the tree. Such evidence, if believed by a jury, is sufficient to establish gross negligence on the part of Let's Go Tubing.

The declarations submitted by Pellham establish the following facts:

1. All of the persons involved in the excursion were taken by bus to the launch site, which was chosen by the bus driver. No one was given the option of entering the river at a different location;
2. The downed tree was just below the launch site, but was not visible from the launching area;
3. Participants in the float were at risk of getting caught in the tree if they did not paddle quickly out to the middle of the river;
4. Let's Go Tubing was aware of the hazard posed by the downed tree; and
5. Pellham was not told about the downed tree or instructed how to avoid getting caught in it.

These facts, if believed by the jury, would support a finding of gross negligence. Let's Go Tubing was aware of a specific risk to Pellham and knowingly subjected him to that risk. The likelihood that Pellham could be injured if he entered the river at that particular location without being warned of the downed tree was highly foreseeable. Thus, Let's Go Tubing failed to exercise even slight care for Pellham's safety.

Had Let's Go Tubing merely chosen the launch site without ensuring that it was a safe place from which to start the float, it would arguably be guilty of ordinary negligence only. The failure to determine whether there were any immediate hazards to person starting their float at that location would arguably create an unreasonable risk to the participants in the float and would constitute a failure to exercise reasonable care.

Here, however, the evidence, when viewed in the light most favorable to Pellham, establishes that Let's Go Tubing had actual knowledge of the hazard created by the downed tree and failed to take any action to protect Pellham from that hazard. A reasonable jury could conclude that Let's Go Tubing's choice of the launch site, coupled with its failure to warn Pellham of the downed tree and/or instruct him how to avoid getting caught in it constitutes negligence that is substantially and appreciably greater than ordinary negligence. The trial court erred by granting summary judgment in favor of Let's Go Tubing.

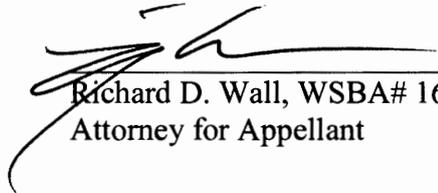
In moving for summary judgment, Let's Go Tubing argued that, because the release states that participants may encounter natural obstacle on the river, Pellham was aware of all the facts that a reasonable person would want to know prior to agreeing to participate in the float. Thus, according to Let's Go Tubing, Pellham assumed the risk that he might encounter obstacles and hazards while on the river. CP 24. What Plaintiff did not know, however, was whether the particular launch site chosen by Let's Go Tubing was a safe place from which to enter the river. Therefore, it cannot be said that Pellham assumed the risk that Let's Go Tubing would chose a launch site that placed him at risk of injury without, at a minimum, warning him of any known hazards at that site.

In any event, a valid assumption of risk, whether express or implied, does not relieve a party from liability for injury caused by the party's gross negligence. Because the evidence here is sufficient to support a claim of gross negligence, the assumption of risk doctrine does not apply.

#### CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's order granting summary judgment and remand this case for trial.

Respectfully submitted this <sup>th</sup>6 day of October, 2016.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6<sup>th</sup> day of October, 2016, a true and correct copy of the foregoing APPELLANT'S OPENING BRIEF was sent via US MAIL postage prepaid to:

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