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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 344339

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

Brian Pellham,

Appellant,

v.

Let's Go Tubing, Inc.,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant alleges he was injured while floating in the Yakima River on an unguided excursion with friends, on an inner tube he rented from Respondent Let's Go Tubing, Inc. ("Let's Go Tubing").¹

Appellant's asserted claim against Let's Go Tubing is for "Negligence/Failure to Warn." He alleges he was unable to navigate around a tree that had fallen in the river and that Respondent failed to warn him about the tree. When he rented the tube, Appellant signed Respondent's Release of Liability and Assumption of Risk ("Release") which states, in relevant part: [I] "assume and understand that river tubing can be HAZARDOUS, and that rocks, logs, bridges, plants, animals, other people, other water craft, exposure to the elements, variations in water depth and speed of current, along with other structures and equipment, and many other hazards or obstacles exist in the river environment." CP 46 (caps in original). "I realize that... accidents do occur and serious injuries or death may result and I assume full responsibility for these risks." *Id.* By signing the Release, Appellant agreed to "RELEASE HOLD HARMLESS AND INDEMNIFY LET'S GO TUBING, INC. ITS SUBSIDIARIES AND ITS AGENTS

¹ Respondent requests the Appellant's caption be corrected to reflect Let's Go Tubing, Inc. as the only Respondent. Appellant originally sued Let's Go Tubing, Inc. and David Johnson. Appellant stipulated to dismiss David Johnson and his marital community. CP 224. This also is reflected in the Summary Judgment Order. CP 249-252.

FROM ANY AND ALL CLAIMS AND LIABILITIES ARISING OUT OF OR IN CONNECTION WITH THE USE OF THIS RENTAL EQUIPMENT.” CP 46 (caps in original).

The validity of the Release is not in dispute. Appellant has not argued that the Release is invalid. He admits he signed the Release and knew it was a waiver when he signed it.

Appellant’s only argument is that Let’s Go Tubing failed to warn him about a specific tree in the Yakima River and that this constituted “gross negligence.” Appellant, who never alleged gross negligence in his pleadings, raised the issue in response to the summary judgment motion to avoid the effect of the Release, because it is a complete bar to his claim. The trial court correctly ruled that Appellant’s claim is barred by the written Release. Moreover, Appellant’s claim is also barred by the affirmative defense of assumption of risk. He went into the Yakima River voluntarily and encountered a natural condition in the river.

This court should affirm the trial court’s order granting summary judgment to Respondent.

II. COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Should this court affirm the trial court’s summary judgment dismissal of Appellant’s claims, where Appellant executed a valid Release and there was no evidence presented that established a duty to warn Appellant of each and every particular naturally occurring hazard that might occur during the float trip?

2. Should this court affirm the trial court's summary judgment dismissal of Appellant's claims, where Appellant failed to create a genuine issue of fact to support a claim of gross negligence?

3. Should this court affirm the trial court's summary judgment dismissal of Appellant's claims, where Appellant cannot show causation?

4. Should this court affirm the trial court's summary judgment dismissal of Appellant's claims, where Appellant assumed the risk of encountering a natural condition when he decided to go tubing and entered the river?

III. COUNTERSTATEMENT OF THE CASE

A. Background Facts

In 2011, Let's Go Tubing was in the business of renting inner tubes, and it had a rental location near the Umtanum Recreational Area, milepost 16 of Canyon Road the Yakima River. CP 105-107.² It provided equipment and transportation to people interested in floating the Yakima River. Let's Go Tubing did not provide guided tours. CP 107.

1. Appellant Signed the Release

On July 30, 2011, Appellant and a group of twenty friends met at the Umtanum rental location. CP 59. Appellant testified that, at the check-in site, he signed the one-page Release titled "**Release of Liability and**

² Steff Thomas was the operator of Let's Go Tubing, Inc.'s Yakima River location (d/b/a Yakima River Tubing) in 2011. CP 106. The Umtanum Recreation Area is managed by the Bureau of Land Management (BLM) Spokane District. Yakima River Tubing obtained permits from BLM to cross Umtanum Recreation Area land. CP 105.

Assumption of Risk” (bold in original) (“Release”).³ CP 46, 54, 57-58.

The Release states, in part:

Release of Liability and Assumption of Risk *** Read before signing *******

I, the renter of this rental equipment, assume and understand that river tubing can be HAZARDOUS, and that rocks, logs, bridges, plants, animals, other people, other water craft, exposure to the elements, variations in water depth and speed of current, along with other structures and equipment, and many other hazards or obstacles exist in the river environment. In using the rental equipment or any facilities or vehicles related thereto such dangers are recognized and accepted whether they are marked or unmarked. ... I realize that slips, falls, flips, and other accidents do occur and serious injuries or death may result and I assume full responsibility for these risks. ... I further acknowledge that life vests are always recommended and provided and if I choose not to wear it I do so at my own risk against the advice and policies of Let's Go Tubing, Inc. “IN CONSIDERATION FOR THIS RENTAL AND ANY USE OF THE FACILITIES, VEHICLES, OR ENVIRONMENT RELATED TO THE USE OF THIS EQUIPMENT, I HEREBY RELEASE, HOLD HARMLESS, AND INDEMNIFY LET'S GO TUBING, INC., ITS SUBSIDIARIES AND ITS AGENTS FROM ANY AND ALL CLAIMS AND LIABILITIES ARISING OUT OF OR IN CONNECTION WITH THE USE OF THIS RENTAL EQUIPMENT.”

CP 46, (bold and capitalization in original, underline added).

Appellant understood the Release he signed was a waiver:

Q. ·Okay· But to be fair, you understood it was a waiver?

A. ·I realize it's a -- I realized it was a waiver –

³ The Release was exhibit 23 to Appellant’s deposition, and he confirmed in his deposition that it is the release he signed that day. CP 48, 57-58; *see also* CP 135-139, 145 (Plaintiff’s Responses to Requests for Admission).

waiver, yes.

CP 58. He further testified, “**And it just seemed like a standard waiver form, like, fairly generic.**” CP 55 (bold added).⁴

2. Appellant Encountered a Fallen Tree on the River

Appellant alleges that shortly after his group started down the river on their tubes, they came upon a fallen tree. The tree was above the water and there to be seen. CP 75.⁵ Although his tube struck the tree, this did not injure him; he was able to stop and hug the tree. CP 75-76. He pulled himself along the tree towards midstream and attempted to get around it. CP 75-76. He claims “the current grabbed the tubes and it was pulled out from underneath me and I went over backwards into the water.” CP 76.⁶

B. Procedural History

Appellant filed his Complaint in 2013, alleging “Negligence/Failure to Warn” and violation of Consumer Protection Act (as stated below, the CPA claim and individual defendant were later dismissed by stipulation).⁷

⁴ Appellant is a 45 year old CEO and a graduate of the Wharton School of Business. CP 87. He had had other experiences where he has signed waiver forms for other types of events, including for kayaking and rafting previously. CP 55. He founded and is CEO of Khepher Games, a company formed in 1994 that creates and sells drinking and adult relationship games. CP 87-89. He uses release forms for his business and has experience with various types of contracts. CP 55.

⁵ Appellant concedes that there are trees along both sides of the Yakima River, that he has seen a fallen trees, and that he is aware that trees fall. CP 56.

⁶ In his deposition, Appellant asserted the other potentially “dangerous” condition before the tree was that the current picked up. CP 73. Of course, “variations in water depth and speed of current” were also risks expressly assumed. CP 46.

⁷ The dismissals of the CPA claim and of Mr. Johnson and his marital community are reflected in the Summary Judgment Order entered on April 14, 2016. CP 249-251, 252.

Defendants answered the Complaint in September 2013, asserting affirmative defenses that the claims were barred by the Release and plaintiff's assumption of risk. CP 9-16. Appellant did not amend his complaint to allege gross negligence or negligence "substantially or appreciably greater than ordinary negligence."

On or about March 17, 2016, Defendants moved for summary judgment seeking dismissal of all claims. CP 17-41.

Appellant stipulated to dismiss the CPA claim and to dismiss David Johnson and his marital community, stating in his response to the summary judgment motion:

IV. NON ISSUES

- a) Plaintiff does not oppose summary dismissal of alleged CPA claim.
- b) Plaintiff does not oppose summary dismissal of David Johnson and his marital community.

CP 224.⁸ As such, Respondent requests that Appellant's Caption be corrected to reflect the only Respondent as Let's Go Tubing.

Appellant's only claim is "Negligence/Failure to Warn." Appellant alleged his injuries were caused by "the tortious conduct of Defendants, their failure to warn and other negligent conduct," and that "[t]he negligent actions of Defendants caused these injuries to Plaintiff." CP 5-6, at ¶¶2.21

⁸ Defendants submitted evidence and argument to dismiss the CPA claim and Mr. Johnson. CP 37-39, 80, 84, 152-159. Appellant dismissed the CPA claim and Mr. Johnson and his marital community. CP 224, 249-251, 252.

and 3.2. His Complaint did not allege gross negligence or negligence “substantially or appreciably greater than ordinary negligence.” CP 3-8.

Appellant contends that he created an issue of fact as to gross negligence. The trial court ruled that the waiver and release executed by Appellant was valid; that the waiver was full and complete; that there was no evidence presented that established a duty to warn Appellant of the specific fallen tree; and that the release was enforceable and precluded Appellant’s claim. CP 249-251, 252. The court granted Defendants’ summary judgment motion on April 14, 2016. CP 249-251.

IV. SUMMARY OF ARGUMENT

Appellant argues that Let’s Go Tubing was not negligent, but rather “grossly negligent.” Preliminarily, Appellant has presented no authority to establish the applicable standard of care, or any duty to warn of a specific fallen tree, a naturally occurring condition. Nonetheless, Appellant *was explicitly warned* that logs, plants, changes in current, and “many other hazards or obstacles” could be present in the river. CP 46.

The Release not only warned Appellant of obstacles and hazards in the river, but by signing it Appellant expressly agreed to “RELEASE, HOLD HARMLESS AND INDEMNIFY” Let’s Go Tubing and its subsidiaries and agents “FROM ANY AND ALL CLAIMS AND

LIABILITIES ARISING OUT OF OR IN CONNECTION WITH THE USE OF THIS RENTAL EQUIPMENT.” CP 46 (caps in original).

Appellant presents no authority for the proposition that he had to be warned of each specific fallen tree or other naturally occurring obstacle or hazard that might be in the river. No Washington authority supports the argument that the failure to warn of a specific tree in these circumstances constituted “gross negligence.” Appellant noticeably fails to address in his brief the body of Washington case law rejecting bald and unfounded assertions of “gross negligence” in the face of a valid and enforceable Release. Instead, Appellant details a host-guest statute case, which involved neither recreational activities nor a Release. The analysis relied on by Appellant is inapposite. Overwhelmingly, the on point recreational cases enforce releases, and reject assertions of “gross negligence” where the risk encountered is inherent in the activity. Taking the facts in the light most favorable to Appellant, he has not created a genuine issue of material fact to support a claim of gross negligence. The trial court correctly granted summary judgment and should be affirmed.

V. ARGUMENT

A. Standard of Review

The Court of Appeals reviews a trial court’s ruling on summary judgment de novo, engaging in the same inquiry as the trial court. *Lakey v.*

Puget Sound Energy, Inc., 176 Wn.2d 909, 922, 296 P.3d 860 (2013). Thus, the court “will affirm an order of summary judgment when ‘there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.’” *Id.* (quoting *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007)); CR 56(c). The court must “review the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party’s favor.” *Id.*

The moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party is a defendant and meets this burden, the burden shifts to the plaintiff to bring forth “specific facts showing that there is a genuine issue for trial.” *Rathvon v. Columbia Pac. Airlines*, 30 Wn. App. 193, 201, 633 P.2d 122 (1981). If the plaintiff “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,” then the trial court should grant the defendant’s motion. *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 382, 46 P.3d 789 (2002) (internal quotation marks omitted) (quoting *Young*, 112 Wn.2d at 225).

B. There is No Genuine Issue of Material Fact to Support Gross Negligence, and Therefore, the Release is Dispositive.

“‘Gross negligence’ is ‘negligence substantially and appreciably greater than ordinary negligence,’ i.e. ‘care substantially or appreciably less than the quantum of care inhering in ordinary negligence.’” *Johnson v. Spokane to Sandpoint, LLC*, 176 Wn. App. 453, 460, 309 P.3d 528 (2013) (citing *Nist v. Tudor*, 67 Wn.2d 322, 331, 407 P.2d 798 (1965)); see also Appellant’s Brief, at 5. To overcome an exculpatory clause in a Release by proving gross negligence, a plaintiff “must supply ‘substantial evidence’ that the defendant’s act or omission represented care appreciably less than the care inherent in ordinary negligence.” *Id.* (citing *Boyce v. West*, 71 Wn. App. 657, 665, 862 P.2d 592 (1993)). The plaintiff must offer “something more substantial than mere argument that the defendant’s breach of care rises to the level of gross negligence.” *Id.*

1. The Release Is Valid and Enforceable

“[P]arties may contract that one shall not be liable for his or her own negligence to another.” *Wagenblast v. Odessa Sch. Dist.*, 110 Wn.2d 845, 848, 758 P.2d 968 (1988) (citing W. Keeton, D. Dobbs, R. Keeton & D. Owen, PROSSER AND KEETON ON TORTS § 68, at 482 (5th ed. 1984)). Exculpatory agreements are enforceable, with three exceptions: (1) inconspicuous releases, (2) releases that violate public policy, and (3) releases purporting to limit

liability for acts falling “greatly below the standard established by law for protection of others.” *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 109 Wn. App. 334, 339, 35 P.3d 383 (2001) (quoting *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 487, 834 P.2d 6 (1992)). “The sufficiency of the language to effect a release is generally a question of law.” *Scott*, 119 Wn.2d at 490. Courts should use “common sense” in interpreting purported releases. *Id.* (for example, use of the word “negligent” is not essential).

“[A] party to a contract that he or she has voluntarily signed will not be heard to declare that he or she did not read it, or was ignorant of its contents.” *Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 381, 745 P.2d 37 (1987). Therefore, “a person who signs an agreement without reading it is bound by its terms as long as there was ‘ample opportunity to examine the contract in as great a detail as he cared, and he failed to do so for his own personal reasons.’” *Chauvlier*, 109 Wn. App. at 341. Here, the Release was knowingly signed and conveys the parties’ intent to shift the risk of loss.

a. The Release is Conspicuous

Appellant tacitly admits that the Release is conspicuous.⁹ He signed the Release just below language in bold stating: **“I have read, understand,**

⁹ This was briefed by Respondent below. CP 26-28. Appellant never argued this point and has abandoned any argument that the Release was not conspicuous. *See e.g.* RAP 2.5(a) and *Westmark Dev. Corp. v. City of Burien*, 140 Wash. App. 540, 564, 166 P.3d 813, 826 (2007) (issues involving a question of law cannot be raised for the first time on appeal).

and agree to the Release of Liability and Assumption of Risk and the Rental Terms and conditions above.” CP 46 (bold in original).¹⁰

Appellant admits he knew the Release was a waiver when he signed it. CP 55, 58.

b. The Release Does Not Violate Public Policy

Appellant has not argued the Release violates public policy and, again, has waived the right to do so.¹¹ The issue is a question of law,¹² based on:¹³

whether: (1) the agreement concerns an endeavor of a type thought suitable for *public regulation*; (2) the party seeking to enforce the release is engaged in performing *an important public service*, often one of practical necessity; (3) the party *provides the service to any member of the public*, or to any member falling within established standards; (4) the party seeking to invoke the release has *control over the person or property* of the party seeking the service; (5) there is a decisive *inequality of bargaining power* between the parties; and (6) the release is a standardized *adhesion contract*.¹⁴

Chawlier, supra (citing *Wagenblast v. Odessa School Dist.*, 110 Wn.2d 845

¹⁰ Appellant verified he signed the Release on the day of the incident, July 30, 2011, before he picked up his inner tube at the check-in site. CP 54-55.

¹¹ See fn 9. This issue was addressed at length in Respondent’s motion. CP 28-33.

¹² See, e.g., *Hanks v. Grace*, 167 Wn. App. 542, 548, 273 P.3d 1029, review denied, 175 Wn.2d 1017 (2012).

¹³ The six factors are not the exclusive considerations, but general characteristics that give a “rough outline” of the type of settings in which exculpatory agreements have not been allowed. *Vodopest v. MacGregor*, 128 Wn.2d 840, 855, 913 P.2d 779 (1996).

¹⁴ The more of the six factors that appear in a given case, the more likely the agreement is to be declared invalid on public policy grounds. *Wagenblast*, at 852. The second factor is the most important. *Chawlier*, at 344-345.

(Wash. 1988)).

Washington Courts consistently uphold and enforce exculpatory agreements in the context of adults engaging in recreational and sporting activities: *Blide v. Rainier Mountaineering, Inc.*, 30 Wn. App. 571, 636 P.2d 492 (1981) (mountain climbing); *Boyce v. West*, 71 Wn. App. 657, 862 P.2d 592 (1993) (scuba diving); *Conrad v. Four Star Promotions, Inc.*, 45 Wn. App. 847, 728 P.2d 617 (1986) (automobile demolition derby); *Hewitt v. Miller*, 11 Wn. App. 72, 521 P.2d 244 (scuba diving) (1974); *Garretson v. United States*, 456 F.2d 1017 (9th Cir.1972) (ski jumping applying Washington law); *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 487, 834 P.2d 6 (1992)) (ski school).¹⁵

In this case as well, river tubing is purely recreational. Appellant has not argued the Release violates public policy, and it does not.

2. Appellant Did Not Establish the Relevant Standard of Care or Factually Show That Let's Go Tubing's Alleged Actions Were Grossly Negligent.

In an action for negligence, it is the plaintiff's burden to establish "(1) the existence of the duty owed, (2) breach of that duty, (3) a resulting

¹⁵ As one example, the court in *Scott* held the following language contained in a ski school application barred a claim by the party parents who signed the application: "For and in consideration of the instruction of skiing, I hereby hold harmless Grayson Connor, and the Grayson Connor Ski School and any instructor or chaperon from all claims arising out of the instruction of skiing or in transit to or from the ski area. I accept full responsibility for the cost of treatment for any injury suffered while taking part in the program." *Scott*, at 488. The language was "was sufficiently clear to give notice that the ski school was attempting to be released from liability for its negligent conduct." *Id.* at 490.

injury, and (4) proximate cause." *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994). The existence of a duty is a threshold question. If there is no duty, then a plaintiff does not have a valid claim. *Folsom v. Burger King*, 135 Wn.2d 658, 671, 958 P.2d 301 (1998).

Here, Appellant has not presented authority on the standard of care of a tube rental company. The Yakima River is by definition a natural, changing environment. While Appellant has not established a duty to warn, even generally, about the existence of hazards inherent in tubing on the river, Appellant *was explicitly warned* that rocks, logs, bridges, plants, animals, other people or watercraft, changes in current, other structures and equipment, and "many other hazards or obstacles" exist in the river environment. CP 46. The Release also warned of the risk of "slips, falls, flips" and "other accidents," and the signor attested that "serious injuries or death may result and I assume full responsibility for these risks." *Id.* The Release expressly released defendants from "any and all claims and liabilities." *Id.*

Notwithstanding those warnings, Appellant argues that Let's Go Tubing had a duty to warn of a *specific* fallen tree, but he presents no authority in support of this alleged duty. This Court has rejected unfounded assertions of a duty without support in the record. As the Court pointed out

in *Johnson v. Spokane to Sandpoint*, 176 Wn. App. 453, 460-461 (Wash. Ct. App. 2013), “Spokane to Sandpoint marked the roadways to warn both drivers and runners of danger and provided a handbook to each runner advising about crossing busy roadways and highways. **Nothing in this record establishes any duty to do more.**” (emphasis added).

Here, Appellant has not established a standard of care that would require Let’s Go Tubing to warn of a specific fallen tree, above and beyond the comprehensive warnings provided in the Release.¹⁶

Imposing a duty to warn of a *specific* tree, or rock, or current, at a given time or place on the river, would place an impossible burden on and chill recreational equipment providers.¹⁷ Conditions are constantly changing in the natural river environment. A tree in one location on the river on a given day, or at a given moment, could move or change. Appellant’s own testimony establishes that he cannot verify the tree he allegedly spoke to the bus driver about was the very same tree:

¹⁶ Tubing is not regulated in Washington. Inner tubes are expressly excluded from state regulations concerning the recreational use of vessels:

(29) “Vessel” includes every description of watercraft on the water, other than a seaplane, used or capable of being used as a means of transportation on the water. **However, it does not include inner tubes, air mattresses, sailboards, and small rafts or flotation devices or toys customarily used by swimmers.**

RCW 79A.60.010 (bold added).

¹⁷ Warning of a specific obstacle could be dangerous; if the condition changes or moves, tubers may become complacent and not watch for other obstacles or hazards. Also, a duty to warn of such changing conditions would literally be a moving target.

Q. And did—when you mentioned this to Stef, the bus driver, did he describe the tree at all that you were talking about?

A. I don't recall that. No.

Q. Did you give any specific description of the tree other than to say "the tree"?

A. I don't think I did.

CP 306^{18, 19}

Regardless, the so-called fallen tree was a naturally occurring condition inherent in the activity, which is the very risk Appellant was warned about and the very risk he assumed by going on the river. There was no duty- and Appellant has established none- to warn of this specific fallen tree, just as there was no duty to warn of each other rock, log, bridge, plant, animal, change in current, watercraft, etc., that may have been in the river that day.

3. The Evidence Does Not Create a Genuine Issue of Material Fact that Would Support a Claim of Gross Negligence.

Appellant first asserted gross negligence in response to the summary judgment motion. He cannot create an issue of fact as to gross negligence without first establishing a duty to warn of a specific tree. The Court should

¹⁸ The reference to CP 306 is an estimate of the likely Clerk's Paper page number, as the pages were part of a supplemental designation of Clerk's Papers which have not been received as of the date of this brief. The testimony is a p. 162/1-7 of Appellant's deposition.

¹⁹ When Appellant later returned to the river the tree was not there. CP 81. He never reported this incident/ alleged "dangerous" tree to the Department of Ecology/Bureau of Land Management. CP 79.

not get to the question of gross negligence until a determination is made whether a claim for ordinary negligence could exist. Ordinary negligence is “the act or omission which a person of ordinary prudence would do or fail to do under *like* circumstances or conditions. . . .” *Nist v. Tudor*, 67 Wn.2d 322, 331 (1965). There is no issue of gross negligence without “**substantial evidence of serious negligence.**” *Id.*, 67 Wn.2d at 332 (bold added).

a. Appellant Has Not Met the Burden of Proof Required to Show Gross Negligence

Whether the plaintiff has presented evidence of gross negligence is an issue of law for the Court. *See, e.g., Johnson v. Spokane to Sandpoint, LLC*, 176 Wn. App. 453, 460-461 (Wash. Ct. App. 2013). “Gross negligence” is “negligence substantially and appreciably greater than ordinary negligence,” i.e., “care substantially or appreciably less than the quantum of care inhering in ordinary negligence.” *Id.*, at 460. In a recreational activity case involving a Release, “a plaintiff seeking to overcome an exculpatory clause by proving gross negligence must supply ‘**substantial evidence**’ that the defendant’s act or omission represented care appreciably less than the care inherent in ordinary negligence.” *Id.* (citing *Boyce v. West*, 71 Wash. App. 657, 665, 862 P.2d 592 (1993) (emphasis added):

Similarly, the Johnsons fail to show Spokane to Sandpoint committed gross negligence by failing to exercise slight care. *See Woody v. Stapp*, 146 Wash. App. 16, 22, 189 P.3d 807 (2008) (when a standard of proof is higher than ordinary

negligence, the nonmoving parties must show that they can support their claim with *prima facie* proof supporting the higher level of proof.). Spokane to Sandpoint's conduct does not reach gross negligence under the circumstances presented here.

Id.

In *Boyce v. West*, 71 Wn. App. 657, 862 P.2d 592 (1993), the plaintiff also tried to avoid the effect of a Release by alleging "gross" negligence. The court found no evidence to create an issue of fact. The exculpatory clause executed by a scuba diver who drowned was enforceable:

In view of the dangerous nature of this particular activity defendants could reasonably require the execution of the release as a condition of enrollment. [Decedent] entered into a private and voluntary transaction in which, in exchange for an enrollment in a class which he desired to take, he freely agreed to waive any claim against the defendants for a negligent act by them.

Id. at 664-65 (quoting *Madison v. Superior Court*, 203 Cal. App. 3d 589, 250 Cal. Rptr. 299 (1988)). In *Boyce* the deceased's mother submitted expert testimony regarding the instructor's negligence. But the assertion of gross negligence, "supported by nothing more substantial than argument, is insufficient to defeat a motion for summary judgment." *Id.*, at 666.

Similarly, in *Conrad v. Four Star Promotions, Inc.*, 45 Wn. App. 847 (1986), where the defendant controlled the man-made race course, the defendant's conduct in changing the course direction after the release was signed did not create an issue of fact to support gross negligence.

Here, Appellant entered a natural river environment uncontrolled by Let's Go Tubing, and signed a Release assuming all the risks of doing so and waiving all claims against Let's Go Tubing. Appellant submitted no expert testimony establishing any standard of care or any breach. His bald assertions of gross negligence are insufficient, as a matter of law, to defeat a motion for summary judgment.

Viewed in the light most favorable to Appellant, he has alleged no facts to create a genuine issue of material fact as to gross negligence. Even if the driver knew there was a tree, somewhere below the drop off point at some unknown prior time, there is no evidence that Let's Go Tubing was aware of a danger above and beyond the usual changing conditions, currents, and obstacles in the river. In support of his claim that Let's Go Tubing's driver "was aware of the hazard posed by the downed tree," Appellant relies on a declaration of Melanie Wells. CP 179. However, the Wells declaration merely says the driver told her that "there was a tree across the river just downriver from where he was taking us to launch and it had created problems for previous people he had put in the river at that point." CP 179. There is no mention of "danger" or any injury of which the driver had notice.²⁰ This is not evidence that Let's Go Tubing was aware

²⁰ Mr. Thomas denies being told of a hazard just past the launch point. CP 116. He denies notice of any injury incident. CP 277.

of a particular danger associated with this specific tree *separate and distinct from* the dangers attendant to any obstacle, rock, log, tree, current, etc. that might be encountered in the river. There is no evidence “the tree” created a hazard distinct from the myriad hazards- including logs, plants, obstacles- listed in the Release. There is no authority establishing a duty to warn of a specific tree in these circumstances. While Respondent denies any negligence, even if accepted as true, the facts submitted would not create an issue of fact beyond ordinary negligence. They do not raise a genuine issue of material fact that Let’s Go Tubing acted in a way that was substantially or appreciably below the norm of ordinary care.

b. Appellant’s Reliance on *Nist* Undermines His Argument.

Appellant relies on a 1965 host-guest statute case, *Nist v. Tudor*, which did not involve a release or recreational activity. However, *Nist* is clearly inapposite. For example, Appellant argues a determinative factor in *Nist* was whether the defendant driver “was aware of the hazard and the degree of foreseeability that failure to avoid the hazard would result in injury.” App Brief, at 6. That analysis pertained to whether a vehicle driver could be held liable to their passenger under the host-guest statute (a disfavored and minority rule ultimately vacated a decade later)²¹ requiring

²¹ The host-guest statute was disfavored and ultimately was vacated in 1978. *Roberts v. Johnson*, 91 Wash.2d 182, 187-88, 588 P.2d 201, 204 (1978).

the passenger to show gross negligence.

Appellant's argument boils down to: If the defendant could have done something to prevent the harm, and failed to do so, that creates an issue of fact as to gross negligence. It does not.²² None of the recreational cases supports this argument.²³ As discussed, *supra*, recreational activities, particularly in the natural environment, inherently involve unknown and/or changing hazards: e.g. changes in wind/current, falling trees, movement of dams, other watercraft, among other things.

Releases are routinely used in regard to recreational activities involving inherent, and often changing, risks, are routinely enforced and relieve the defendant of liability for hazards "within the contemplation of the release." *Blide, supra*. In *Hewitt v. Miller*, the court upheld a release of claims against a scuba diving school for injuries "which may befall me while I am enrolled as a student of the school, including all risks connected therewith, whether foreseen [sic] or unforeseen [sic]." 11 Wash. App. at 79. The plaintiff in *Hewitt* claimed that the defendant negligently selected a scuba diving site, but the court concluded that "the failure of a diver to surface is obviously an inherent danger of the sport of scuba diving." *Id.*

²² Appellant's argument seems to be a description of "but for" causation; it does not create a standard of care.

²³ Appellant would ask the Court to ignore the body of law on recreational cases involving releases where the burden is high for plaintiff to create an issue of fact on gross negligence.

In *Boyce, supra*, the written release acknowledging and assuming “all risks” in connection with the activity (scuba diving) barred the Estate’s claim, even though the plaintiff in Boyce argued the Release did not specifically enumerate “negligent instruction” and regardless of whether “negligent instruction” was considered by the decedent:

Mr. Boyce acknowledged the possibility of death from scuba diving and assumed "all risks in connection with [the scuba diving] course . . . while I am enrolled as a student of the course, including all risks connected therewith, whether foreseen or unforeseen . . .". Negligent instruction and supervision are clearly risks associated with being a student in a scuba diving course and are encompassed by the broad language of the contract. That Mr. Boyce may not have specifically considered the possibility of instructor negligence when he signed the release does not invalidate his express assumption of *all risks* associated with his participation in the course.”

Boyce, at 667 (emphasis added).

Here, any alleged failure to warn about a specific tree, even viewed in the light most favorable to Appellant, does not support his recent assertions of gross negligence.

4. As a Matter of Law, Appellant Cannot Establish Causation.

Appellant’s claim fails to establish proximate cause, a necessary element of a negligence claim. *Tincani, supra*, at 127-28. Appellant was not injured by hitting the tree. He testified in sworn testimony that, although his tube struck the tree, this did not injure him; he was able to stop and hug

the tree. CP 75-76. Appellant pulled himself along the tree towards midstream and attempted to get around it. CP 75-76. He claims “the current grabbed the tubes and it was pulled out from underneath me and I went over backwards into the water.” CP 76. Of course, “speed of current” is yet another potential hazard in the river which Appellant expressly assumed and released. EX 1.

Appellant’s declaration, submitted in response to the summary judgment, falsely claimed he was injured by hitting the tree. However, this directly contradicts his prior sworn deposition testimony that he was not injured by running into the tree. A declaration that contradicts Appellant’s sworn deposition testimony cannot be considered. *Marshall v. AC&S, Inc.*, 56 Wn. App. 181, 186, 782 P.2d 1107 (1989).

For this and all of the foregoing reasons, the claim is barred as a matter of law.

C. Appellant’s Claim Also is Barred by the Doctrine of Assumption of Risk.

Appellant assumed the risk of injury, both expressly (contractually) and implicitly. The assumption of risk doctrine is divided into four classifications: (1) express; (2) implied primary; (3) implied reasonable; and (4) implied unreasonable. *Shorter v. Drury*, 103 Wn.2d 645, 655, 695 P.2d 116 (1985). Express assumption of risk and implied primary assumption of

risk “operate the same way and ‘arise when a plaintiff has consented to relieve the defendant of a duty—owed by the defendant to the plaintiff—regarding specific known risks.’” *Hvolball v. Wolff Co.*, 187 Wn. App. 37, 47-48 (2015). The only difference is “the way in which the plaintiff manifests consent.” *Id.*

“With express assumption of risk, the plaintiff states in so many words that he or she consents to relieve the defendant of a duty the defendant would otherwise have. With implied primary assumption of risk, the plaintiff engages in other kinds of conduct, from which consent is then implied.” The elements of proof of both express and implied primary assumption of risk are the same: “The evidence must show the plaintiff (1) had full subjective understanding (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk.” [citations omitted].

Id. Either express or implied primary assumption of the risk negates any duty the defendant would have owed because plaintiff consented to assume a duty for his own safety, and “[i]f the defendant does not have the duty, there can be no breach and hence no negligence.” *Scott*, 119 Wn.2d at 497.

1. Signing the Release Was Express Assumption of Risk

“Contractual express assumption of the risk involves an agreement in advance to relieve one party from the obligation to use reasonable care for the benefit of the other and is enforceable if the agreement clearly and unambiguously specifies the risks assumed.”²⁴

²⁴ *Scott v. Pac. W. Mtn Resort*, *supra*, 119 Wn. 2d at 496-97 (1992); *Shorter*, *supra*, 103 Wn.2d 645, 655–58, 695 P.2d 116 (1985). The defendant may demonstrate the plaintiff’s

The court in *Boyce, supra*, likewise addressed express assumption of risk as an alternative basis to dismiss the claim:

Again, the words used by the court in *Madison [v. Superior Court]*, 203 Cal. App. 3d 589 (1998)], at 601 (quoting from *Coates v. Newhall Land & Farming, Inc.*, 191 Cal. App. 3d 1, 9, 236 Cal. Rptr. 181 (1987)), apply just as well to this case:

“ . . . knowledge of a particular risk is unnecessary when there is an express agreement to assume all risk; by express agreement a ‘plaintiff may undertake to assume all of the risks of a particular . . . situation, *whether they are known or unknown to him.*’ (Rest.2d Torts § 496D, com. a, italics added; Prosser & Keeton, Torts (5th ed. 1984) § 68, p. 482.)” (Fn. Omitted.)

As with the release of liability exculpating ordinary negligence, in the absence of a showing of gross negligence, Mr. Boyce’s express assumption of all risks associated with his enrollment in the scuba diving course bars a claim for recovery. W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* § 68, at 484 (5th ed. 1984). The summary judgment on this alternative defense was also proper.

Boyce, at 667 (bold added).

Here, by signing the Release, Appellant assumed the risk of natural river hazards. He signed and acknowledged “accidents do occur and serious injuries or death may result and I assume full responsibility for these risks.” CP 46. He agreed to “RELEASE HOLD HARMLESS AND INDEMNIFY” defendants. *Id.* The Release is explicit and bars his claims.

consent by pointing to an express agreement.” *Kirk v. Washington State Univ.*, 109 Wn.2d 448, 453-54, 746 P.2d 285, 288-89 (1987).

2. The Claim Also is Barred by Implied Assumption of Risk

Appellant voluntarily got into the river, a natural environment with obvious hazards and changing conditions. Although the Court need not get to the issue of implied primary assumption of risk in light of the Release, the claim would be barred on that basis as well. *Jessee v. City Council of Dayton*, 173 Wash. App. 410, 414-15, 293 P.3d 1290, 1292-93 (2013). The river was a natural condition and the hazards attendant to it are obvious and foreseeable. His claim is barred as a matter of law.

VI. CONCLUSION

Respondent Let's Go Tubing respectfully requests that this court affirm the trial court's summary judgment dismissal of Appellant's claims.

RESPECTFULLY SUBMITTED this 9th day of December, 2016.

ANDREWS ▪ SKINNER, P.S.

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DECLARATION OF SERVICE

I, Sally Gannett, hereby declare as follows:

1. I am a citizen of the United States and of the State of Washington, living and residing in King County, in said State, I am over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness therein.

2. On the 9th day of December, 2016, I caused a copy of the foregoing Brief of Respondent to be sent for service upon the following in the manner indicated:

Attorney for Appellant:

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Via US Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 9th day of December, 2016, at Seattle, Washington.



Sally Gannett, Legal Assistant