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NO. 64558-7-I

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

RONALD PACE, et al.,

Plaintiffs-Appellants.

v.

JAMES DAVIS, SCOTT DAVIS, TYLER DAVIS , et al,

Defendants-Respondents.

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STATE OF WASHINGTON

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PLAINTIFF/APPELLANT'S REPLY BRIEF

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I. REPLY TO RESPONDENT'S MOTION TO STRIKE

Respondent's Motion to Strike, appendix No. 1 to Appellant's Opening Brief is renewed at page 28 of respondent's opening brief. As previously indicated, it is clearly Appellant's (hereafter Plaintiff) position that such statistical data can be viewed as "persuasive authority," given that it appears that our Appellate Courts have used such data as part of prior decisions, even though, given the context, it appears that such information had not been submitted before the Trial Court. See, for example, *York v. Wahkiakum School District No. 200*, 63 Wn.2d 297, 333 n. 5, 178 P.3d 995 (2008) Justice Chambers concurrence); *Federal Way School District No. 210 v. State*, 167 Wn.2d 514, 520 n. 5, 219 P.3d 941 (2009); *Salas v. High Tech Erector*, 168 Wn.2d 664, 670, 230 P.3d 583 (2010).

Beyond the fact that such information appears to have been utilized by our Appellate Courts, including the Supreme Court, as "persuasive authority" it is also noted that such statistical data, is the kind of information of which our appellate courts can take "judicial notice." See, *ER 201*. "Judicial notice" was discussed in detail in the Supreme Court's opinion in *Tyler Pipe Industries, Inc. v. Department of Revenue*, 96 Wn.2d 785, 795-96, 638 P.2d 1213 (1982), where the Court reiterated that Court's can take "judicial notice" of facts capable of immediate and accurate proof.

It is respectfully and humbly suggested that the statistical data generated by the Federal Department of "Homeland Security," attached to Appellant's Opening Brief, is simply the kind of data capable of an immediate and accurate proof, of which judicial notice can be taken.

Further, it is noted that pursuant to RAP 1.2(c) the Appellate Court has the authority to consider issues not raised by the parties below, if necessary, to serve the ends of justice. See, *State v. Carter*, 138 Wn.App 350, 368, 157 P.3d. 420 (2007). Indeed, an Appellate Court may review matters, notwithstanding compliance with Court Rules, where justice so demands, which means the Court can depart from the rules if there is no discernible or particularly prejudice flowing to the opposing party, no unfairness to the trial judge, and no inconvenience to the Appellate Court. See, *McClarty v. Totem Electric*, 119 Wn.App 453, 462, 81 P.3d 901 (2003), reversed on other grounds, 157 Wn.2d 214, 137 P.3d. 844 (2006). Moreover, as pertinent to the respondent's motion to strike, it is well established that pursuant to the authority, vested, and afforded by RAP 1.2(c), the Appellate Court may waive the requirements of RAP 9.11, with respect to the acceptance of new evidence on appeal, if the new evidence otherwise would serve the ends of justice. See, *Spokane Airports v. RMA, Inc.*, 149 Wn.App 930, 937, 206 P.3d 364 (2009); see also, *Washington Federation of State Employees v. State*, 99 Wn.2d 878, 885-86, 665 P.2d 1337 (1983).

As discussed below, in this case the Plaintiff is requesting that the Court, either extend existing common law duties to a new factual scenario, or is requesting that the Court modestly extend the law, and applicable duties to the facts of this case. As is well recognized, the existence of a "legal duty" is a question of law, and depends on mixed considerations of "logic, common sense, justice, policy and precedent." See, *Christensen v. Royal School District No. 106*, 156 Wn.2d 62, 66-67, 124 P.3d 283 (2005). See also, *Hartley v. State*, 103 Wn.2d. 760, 779-80, 698 P.2d 77 (1985). It is noted, that in making a determination as to whether or not a duty exists, or in this instance whether it should be extended to a slightly different factual scenario, ultimately rests on whether or not there is a need for the imposition of such duty to protect those who might reasonably be harmed by the failure to conform conduct, to reasonable standards, and to protect reasonably foreseeable victims. In other words, it is suggested that when making "policy" determinations with regard to the existence of a duty, the first question one should ask is whether or not there is a need.

As stated long ago in the case of *Strode v. Gleason*, 9 Wn.App 13, 17, 510 P.2d 250 (1973):

The novelty of an asserted right and the lack of precedent are not valid reasons for denying relief to one who has been injured by the conduct of another. The common law has been determined by the needs of

society and must recognize and be adaptable to contemporary conditions and relationships.
(Citations omitted).

As indicated by the statistical data provided by the Plaintiff herein, there is a clear need for the extension of previously recognized tort duties to extend to watercrafts, such as jet skis which are at issue in this case. Such statistical data shows that there is a societal need for accountability for negligent conduct which occurs upon our local waterways. Further, while at footnote 10, respondent apparently have a different point of view as to the import of the statistical data provided, it is hard to dispute the raw data provided by our Department of Homeland Security, regarding accidents which occurred on Washington's waterways in the year 2008. According to the table attached hereto as Appendix No. 1, which is page 51 of the Recreational Boating statistics for 2008, in 2008 alone, there were 98 total accidents in the State of Washington. Eighteen of those accidents involved one or more fatalities. With respect to those specific accidents, there were 22 deaths. There were also 46 non-fatal injury accidents. With respect to the non-fatal injury accidents, despite the number being 46, in a number of instances there were multiple persons harmed, therefore, the total number of persons injured totaled 72.

It is suggested, as under the facts of this case, there is a need for the extension of the below-discussed common law doctrines to be applicable to personal watercraft,

such as recreational boats, jet skis and the like. It is suggested that such a conclusion really cannot be disputed, and that the numbers do not lie. Thus, the statistical data submitted by Plaintiff should be considered, because it serves "the ends of justice" by showing to the Appellate Court the need to extend a duty, "as a matter of law."

II. SUMMARY JUDGMENT STANDARDS, AND REPLY OF FACTUAL DISCUSSION

In this appeal, the respondent suggests that credibility issues no longer are sufficient to create an issue of fact upon which summary judgment should be denied. (See respondent's brief, Page 16). That is hardly the case, and clearly this is a matter, with respect to the claims against James Davis, where his credibility was thoroughly impeached, based on proof that not only did he fail to honestly inform the police that his jet skis were being used on the day in question, but also based on the undisputed fact that in an effort to acquire an early summary judgment in this case, he filed a Declaration which was in many instances patently false. (CP 1057-58; 1299-1301). With respect to Mr. Davis' credibility, and the credibility of all Davis defendants, it is noted that a fact that is repeatedly ignored by the Respondents is that at the time of the accident in question, Plaintiff, Ron Pace, observed that one of James Davis' jet skis, with hull number WN7704NT was at the scene. (CP 1040-41). This is the same high powered Jet Ski that was owned by Mr. Davis and which, despite Mr. Davis' assertions to the contrary had admittedly been used on that very stretch

of the Columbia River on that very date in question. Additionally, it is noted that the likelihood of Mr. Pace acquiring the wrong hull number at the scene, is exceptionally remote and belied by the fact that this very jet ski owned by James Davis, was admittedly, on that day, at the very location of the accident scene, i.e. on the Columbia River near a vacation property development, where both Mr. Pace and James Davis owned recreational properties. (CP 1208-1211). Thus, the odds of misidentification, at best are remote, and more likely than not, simply non-existent.

This is simply not a case where the plaintiff, in hopes of defeating a summary judgment, is desperately making an effort to “recite” that “Credibility” issues exist. Clearly, credibility issues are and were present in this matter, and frankly such a proposition is not subject credible dispute. Further, if we actually examine the case relied on by the respondents for the proposition that credibility issues cannot create factual questions regarding a “material fact,” it is noted that **is not the holding of the case relied on by the respondents**. See, *Laguna v. Washington State DOT*, 146 Wn.App. 260, 192 P3rd 374 (2008). First, as should be a self-evident proposition, a decision of an intermediate appellate court cannot serve to overrule an opinion of our Supreme Court. Thus, it is noted that the case of *Balise, v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963) is still **good law**. Further, the refinements placed upon that case by the *Laguna* opinion, bolster, as opposed to

undercut the Plaintiff's position that with respect to James Davis' personal liability, and the existence of material factual issues as to the use of his jet ski that warranted the denial of summary judgment on specific claims, which were brought against him. Under the terms of the *Laguna* case a party opposing summary judgment still can defeat a summary judgment motion by being able to "point to some fact 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 hopes the jury may disbelieve factually uncontested proof.**" See *Laguna v. Washington State Department of Transportation*, 146 Wn.App. at 266-67. (Emphasis added).

Here, a "material fact" at issue was whether or not Mr. Davis' jet skis were being used on the day in question. The bare fact that Mr. Pace identified the hull number of the jet ski involved in the accident in question, which traced directly back to James Davis, in and of itself should have created a sufficient factual dispute which warranted the denial of summary judgment. (CP 1271). Such a position is further bolstered by the fact that Mr. Davis, in his statement to the police, regarding the use of his jet skis on the day in question, was false, and his willingness to file a clearly false Declaration in this very court proceeding. (CP 1299-1303); (RP 520-21).

Contrary to the defendant's assertions in this case, when it comes to Court proceedings, **credibility is important**. It would simply lead to a travesty of justice, and an abuse of the justice system to allow a party, such as Mr. Davis, to defeat a valid claim brought by a plaintiff, such as Mr. Pace, by providing false information to the police and to the Court. As discussed in a slightly different context, the credibility of a party, can go to the very heart of the validity of **any** asserted claims and/or defenses. *Crisp v. Nursing Homes, Inc.*, 15 Wn.App 599, 604-05, 550 P.2d 718 (1976).

Whether or not Mr. Davis' jet skis were being used at the time of the question was a core factual issue in this case and clearly was not a "collateral matter". Thus, the plaintiff's ability to call into question the credibility of his assertions that his jet skis were not involved in the subject collision, combined with the fact that one of his jet skis was observed at the scene by Mr. Pace, who affirmatively testified that it was one of the jet skis involved, in and of itself was a sufficient basis for the denial of summary judgment with regards to the claims brought against Mr. Davis, should the court find that the asserted claims appropriately exist. (CP 1060; 1061; 1133-1135). As shown below, that question frankly, should not be viewed as being close.

Also, when considering whether or not the Trial Court erred, as a matter of law, in granting summary judgment to Mr. James Davis, it is noted that summary

judgment, as has long been recognized, to be particularly inappropriate under circumstances where one party, in this instance the defendant Davis', clearly had control over the relevant information, and when proof on plaintiff's claims, and the integrity of the Court system is dependent on their honesty:

We construe the facts in all reasonable inference in the light most favorable to the non-moving party. And where material facts are particularly within knowledge of the moving party, courts have been reluctant to grant summary judgment. In such cases, it is advisable that the cause proceed to trial in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor by the moving party while testifying. (Citations omitted). (Emphasis added).

Riley v. Andres, 107 Wn.App. 391, 395, 27 P.3d 618 (2001). See also *Gingrich v. Uniguard SEC. Insurance Co.*, 57 Wn.App. 424, 428-29 788 P.2d 1096 (1990). (Summary Judgment should not be granted when the credibility of a material witness is at issue and may not be appropriate where material facts are particularly within the knowledge of the moving party). See also *In Re: Estate of Black*, 116 Wn.App. 476, 66 P.3d 670, (2003), *aff'd* on other grounds, 153 Wn.2d 152, 102 P.3rd 796 (2004), (Rule suggesting that summary judgment should be denied when facts in the particular knowledge of the moving party, also applies to their witnesses.)

Here, the material fact of who was actually using James' Davis' jet ski on the date in question, was a factual matter particularly and peculiarly the knowledge of the

defendants.

Again, at the Summary Judgment phase of proceeding in this matter, clearly there were factual issues regarding the use of Mr. Davis' jet ski and its involvement in the subject accident. It was identified by hull number as being the jet ski involved, and such a position was further bolstered by the fact that the owner, James Davis, was being, less than candid about the use of his jet skis on that particular day.

Further, by way of discussion of procedural issues raised by respondent, it is noted that the defendants in this case are within their opening brief grossly inconsistent with respect to their assertion that in reviewing the propriety of summary judgment in this matter the appellate court is bound to consider "only the evidence, which was called to the attention of the trial court", citing to RAP 9.12 (See respondent's brief, P. 14).

Under Respondent's position, a party could submit false evidence, gain summary dismissal, and thereafter, could submit contradictory evidence, as a witness in the case against a co-defendant who was not dismissed, and despite such mendacity, escape Appellate scrutiny of such behaviors.

Here, during the summary judgment phase, there was an argument that James Davis had given false information to the police, and the Court but after he was dismissed as a party, during trial **he admitted it.** (CP 1356-1357); (RP 515-519).

To compartmentalize the record, based on artificial concerns, in this instance, would reward efforts to undermine the search for the truth.

It is respectfully suggested when it comes to the application or RAP 9.12, respondent is guilty of "the pot calling the kettle black". If one examines the texture and tone of respondent's opening brief, it is noted that, although pointing out that RAP 9.12 on its face appears to limit the Appellate Court to considering only that evidence submitted with respect to the summary judgment motions at issue, when considering the propriety of the granting of such motions, the respondents readily and interchangeably cite from the summary judgment record and to the court record to argue its various points. For example on the issue of James Davis' consent, in the long introductory statement regarding "the Davis family on June 30, 2006" at Page 3 on the issue of permission to use the subject jet skis, the defendants, cites solely to the Trial Court record, and not the record before the Trial Court on Summary Judgment. While of course this is just an "introduction", it is noted that the clear motivation behind such a summary, is to influence the Court in its later reading of the facts as they relate to the specific summary judgment and trial court proceedings, without differentiation.

Further, it appears that RAP 9.12 is primarily focused on the question of what was, or was not before the trial court when a summary judgment decision has fully

resolved the case. See, for example, *Riojas v. Grant County PUD*, 117 Wn. App. 694, 696, n.1, 72 P.2d 293 (2003), (Appellate Court would not consider a declaration that had not been brought to the attention of the trial court, nor listed in the summary judgment order, when considering the propriety of the grant of a motion for summary judgment); *Mithoug v. Apollo Radio Spokane*, 126 Wn. 2d, 460, 909 P.2d 291 (1996), (RAP 9.12 did not bar consideration of depositions on file, which were technically not part of the summary judgment pleadings, because they were in the Court file and had been brought to the attention of the trial court). It is noted that defendant cites no case involving multiple parties where some, but not all, parties are dismissed by way of summary judgment and the remaining parties proceed to trial on related issues, stating that the Appellate Court cannot consider, the more detailed factual record developed during the course of trial.

In fact, when the issue is a denial of a motion for summary judgment and the case has proceeded to trial, the rule is to the exact contrary and the factual sufficiency of any claim or defense must be considered based on the trial record as a whole. See *Johnson v. Rothstein*, 52 Wn. App. 303, 306-07, 759 P.2d 471 (1988). This is of course because the purpose of summary judgment is to avoid a useless trial, and once a trial has occurred, an appeal of a summary judgment determination, as opposed to the final determination, would be purposeless.

Similarly, it is suggested, that in a case such as this, where there initially had been multiple parties, some who were dismissed and others who were not, on the same or similar claims, it makes no practical sense, to ignore the record developed during the course of trial. While, arguably there may be some unfairness to the trial court judge who entered the order for summary judgment, it is suggested that such unfairness does not trump the parties' rights, ultimately to have their day in court. See, *Washington State Constitution Article I, Section 21* ("Trial by Jury"). Further such an interpretation of RAP 9.12 is inconsistent with the command of RAP 1.2 which expresses a substantial public policy, that cases on appeal should be decided based on their "merits" as opposed to technical compliance or non-compliance with the rules.

In any event, as shown below such matters simply are academic, given that although perhaps in slightly different form the exact same evidence relied on at time of trial to circumstantially establish that Scott Davis was using the jet ski at the time in question, was before the trial court within plaintiff's response to defendant's various motion for summary judgment. Thus, the defendant's protestations and objections are simply without merit.

As discussed in Page 8 through 10 of plaintiff's opening brief, plaintiff provided a substantial response to defendant's motion for summary judgment

regarding the liability of James Davis, who apparently the defendants, want to mischaracterize as some kind of kindly grandfather figure. Prior to the filing of this response, defendant had filed an earlier motion for summary judgment which includes a declaration from Mr. Davis falsely indicated that he had personal knowledge about the use of his jet ski on the date of the accident. (CP 1356-57); (RP 515-519). Following the initial filing of defendant's motion for summary judgment, there was an agreed continuance so that the parties could engage in appropriate discovery prior to the hearing of the motion.

Defendant refiled for summary judgment for hearing in late July 2008, apparently withdrawing the declaration of Mr. James Davis, but this time including a declaration from Scott Davis generally denying that he was riding the jet ski at the time of the accident.

In response to defendant's, rather perfunctory motion for summary judgment plaintiff provided an extensive response including a 20-page memorandum of points and authorities addressing issues of "presumed agency", the family purposes doctrine, and the issue of negligent entrustment. (CP 1354-1373).

Ronald Pace also filed a declaration in opposition of defendant's motion for summary judgment indicating very directly that "I can say on a more probable than not basis, that Scott Davis was the individual driving the Sea Doo at the time of the

incident." (CP 1041). Not only did plaintiff's response include a copy of Mr. Pace's declaration but also a copy of the police reports generated regarding this incident including documentation, indicating that the Hull No. WN7704NT was identified as the hull number of the involved jet ski. (CP 1060-1064). Additionally, among other things, the entirety of Mr. James Davis' deposition and that of Scott Davis' deposition were included within plaintiff's summary judgment response. (CP 1160-1324).

If one surveys the information which is provided within these depositions or within the deposition of James and Scott Davis, the exact same information which was discussed during the course of trial, (while slightly less developed), were before the trial court when deciding the summary judgment motion against James Davis. Similarly, in response to the subsequent Motion for Summary Judgment filed regarding the liabilities of Scott and Tyler Davis, and Scott Davis' marital community, plaintiff submitted an extensive response. It was also developed in response to the Motion for Summary Judgment regarding Tyler Davis, that he typically would ride jet skis with his father Scott Davis, he admitted to using the jet ski on the very date in question, (as with both with his father, and with a friend of the Davis family named Bruce Thompson). Both his father Scott, and his grandfather James admitted, that Tyler often could be a rambunctious youth, and (naturally), would have wanted to utilize as much as possible the jet skis that his grandfather had

just purchased for the family vacation property. As stated by Scott Davis, Tyler Davis was a "usual, rambunctious 14-year-old looking for thrills." (See Dep. of Scott Davis Page 28). (CP 1321).

With regard to Scott Davis, the son, during the course of his deposition at Page 14 through 15, he testified regarding whether or not he had ever been denied permission to use the jet skis, and what were the "rules" regarding the use of such jet skis, the following testimony:

Question: When you use your father's 2006 and 1997 Ski Doo's, did he impose any rules?

Answer: Cautionary rules, yes.

Question: What do you recall?

*Answer: Be careful. Watch for other people. **Don't be stupid.** Things, you know, the basics. Take care of them. Don't beach them. Stay away from rocks. You know, general stuff.*

Question: During the weekend of 4th of July weekend of 2006, and again, we are talking about, let's go from the 29th to the 4th of July. When I talk about the 4th of July weekend, that will be the time.

Answer: Okay.

Question: Did your father ever tell you that you cannot use the Ski Doo's at any period of time?

*Answer: **I do remember he would rather us not be out on the busy weekends riding them with all the people that***

are out there during those weekends.

Question: That is a preference. But did he ever impose a rule upon you and say, "You are not to use these things at any particular period of time?"

Answer: I guess you would call it a rule, yes. (Emphasis added).

(CP 1318).

Thus, to the extent that the defendants are contending that James Davis imposed a hard and fast family rule that the jet ski's could not be utilized on busy weekends, it is noted that viewing the facts in light most favorable to the plaintiffs, at best such rule was a family guideline, and was certainly equivocal.¹

At the time the summary judgment hearings and before the various trial judges, it is noted that there was unequivocal testimony before the trial court that one of Mr. Davis' jet skis was involved in the accident which caused Mr. Pace injury. In response, James Davis, the owner of the jet skis had misled the police, who were investigating the accident, and had filed a false declaration, indicating that he had personal knowledge of facts, of which he clearly did not. The evidence is before the

¹ Finally with respect to respondent's factual assertions, it is noted, that to the extent that respondent, desires to convince the court that Bruce Thompson, can vouch for the whereabouts of the jet skis during the relevant timeframe, it is noted that during the course of trial, Mr. Thompson was substantially impeached regarding his assertions that he was observing the jet skis essentially the whole afternoon, given the fact that it was established at time of trial, that afternoon he was relaxing on the backside of the vacation property, and did not have a view of the buoys where the jet skis were allegedly moored. (RP554-562).

trial court admitted that the subject jet skis were being used on the day in question at the location in question but of course efforts were made to sculpt such usage to exclude the timeframe in which this action occurred. Once such assertions were fully probed, it was clear the defendants could not establish with any certainty, the location of the potentially involved individuals, and could provide very little information about the location and use of the jet skis at the time in question, beyond their denials, had been and then were substantial credibility issues.

This was a case where the defendants clearly controlled the relevant information, regarding the use of the subject jet skis at the time in question, and it was error for the trial court to fail to take such matters into consideration or to properly credit plaintiff's proof, which, although circumstantial in many respects, certainly should have been deemed sufficient to raise questions of fact warranting denial of summary judgment regarding the various claims which had been propounded in plaintiff's complaints, particularly as it relates to James Davis' liability.

III. REPLY ARGUMENT

A. THERE ARE ISSUES OF FACT REGARDING PRESUMED AGENCY. THE DEFENDANTS FAILED TO PROPERLY REBUT THE PRESUMPTION OF AGENCY.

As a general proposition when ownership of a vehicle causing damage,

proved or admitted, a presumption exists that the vehicle was being used in the owner's service, casting the burden onto the owner to overcome the presumption of agency. See, *Steiner v. Royal Blue Cab Company*, 172 Wn. 396, 20 P.2d 39, (1913). As initially formulated, such a presumption only could be rebutted by testimony from a disinterested witness. *Id.* However, such a proposition was substantially modified in the case of *Bradley v. S.L. Savidge, Inc.*, 13 Wn.2d 28, 123 P.2d 780 (1942). Under the current formulation of the rule, such a presumption does not involve an issue for the jury but if unrebutted, serves only to carry the case to the jury, thus avoiding a directed verdict, (and/or in this instance summary judgment) but otherwise has no additional affect. See *6 Washington Practice*, WPI 50.08 (5th Edition (2010)).

Under the *Bradley* opinion, in order to overcome the presumption of agency, the defendant had the burden of showing:

We now hold that the presumption may be overcome by competent evidence from either interested or disinterested witnesses, provided that their testimony is uncontradicted, unimpeached, clear and convincing. When evidence of that degree and character is submitted by the defendant, the presumption disappears entirely from the case, casting upon the plaintiff the burden of producing competent evidence to meet the evidence of the defendant, and of establishing by a preponderance of evidence the fact that, at the time of the accident the driver of the offending automobile was the agent of the owner was acting within the scope of his authority....

Bradley v. S.L. Savidge, Inc., 13 Wn.2d at 63-64.

If one analyzes the evidence submitted by the defendants in this case it is clear that it was insufficient in and of itself to overcome the presumption of agency. At the time of summary judgment, plaintiff presented unequivocal proof that one or more of Mr. Davis' jet ski was involved in the subject accident. Particularly the super-charged high-powered jet ski with Hull No. "WN7704NT". Thus, the evidence presented by Defendant James Davis was contradicted, and was impeached, thus was in and of itself insufficient to overcome the presumption of agency. As a result, the jury should have allowed to consider whether or not James Davis' jet ski, caused the subject injury, and whether or not he should be held responsible. Such a proposition is applicable, whether or not ultimately it was determined that Scott Davis or some other person was using the jet ski. Thus, whether or not Scott Davis was actually determined to be the individual utilizing the jet ski, is not dispositive, and defendant's assertions that simply because the jury, did not find in find plaintiff's favor against Scott Davis, is simply of no moment.

Further, given the fact that the trial did not occur until **after** the summary judgment, taking into consideration the results of trial would be violative of the very principles in which the respondents espouse, i.e., that this Court should only consider

that evidence which is before the trial court during the course of summary judgment. At that time there had been no determination as to whether or not Scott Davis was the rider of the subject jet ski, and the Court can take notice that had all of plaintiff's asserted claims and defenses been before the jury, as well as James Davis, this would have been an entirely different case.

Thus, the trial court erred in not permitting the case to go forward against James Davis on a "presumed agency theory."

B. THERE WERE FACTUAL ISSUES BEFORE THE TRIAL COURT, WHICH PRECLUDED SUMMARY JUDGMENT ON A NEGLIGENT ENTRUSTMENT THEORY.

The seminal case in Washington dealing with negligent entrustment theory, unrelated to automobiles, is the case of *Bernethy v. Walt Faylor's Inc.*, 97 Wn.2d 929, 653 P.2d 280 (1982). In the *Bernethy* case the Washington Supreme Court looked to Restatement of Torts, 2nd, § 390 (1965) in determining that liability should be imposed. Section 390 provides:

One supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them. (Emphasis added).

Thus, under the terms of Restatement 2nd, § 390, and as it has been applied in the State of Washington, clearly "negligent entrustment" principals are not limited to use of automobiles, but have been applied to such other things as firearms, and even hazardous waste. See *Bernethy v. Failor's Inc.* (Firearms) and see also *Hickle v. Whitney Farms*, 148 Wn.2d 911, 64 P.3d 1244 (2003) (Hazardous Waste). In this case, it appears that respondent is not contending that the high powered, turbo charged jet skis, involved in this accident, would not be dangerous instrumentalities, subject to negligent entrustment principals.

On the issue of "entrustment" it is noted that the case of *Parrilla v. King County*, 138 Wn. App. 427, 441, 157 P.3d 879 (2007) is inconsistent with the *Bernethy* opinion on this issue. In *Parrilla*, a case which involved the theft of a bus, by a mentally deranged person, found that a county bus driver who left the bus with its engine running on the side of a public street with a physically erratic passenger, did not "entrust" the vehicle to the deranged passenger who ultimately stole the bus and collided with several vehicles causing injury to the plaintiff in that case. In *Parrilla*, instead of looking to prior case law, the Court looked to Black's Law Dictionary Page 574 (8th Ed. 2004) for a definition of the word "entrust" and it determined that it involved "some kind of agreement or consent, either express or implied, to relinquish control of the instrumentality in question." In any event,

without delving deeply into whether or not *Parrilla* is inconsistent with *Bernethy*, it is noted that in this case there were clearly factual issues before the trial court on summary judgment as to whether or not James Davis impliedly had provided permission to his son Scott to use the jet skis in question. Clearly the subject jet skis were there for the use and enjoyment by family members, including Scott and Tyler Davis. (CP 1187-1194). Although there may have been "family rules" regarding the use of the jet skis, it is suggested that such family rules do not rise to a level of being a legal obligation, and as admitted by James Davis, even if Scott had violated the rules, he nevertheless would have had in the broad sense permission to use the jet skis. Further, looking at the entire facts of the events, on the date in question involving the Davis family, it is noted that at the time the Davis family had just acquired two jet skis which were new to them, and it was a beautiful late June sunny day. Both Tyler and Scott had used the jet skis earlier, and James Davis, left the vacation property with the keys to the jet skis readily available to both Scott and Tyler should they desire to use them, despite the "family rules." (CP 1212).

Further, the mere fact that James Davis may have admonished his son and grandson not to use the jet skis on the day in question because of concerns for the amount of traffic on the river on that date, in and of itself is dispositive. In *Cameron v. Downs*, 32 Wn. App. 875, 881, 650 P.2d 260 (1982) the appellate court found, that

despite the fact that a parent had admonished his family regarding the use of a motor vehicle, he nevertheless may have had reason to expect that his daughter might loan the vehicle to his son, who had a poor driving history and insurance problems. Further, a key to the *Cameron* case, was the fact that the daughter had made accessible to her brother the keys to the particular automobile in question, even though there was testimony indicating that she believed that someone else would subsequently be the driver.

As in *Cameron*, in this case clearly James Davis left the keys to the jet skis accessible and left the vacation property, and did not return until after the accident in question. (Cp 1212; 1226-26). Thus knowing the likely desire on the part of both Scott and Tyler to use the jet skis, he nevertheless left the keys accessible to them. Further, despite the fact that he admonished both his grandson and son, the evidence clearly suggest that he knew that both Scott and Tyler could be "heedless", whether due to their youthful exuberance, or otherwise, and that it was reasonably probable that they could use the jet skis despite such admonishments. (See, decision regarding implied consent below). (CP 1257-58; 1287-88) (RP 517).

Ultimately there were sufficient facts that the jury should have been allowed to determine, whether or not even despite such admonishment there was an implied permission, particularly as it came to Scott, to use the jet skis in his father's absence.

As suggested by James Davis' testimony at time of trial, even if his son had taken the jet skis without his express permission, it nevertheless would have been subject to ratification.

Given the fact that the issue regarding the use of such jet skis, was information solely in the possessions of the defendants in this case, the trial court should have, as suggested above, permitted such issues to be presented to the jury, and allow the jury to sort out the facts and reasonable inferences therefrom.

It is respectfully suggested, that it was simply error to grant summary judgment on this issue, given the disputed facts, and the reasonable inferences therefrom.

C. THE FAMILY PURPOSES DOCTRINE SHOULD BE DEEMED APPLICABLE TO WATERCRAFT.

Whether or not other jurisdictions recognize "The Family Purposes Doctrine" is irrelevant given the fact that such doctrine is firmly established within the laws of the State of Washington. See *Kaynor v. Farline*, 117 Wn. App. 575, 72 P.3d 262 (2003). See also *Birch v. Abercrombie*, 74 Wn. 486, 133 P. 1020 (1913); *Davis v. Browne*, 20 Wn.2d 219, 229, 147 P.2d 263 (1944).

As discussed in *Davis v. Browne* at p. 229 the doctrine establishes:

That one who furnishes a vehicle for the customary conveyances of the members of his family, whether for business or solely for pleasure, makes the transportation of such person by that vehicle his affair, that is, his business, and anyone driving the vehicle, for that purpose with his consent, express or implied, whether a member of his family or another, is his agent.

Thus, in its primary formulation, family membership, is not dispositive as to whether or not the "family car" doctrine is applicable, i.e. ".. whether a member of his family or another...". (Emphasis added).

As discussed in *Kaynor*, at 586-87 the formulation, of whether or not the car is being used for "family purposes" has varied from case to case.

Ultimately, the *Kaynor* case suggest that whether or not a vehicle is a "family vehicle" must be determined on a case by case basis, looking at the specific factual situation. As stated in *Kaynor* at 588, "the issue as to what constitutes general use, pleasure, and convenience of a family is a question of fact that may change from family to family depending on the needs of the family and the authorization granted by the parent or parents." Further as discussed in *Kaynor*, there is simply no

"residency requirement" in making a determination as to whether or not a vehicle is a "family vehicle" upon which the doctrine applies.

Here it is undisputed the whole point of Mr. Davis' purchase of the two jet skis was for their use at the family vacation property, by family members and friends. (CP 1188). This was a family vacation property that was used by Scott Davis, even in the absence of his parents, and was open and available to him, as would have been the jet skis. (CP 1188; 1194). Thus, it can be readily said that these were jet skis, maintained by the parents for the customary use by the family members, (primarily for pleasure purposes), and at the time of the accident the jet skis were being driven by a member of the family for who they were maintained, with either the express or implied consent of the parents. See *Cameron v. Downs*, 32 Wn. App. at 879-80.

Further, even if we assume arguendo, that James Davis expressly denied on the date of the accident permission for his son to use the jet skis, nevertheless, tacit permission can be implied from the circumstances. See, *Clayton v. Long*, 147 Ga. App. 645, 249 SE 2d 622 (1978). Implied permission to use a vehicle may be inferred from a tacit understanding between the defendant and the family member that the family member can use the vehicle. See, *Hasegawa v. Day*, 684 P.2d 636

(Colo. App. 1983). As indicated by the above-cited *Clayton* opinion, when a person with control of the family vehicle permits a family member to habitually use the vehicle, the family member use of the vehicle may be considered to be with implied authority, even when the family member disobeys instructions not to use the vehicle on the occasion of the accident where the plaintiff was injured. Generally in order to establish that a family member had permission to use a family vehicle, it is not necessary for the plaintiff to show that the person had permission to use the vehicle at the exact time and place of the accident, since it would generally be sufficient that the person had ongoing permission to use the vehicle. This permission once given, will be sufficient to make the owner liable for negligent use of the vehicle by a family member, even though the family member was using the vehicle at a time or place contrary to the owner's instructions. See, *Heenan v. Perkins*, 278 Or. 583, 564 P.2d 1354 (1977).

In this case it is suggested that, a reasonable jury could find that permission was implied that Scott Davis, generally had available to his use the subject jet skis, even if, credit is given to Mr. Davis' assertions that on the particular date in question any use would have been without his permission. As indicated in Mr. Davis' trial

testimony, even if Scott had used the jet ski without his knowledge, nevertheless even in his absence, Scott generally had permission to use the jet skis. (CP 1301) (RP 520). See respondent's opening brief Page 15, Footnote 7.

As discussed above, clearly given the amount of watercraft in the State of Washington, and the inherent dangerousness of a high powered jet ski, there is simply no basis for rejecting the application of the "Family Purposes Doctrine" to jet skis.

D. TYLER'S LIABILITY

Mr. Pace testified at time of trial the accident involved three jet skis that were in the general vicinity including a jet ski that had some relationship to the color "yellow". Not only did a jet ski cut across the plaintiff's lane of travel, thus causing the accident, but immediately prior to that event he was splashed by another jet ski, which served to disorient him immediately prior to the accident.

In addition Tyler Davis' presence at the scene, certainly can be inferred based on the facts of this case wherein it was clear that the primary users of the jet skis on the weekend in question would have been Scott and Tyler Davis, and Tyler Davis and Bruce Thompson. (CP 12081211). Tyler Davis had used with Scott, the jet skis

earlier in the day, and certainly was motivated with his youthful exuberance to use such jet skis. As indicated he wanted to use the jet skis and the keys were at a location where both he and his father had access.

Such facts are not mere speculation but are the facts of this case, and Tyler and Scott's failure to follow a "family rule" is not tantamount to "theft" as suggested at Page 34 of respondents opening brief. Further the defendants simply failed to acknowledge the fact that Ron Pace, affirmatively testified both in opposition to summary judgment, and at time of trial that one of Mr. Davis' jet skis was present and the cause of the subject accident, thus taking the use of such jet skis, allegedly without express permission of James Davis, outside of the realm of "mere possibility or speculation" but into the realm of fact. Further, if in fact one of Mr. James Davis' jet skis was being used on that date, and its undisputed that when used, that jet ski was usually used in conjunction with the 1997 jet ski owned by James Davis, and the presence of three jet skis at the time of the incident, one can reasonably infer that the 1997 jet ski was being used by somebody, and it was intended and typically used by Tyler Davis.

As with all factual issues with regard to the use of the jet ski, plaintiff should have been provided the benefit of the inferences for the evidence, given the fact that clearly information regarding the use of such jet skis, was almost exclusively within the control of the defendants in this case, who clearly have and had made a number of misstatements, under oath, and to the police who were trying to investigate the very incident in question.

E. THE FAILURE TO GIVE PLAINTIFF'S PROPOSED JURY INSTRUCTION REGARDING STATUTORY DUTY, WAS REVERSIBLE ERROR.

With due respect to the respondents, plaintiff substantially disagrees with the proposition “An ordinary juror would have understood without proposed instructions that powering a Jet Ski so close that the boat operator has to suddenly veer to avoid a collision.” It is unknown to what varying degrees each individual juror may or may not have known regarding the “rules of road”, so to speak, as it relates to navigating watercraft on Washington’s waterways. Some jurors may not even be aware that like the use of automobiles on our highways, there are specific statutory rules applicable to boating, establishing such things as right-of-ways, speeds, and the like.

In any event, it is humbly suggested that the instructions provided by the Trial Court in this case were in fact deficient to permit the plaintiff to argue his theory of the case. As stated in Pearce v. Motel No. 6, Inc. 28 Washington Appellate 474, 480-81, 624 P.2d 215 (1981):

*Each party to a negligence action is entitled to have his theory of the case presented to the jury by proper instructions, there being evidence in support thereof. When there is a request for an appropriate instruction which relates to the principles of law involved to the issues in the case, it is not enough to simply apprise the jury in generally or abstract terms that a party claims the other was negligent. As stated in Dabroe v. Rhodes Company 64 Washington Appellate 431, 392 P.2d 317 'no where in the instructions is there any reference the claimed negligence of the defendants might be, except the statement of plaintiff's contention in Instruction No. 1 'That the defendants negligently operated and maintained the escalator'. The plaintiffs were, of course, entitled to have their theories of the case presented to the jury by proper instructions, there being evidence to support them; and their right was not affected by the fact that the law was covered **in a general way by the instructions given.** (Emphasis added) (Citation omitted).*

Further as suggested in Trueax v. Ernst Home Center 70 Washington Appellate 381, 853 P.2d 491 (1993), reversed on other grounds, 124 Wash. 2d 334,

878 P.2d 1208 (1994), the failure to give statutorily based instructions, can constitute reversible error as a matter of law.

In this case, the plaintiff was denied an opportunity to argue his theory of the case, that Scott Davis was operating his Jet Ski in a “negligent manner” thus violative of the laws of State of Washington. Contrary to defendant’s ascertain, the statute, RCW 79A .60.030 does not relate solely to speed, but also instructs that a operator of a vessel upon the waterways in Washington is acting in a negligent manner, if he does so, “in disregard of careful and prudent operation” and it simply cannot be said that under the facts of this case, the speed of Scott Davis’ Jet Ski was not a factor in the collision at issue. As indicated by Mr. Pace, the Jet Ski that caused him to take evasive action was traveling at a high rate of speed directly into his lane of travel. Obviously absence the speed and trajectory of the Jet Ski, the need for evasive action simply would not have existed.

As indicated by the Pearce case, the failure, to provide specific instructions regarding the duty applicable in the case, is reversible error and is simply not cured by giving of general instructions regarding “negligence.”

That is exactly what occurred here, as opposed to providing specific instructions regarding Scott Davis' statutory duties upon the waterways, the court instead opted to provide only general and abstract instructions regarding negligence. By doing so the Trial Court denied the plaintiff a fair opportunity to present his theory of the case, which was that Davis' actions were negligent, as evidenced by his statutory violation. Such a defect in instructions, which failed to permit the plaintiff to argue his theory of the case requires reversal. See, *Joyce v. State*, 155 Wash. 2d 306, 119 P.3d 825 (2005).

F. THE TRIAL COURT COMMENTED ON THE EVIDENCE.

With due respect to respondent's counsel it is noted that by answering the jury questions as it did, the Trial Court, perhaps inadvertently, did comment on the evidence. As indicated the jury question queried:

In regard to Instruction No. 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?

It is undisputed that the Trial Court answered this questions "no" despite

plaintiff's protestations that the plaintiff desired that the jury simply be told to reread the instructions.

The reason why the answer to this question of "no" constitutes a comment on the evidence, is that it appears that the jury was taking into consideration that Tyler was in fact at the scene of the accident, and by answering "no" the Trial Court was suggesting that it had found that Tyler was not present.

Naturally communicating such an impression, could have reasonably led the jury to conclude that if the Trial Court had concluded that Tyler was not present, that he was also suggesting that Scott Davis was not present either. As indicated above, typically Tyler Davis would amongst others ride the Jet Skis with his father Scott. Thus if the court was indicating that it believed that Tyler Davis was not present, it could be "reasonably inferable" that the Trial Court did not believe that Scott Davis was not present as well.

At a minimum, the jury question does suggest that plaintiff's position, that it could be reasonably inferred that Tyler Davis was at the scene of the accident is correct, and that it was simply error to have permit his dismissal in this case.

G. THE TRIAL COURT ERRED BY ALLOWING ONLY “CLARIFYING QUESTIONS”

To clarify, it is noted that with respect to this issue plaintiff is simply seeking guidance, should this matter be remanded for a new trial, and concurs, that the court’s approach to jury questions in this case, in and of itself was not reversible error. The court can take notice that there is woefully little case law, addressing the issue as to the scope of jury questions in a civil case. See, *Tegland*, 14A WAPRAC § 30:12 (2010), here, it is suggested that the Trial Court’s approach, and the language set forth within the WPI, is simply too restrictive, and that it unduly handicaps the jury in its fact finding role. Further, to the extent that questions are asked that are “non-clarifying” under CR43(k), any question, is ultimately filtered through the discretion of the Trial Court, thus whether the questions are clarifying, or not, is not a particular or necessary guarantee that only appropriate questions are asked. It is suggested, that under the terms of the Court Rule, the jury should be permitted to ask whatever questions they may desire, and whether or not such questions are actually asked is entirely different issue.

In any event to be clear, should a retrial be granted in this case, plaintiff is simply seeking guidance on this issue, and concurs with the respondent, that on this record, the resolution of this question in and of itself is not outcome determinative.

IV. CONCLUSION

For the reasons stated above, plaintiff should be provided the relief requested. This case should be reversed and remanded for a full trial on all claims, against all parties. Clearly the Trial Court erred in granting summary judgment in favor of James Davis, and Tyler Davis as well. Plaintiff should have a full opportunity to try his full case with proper instructions. Thus, it is humbly and respectfully requested that the court reverse the above-referenced decisions of the Trial Court and remand this matter for a plenary new trial.

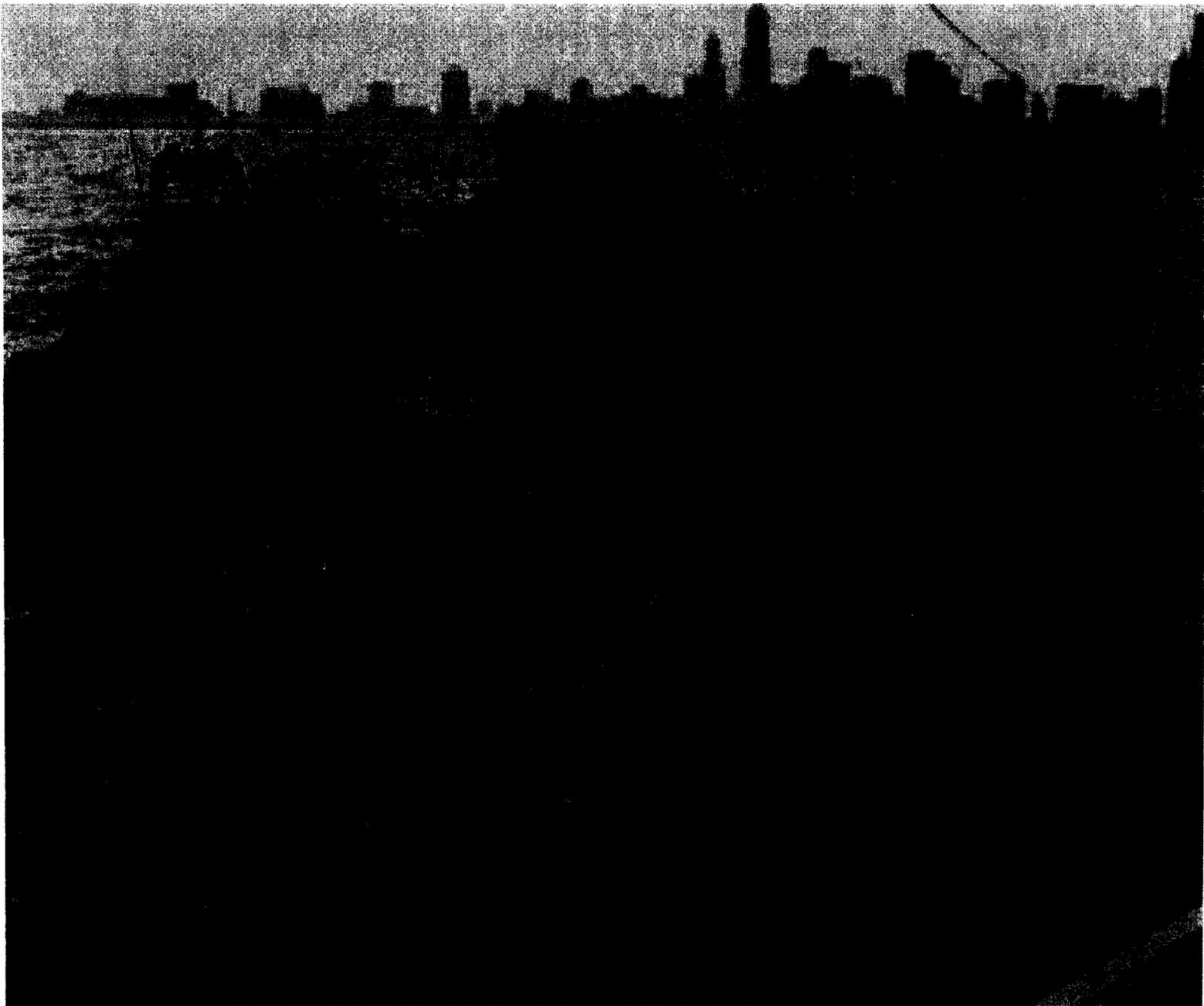
Dated this 21st day of October, 2010.



Paul A. Lindenmuth, W&BA# 15817
Attorney for Appellant

Appendix 1

RECREATIONAL BOATING STATISTICS 2008



COMDTPUB P16754.21



U.S. Department of Homeland Security
U.S. Coast Guard
Office of Auxiliary and Boating Safety

Appendix 1

Casualty Data

Jurisdiction	Number of Accidents				Persons Involved		Property Damage
	Total Accidents	Fatal Accidents	Non-Fatal Injury Accidents	Property Damage Accidents	Deaths	Injured	
Totals	4789	619	2379	1791	709	3331	\$54,282,587
Alabama	76	11	25	40	16	44	\$2,226,628
Alaska	44	11	12	21	14	24	\$743,719
Arizona	158	5	99	54	6	116	\$463,031
Arkansas	66	13	30	23	14	42	\$259,021
California	520	39	279	202	45	376	\$5,554,554
Colorado	39	7	17	15	7	33	\$111,338
Connecticut	53	9	20	24	11	31	\$1,133,366
Delaware	11	3	4	4	3	6	\$280,765
Dist. of Columbia	2	0	1	1	0	2	\$3,000
Florida	616	50	267	299	55	371	\$22,715,343
Georgia	150	16	85	49	18	104	\$425,433
Hawaii	21	5	0	16	5	0	\$189,441
Idaho	65	15	29	21	15	34	\$241,298
Illinois	119	14	52	53	19	79	\$449,550
Indiana	55	7	28	20	8	38	\$256,988
Iowa	38	0	25	13	0	30	\$357,200
Kansas	38	4	14	20	5	16	\$175,737
Kentucky	46	5	23	18	6	32	\$707,302
Louisiana	110	31	55	24	38	98	\$685,780
Maine	32	8	15	9	9	26	\$96,226
Maryland	159	8	102	49	9	135	\$872,979
Massachusetts	64	11	33	20	11	46	\$510,118
Michigan	187	30	94	63	34	116	\$858,762
Minnesota	86	12	50	24	12	59	\$690,837
Mississippi	24	4	13	7	5	22	\$364,800
Missouri	135	19	75	41	20	101	\$706,889
Montana	31	12	14	5	14	20	\$102,200
Nebraska	20	2	9	9	2	11	\$98,650
Nevada	80	6	40	34	6	49	\$367,937
New Hampshire	28	2	15	11	2	17	\$53,087
New Jersey	140	7	64	69	10	97	\$141,002
New Mexico	30	2	21	7	3	28	\$77,845
New York	160	17	62	81	24	98	\$1,789,950
North Carolina	148	16	89	43	18	121	\$1,018,695
North Dakota	15	0	10	5	0	12	\$47,990
Ohio	125	12	71	42	15	112	\$902,722
Oklahoma	54	10	26	18	11	37	\$716,700
Oregon	53	11	23	19	13	36	\$465,563
Pennsylvania	59	8	37	14	8	54	\$191,489
Rhode Island	35	4	10	21	4	15	\$377,700
South Carolina	107	25	41	41	29	59	\$1,603,152
South Dakota	16	3	5	8	3	10	\$78,750
Tennessee	130	18	68	44	20	91	\$1,493,851
Texas	218	55	104	59	61	167	\$1,340,402
Utah	80	5	61	14	5	78	\$172,800
Vermont	8	5	3	0	5	4	\$21,600
Virginia	95	15	43	37	17	56	\$370,168
Washington	98	18	46	34	22	72	\$849,200
West Virginia	11	1	5	5	1	8	\$28,000
Wisconsin	110	19	56	35	20	82	\$345,964
Wyoming	11	2	6	3	2	7	\$96,000
Guam	1	1	0	0	1	0	\$0
Puerto Rico	1	0	1	0	0	3	\$1,000
Virgin Islands	0	0	0	0	0	0	\$0
Am. Samoa	0	0	0	0	0	0	\$0
N. Marianas	1	0	0	1	0	0	\$200
*Atlantic Ocean	6	3	1	2	3	5	\$398,865
*Gulf	1	1	0	0	1	0	\$0
*Pacific Ocean	3	2	1	0	4	1	\$51,000

*1997 was the first year statistics were compiled for accidents that occurred three or more miles offshore in the Atlantic Ocean and Pacific Ocean and nine or more miles in the Gulf (of Mexico, Alaska, etc.). NJ did not submit property damage estimates to boats in 2008. However, NJ noted that accidents submitted to the Coast Guard that did not have an injury or death were considered to have \$2000 or more in damages. The Coast Guard adjusted NJ's property damages to boats such that each accident without an injury or death had \$2000 damages.

No: 64558-7-I

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

RONALD PACE,

Plaintiff/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; and "JOHN DOE #1" and "JANE DOE #1", individually and the marital community comprised thereof.

Defendant/Respondents

DECLARATION OF SERVICE

On October 21, 2010, a true and correct copy of **PLAINTIFF/APPELLANT'S REPLY BRIEF**, was served on the following by e-mail and legal messenger to:

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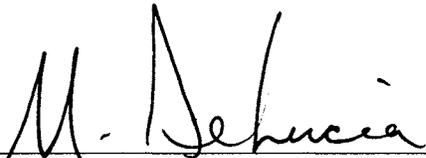
Alice C. Brown
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Copy filed via facsimile and legal messenger delivery:

Court of Appeals, Division I
Clerk's Office
600 University St.
Seattle, WA 98101
206-389-2613 (fax file)

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

DATED October 21st, 2010.



Marilyn DeLucia, Paralegal
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& Associates, P.L.L.C.
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