

NO. 31042-6-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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ROBIN JOHNSON and CRAIG JOHNSON,  
wife and husband, and the marital community composed thereof,

Appellants,

vs.

SPOKANE TO SANDPOINT, LLC.,  
a Washington corporation,

Respondent.

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BRIEF OF APPELLANTS JOHNSON

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Martin A. Peltram, WSBA #23681  
Attorney for Appellants

900 North Maple Street  
Suite 200  
Spokane, WA 99201-1807  
(509) 624-4922

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**A. ASSIGNMENTS OF ERROR [RAP 10.3(a)(4)].**

1. The Superior Court of Spokane County, state of Washington, erred in entering its oral ruling on April 20, 2012, in cause no. 10-02-05387-0, wherein the court denied the motion for partial summary judgment of the plaintiffs, ROBIN JOHNSON and CRAIG JOHNSON, and appellants herein, as to the lack of validity and enforceability of the subject preinjury release and waiver under the evidentiary facts and circumstances, and governing law presented. [RP 48-51, 52; CP 454].

2. The Superior Court of Spokane County, state of Washington, likewise erred in entering its oral ruling on April 20, 2012, in cause no. 10-02-05387-0, wherein the court further granted the motion for summary judgment of the defendant, SPOKANE TO SANDPOINT, LLC, and respondent herein, dismissing all claims of liability and damages against said defendant, as brought by the plaintiffs, and appellants herein, notwithstanding the fact there were genuine issues of material fact in dispute and the defendant was not entitled to judgment under the law governing and controlling this particular case and controversy. [RP 48-51, 52; CP 454].

3. The Superior Court of Spokane County, state of Washington, equally erred in entering its written "order granting summary judgment" to said defendant, and respondent herein, on April 20, 2012, in cause no. 10-02-

05387-0, wherein the court formally confirmed its oral decision (a) granting the motion for summary judgment of the defendant, while (2) denying the corresponding motion for partial summary judgment of plaintiffs on the issue of invalidity and unenforceability of the subject preinjury release and warrant. [CP 452-53, 454].

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**  
**[RAP 10.3(a)(4)].**

1. Whether the defendant, SPOKANE TO SANDPOINT, LLC, and respondent herein, met its initial, and ultimate, burden of proving under the provisions of CR 56(c) that (a) there was no genuine issue of fact in dispute as to the validity and enforceability of the subject preinjury release or waiver at issue in this matter, and (b) it was entitled, under the governing principals of law, to judgment and summary dismissal of the plaintiffs' personal injury claims against it on the basis of said preinjury release and waiver? [Assignments of Error Nos. 1 and 3].

2. Whether, in turn, the plaintiffs, ROBIN JOHNSON and CRAIG JOHNSON, and appellants herein, established by evidentiary fact, and governing law, that there was no genuine issue of fact in dispute as to the invalidity and unenforceability of said release and waiver, and accordingly they were entitled to summary judgment, on the following grounds, and for

the following reasons, that:

(a) this purported preinjury release and waiver is by its terms and circumstances fraught with uncertainty, unresolvable ambiguities and anomalies associated with its creation, wording and contents, and does not even under its express terms apply to the injuries suffered by ROBIN JOHNSON in this case;

(b) this purported waiver and release runs entirely afoul of the public interest and safety associated with this type of public event; and further

(c) this purported release and waiver cannot be enforced under governing public policy because of the defendant's own inexcusable gross negligence and recklessness in investigating, developing, creating, formulating, conducting, arranging, and operating the subject sports venue and event, without the basic and necessary safe-guards and measures being put in place and incorporated therein, so as to insure and protect participants, as well as the traveling public in general, from foreseeable and serious personal injury, or even possible death, as those personal injuries suffered by Ms. JOHNSON in this case? [Assignments of Errors Nos. 2 and 3].

3. Whether, in light of the absence of any genuine issue of material fact concerning the infirmities associated with the alleged waiver and release, as well as under the governing law concerning such release, the

plaintiffs were entitled to partial judgment under the provisions of CR 56(c) and (d), as against the defendant, and respondent herein, on the issue of the invalidity and legal unenforceability of the said preinjury release? [Assignments of Error Nos. 2 and 3].

4. Whether, and in the alternative and at the very minimum, a ruling on the issue of validity and enforceability of the subject waiver and release should have been held in abeyance by the superior court until such time as a jury determination had been made on the underlying issue whether the actions of the defendant, and respondent herein, were of a nature amounting to gross negligence and recklessness. [Assignments of Error Nos. 1 through 3].

**C. STATEMENT OF THE CASE [RAP 10.3(a)(5)].**

1. Introduction and overview of case [RAP 10.3(a)(3)]. Unless otherwise indicated, the operative facts and factual background outlined below are based upon the evidentiary facts and documentation which were submitted by the defendant, and respondent herein, SPOKANE TO SANDPOINT, LLC, in support of its underlying motion for summary judgment. As a result, it is the position of appellants JOHNSON that the defendant and race organizer did not, upon the evidence submitted, satisfy its initial burden of proving and establishing a prima facie case under CR 56(c)

that (a) there was no genuine issue of material fact in dispute and (b) the defendant as moving party was entitled to judgment as a matter of law. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 p.2d 1030 (1982); see also, Scott v. Pacific West Mountain Resort, 55 Wn.2d 678, 682, 349 P.2d 605 (1960). For purposes of this appeal, Mr. and Mrs. JOHNSON maintain that a close examination of these evidentiary facts, and all reasonable inferences drawn therefrom, shows that neither of these elements was proven by SPOKANE TO SANDPOINT, LLC, either in its pleadings or its supporting evidence submitted on summary judgment. In any case, and even if said defendant could be said to have met its initial burden of proof under CR 56(c), it failed to satisfy its ultimate burden of showing the absence of any genuine issue of material fact, particularly within the framework of its gross negligence and recklessness in failing to establish a safe venue for participants having nullified the said preinjury release in terms of its disputed failure to establish a safe venue for participants.

Consequently, on this basis alone, it remains the position of the JOHNSONS that the motion of said defendant, and respondent herein, should have been denied outright and they should not have been required to respond to the motion of SPOKANE TO SANDPOINT, LLC, as contemplated under CR 56(e). Nevertheless, as the record reflects, the plaintiffs did respond by

way of their counter motion for partial summary judgment under CR 56(d) seeking entry of an "order" as to the invalidity and unenforceability of the subject electronic preinjury release and waiver.

It remains the contention of appellants JOHNSON that said counter motion should have been granted by the superior court on April 20, 2012, rather than respondent's original motion for summary judgment. At a minimum, a decision on the issue of the validity and enforceability of said preinjury release should have been held in abeyance by the superior court until such time as the jury and trier of fact had the opportunity to consider and decide the underlying and disputed issue of the defendant's gross negligence and recklessness in terms of its failing to maintain and create a reasonably safe venue for race participants such as the plaintiff, Ms. JOHNSON.

2. Factual background. On August 13, 2010, the plaintiff, ROBIN JOHNSON, was a registered participant in a team relay race or athletic event sponsored by the defendant, SPOKANE TO SANDPOINT, LLC, a Washington corporation. Originally, said corporation and sporting function had been established in 2008 by Benjamin Phillip Orth and his brother, Bart, and in fact took place for the first time in that year. [See, Exhibit A [October 12, 2011 Depo. of Benjamin Phillip Orth, at pages 7-8] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 104-05]. It continued

for the next two [2] years, and during her first leg of that event in 2010 [i.e., "no. 4 - 6.1 miles"] Ms. JOHNSON ran westbound on Colbert Road along the southern shoulder of that roadway. [See, Exhibit B [October 12, 2011 Depo. of Robin R. Johnson, at page 25, 61 and Exhibit 2, thereto, at page 28] [CP 142, 149, 197] and Exhibit C [October 13, 2011 Depo. Wendy Colton, at page 49] [CP 258] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98].

Eventually, during this portion of the relay race, Ms. JOHNSON was required to cross Highway 2 at the unmarked crosswalk situated at the intersection of that highway and Colbert Road in Spokane County, state of Washington. [See, Exhibit B [October 12, 2011 Depo. of Robin R. Johnson, at page 25, 61 and Exhibit 2, thereto, at page 28] [CP 142, 149, 197] and Exhibit C [October 13, 2011 Depo. Wendy Colton, at page 49 and 53] [CP 258, 259] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98]. Friends and teammates of Ms. JOHNSON had arrived earlier at this location and were waiting for her to arrive at this crossing on one side of the intersection. [See, Exhibit D [October 14, 2011 Depo. Kristy Ervin, at page 29] [CP 266] and Exhibit E [October 13, 2011 Depo. of Nina Roecks, at pages 60 through 61] [CP 276-77] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98].

Highway 2 makes up four [4] lanes of traffic with a dividing median or graveled break in the roadway area separating the two [2] northbound lanes from the two [2] southbound lanes of traffic. [See, Exhibit B [October 12, 2011 Depo. of Robin R. Johnson, at page 25, 61 and Exhibit 2, thereto, at page 28] [CP 142, 149, 197] and Exhibit C [October 13, 2011 Depo. Wendy Colton, at page 49 and 53] [CP 258, 259] and Exhibit E [October 13, 2011 Depo. of Nina Roecks, at pages 52 and 57] [CP 274, 275] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98]. Each lane of traffic is roughly 12 to 13 feet in width with there being additional space in the area of the separating median. [See, Exhibit E [October 13, 2011 Depo. of Nina Roecks, at pages 52 and 57] [CP 274, 275] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98]. The speed limit for Highway 2 is sixty [60] miles per hour. [See, Exhibit B [October 12, 2011 Depo. of Robin R. Johnson, at page 73] [CP 124] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98].

Ms. JOHNSON entered the unmarked crossing at the northeast corner of the intersection after checking for any oncoming traffic and seeing none. [See, Exhibit B [October 12, 2011 Depo. of Robin R. Johnson, at page 25, 61 and Exhibit 2, thereto, at page 28] [CP 142, 149, 197] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98]. After Ms. JOHNSON had safely

crossed both northbound lanes of traffic, and had waited to check for traffic in the median area, she proceeded across the fast or left lane of the southbound roadway into slow lane of traffic, whereupon she was struck by a motor vehicle within ten [10] feet of the west shoulder of Highway 2. [See, Exhibit B [October 12, 2011 Depo. of Robin R. Johnson, at page 25, 61 and Exhibit 2, thereto, at page 28] [CP 142, 149, 197], Exhibit E [October 13, 2011 Depo. of Nina Roecks, at pages 52 and 57] [CP 274, 275], Exhibit G [October 14, 2011 Depo. of Dana Peltram, at pages 61 through 63, and 70 through 71] [CP 291-93, 295], Exhibit H [January 18, 2012 Depo. of Diane Gingrich] at page 49, and Depo. Exhibits nos. 2 through 5] [CP 305, 307-14] and Exhibit I [September 8, 2011 Depo. of Madilyn K. Young, at page 37] [CP 320] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98].

The automobile came upon Ms. JOHNSON unexpectedly. An eyewitness to the accident, Nina Roecks, had only first observed the vehicle headed southbound on Highway 2 when it was approximately "15 to 20 feet from the intersection with Colbert Road" which Ms. JOHNSON had been in the process of crossing. [See, Exhibit E [October 13, 2011 Depo. of Nina Roecks, at page 60] [CP 276] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98]. The driver and operator of this vehicle was the defendant, MADILYN K. YOUNG. [See, Exhibit I [September 8, 2011

Depo. of Madilyn K Young, at page 37] [CP 320] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98].

In her signed accident report to the Washington State Patrol [hereinafter "accident report"], Ms. YOUNG acknowledged that at the time of this collision the weather conditions were "clear" and "sunny," and the roadway was completely "dry." [See, Exhibit I [September 8, 2011 Depo. of Madilyn K Young] [CP 316-324], and Depo. Exhibit A, thereto, "accident report," at page 1] [CP 326] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98]. She also indicated in this accident report that she had been traveling "63" miles per hour [m.p.h.], prior to the collision. Id. [See, Exhibit I [September 8, 2011 Depo. of Madilyn K Young, at page 41 [CP 322], and Depo. Exhibit A, thereto, "accident report," at page 1] [CP 326] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98].

As to the events leading to the accident, Ms. YOUNG went on to state in both her deposition and the "accident report" that she first had seen Ms. JOHNSON running across the northbound lanes of Highway 2, and then lost sight of her "because of a slight turn and . . . dip in the road." [See, Exhibit I [September 8, 2011 Depo. of Madilyn K Young, at page 41 [CP 322], and Depo. Exhibit A, thereto, "accident report," at page 2] [CP 327] to March 20, 2012 Decl. of Thomas C. Stratton]. Once she had driven "out of the turn and

got where [she] could [once again see Ms. JOHNSON] she was in the left lane of the southbound lane[s] of traffic on Highway 2]." Id. Per her testimony and accident report, Ms. YOUNG attempted "to slow down as hard as [she] could and turned southwest to keep from swerving and rolling [her] car." Id.

In the course of these events, Ms. JOHNSON was struck by Ms. YOUNG's car in "the southbound shoulder of SR-2." [See, Exhibit I [September 8, 2011 Depo. of Madilyn K Young [CP 316-23], and Depo. Exhibit A, thereto, "Washington State Patrol Narrative of Trooper A. W. Larned] [CP 325-41] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98]. The plaintiff's right leg suffered a compound fracture. She also incurred injuries to her head, including but not limited to multiple lacerations, bleeding of the brain, and traumatic closed head injury, as a result of smashing the car windshield with her head. [Id.]. One eyewitness, Nina Roecks, opined to officer Todd A. Kerbs that "[i]t was so dangerous to have runners cross the highway without any [cautionary] lights." [See, Exhibit I [September 8, 2011 Depo. of Madilyn K Young, Depo. Exhibit A, thereto, "Witness/Suspect Statement Of Nina Roecks, at page 2] [CP 337] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98].

Additional facts and circumstance, based once again upon the defendant's evidence submitted on summary judgment, are set forth below as they relate to a particular argument or point of analysis on the issues presented.

3. Procedural history. On December 28, 2010, the plaintiffs, and appellants herein, ROBIN JOHNSON and CRAIG JOHNSON, wife and husband, and the marital community thereof, filed suit for personal injuries and damages against the young driver and operator of the subject vehicle, Madilyn K. Young, her parents, Darren and Tanya Young, and the respondent, SPOKANE TO SANDPOINT, LLC, in the Superior Court of Spokane County, state of Washington, under cause no. 10-2-05387-0. [CP 1-7]. In April 2011, these defendants each filed their respective answers and affirmative defenses to said personal injury action. [CP 8-14, 15-22].

Subsequently, SPOKANE TO SANDPOINT, LLC, filed a motion for summary judgment on March 22, 2012, based primarily on the theory that it was immune from liability in light of a preinjury release or waiver which ROBIN JOHNSON allegedly acknowledged on-line and approved electronically. [CP 66-74, 75, 76-95, 96-341, 342-50, 351-64, 365-71, 372-74]. On April 10, 2012, the JOHNSONs responded and filed a counter-motion for partial summary judgment seeking entry of an order declaring the

subject release invalid and unenforceable under the facts and circumstances presented. [CP 407-08, 409-22, 423-35]. The defendant, SPOKANE TO SANDPOINT, LLC, filed its reply to both motions on April 16, 2012 [CP 436-39, 440-451], and said motions, along with certain other unrelated matters [CP 23-24, 25-63, 64-65, 66-74, 75 375-83], were heard and entertained by the Superior Court on April 20, 2012.

Following oral argument, the Superior Court determined that the subject preinjury release was valid and enforceable as a matter of law. [RP 48-51, 52; CP 454]. Consequently, the court entered an order on that same date, April 20, 2012, granting the motion of respondent while denying the appellants' opposing motion for partial summary judgment on the issue of validity and enforceability of the subject preinjury release and waiver. [CP 452-53].

Following this decision, the plaintiffs' liability claims relating to the other defendants, Ms. YOUNG and her parents, were settled and, as to those claims, an order of dismissal was entered on July 9, 2012. [CP 455-56]. This appeal follows with respect to the remainder of the case relating to the defendant, SPOKANE TO SANDPOINT, LLC. [CP 457-62].

#### **D. STANDARD OF REVIEW [RAP 10.3(a)(6)].**

1. When reviewing the grant or denial of a summary judgment motion, the appellate court engages in the same inquiries as the trial court and review is, therefore, de novo. See, Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). In accordance with the provisions of Rule 56(c) of the Washington Civil Rules for Superior Court [CR], summary judgment may only be rendered forthwith when the pleadings, depositions, answers to interrogatories, and admissions on file, together with any supporting affidavits and other competent, admissible evidence, show that (a) there is no genuine issue of material fact in dispute and (b) the moving party is entitled to judgment as a matter of law. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A material fact is one upon which the litigation depends either in whole or in part. Morris v. McNichol, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). Under subsection (d) of CR 56, a party or a nonmoving party by way of cross-motion may move for partial summary judgment on a particular defense or claim pertaining to the cause of action at hand.

2. Function of the court on summary judgment. When faced with the issue of the propriety of summary judgment, the court considers all evidentiary facts submitted, and all reasonable inferences therefrom, in the

light most favorable to the non-moving party. Owen v. Burlington N. Santa Fe R.R., 153 Wn.2d 780, 787, 180 P.3d 1220 (2005). Summary judgment can only be granted when all reasonable persons could reach but one conclusion, that the operative facts are not in dispute and the moving party is entitled to judgment as a matter of law. Ranger Ins. Co. V. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008); Wilson, at 437; Morris, at 494-95. If reasonable persons could reach differing conclusions based upon the evidence and the law, then summary judgment is improper and will be denied. Scott v. Pacific West Mountain resort, 119 Wn.2d 484, 502-03, 834 P.2d 6 (1992). Any doubts in this regard are resolved against the moving party. Atherton Condo. Apartment-owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

Furthermore, the summary judgment procedure may not be used to weigh evidence or to try a particular factual issue in the absence of the jury. Thoma v. C.J. Montag & Sons, Inc., 54 Wn.2d 20, 26, 337 P.2d 1052 (1959). Rather, in reaching its ruling, the court should only determine whether a genuine issue of material fact exists. Blaise v. Underwood, 62 Wn.2d 195, 199, 381 P.2d 966 (1963).

3. Shifting burdens of proof on summary judgment motion.

Generally speaking, the moving party has the initial burden of proving the

absence of any genuine issue of material fact, and he is held to this strict standard. See, Scott, at 502-03; LaPlante v. State, 85 Wn.2d 154, 158, 531 P.2d 299 (1975); Preston v. Duncan, 55 Wn.2d 678, 682, 349 P.2d 605 (1960). The moving party faces this burden regardless of which party would have the ultimate burden of proof at trial. Preston, at 682. Only when the moving party's burden has, in fact, been satisfied is the adverse party required to respond by way of his own evidentiary proof establishing the existence of a factual issue which can only be resolved by the trier of fact. CR 56(e). Once this shifting burden has been satisfied by the opposing party, the moving party may not then ambush the other side by advancing new arguments or theories in support of summary judgment. In re Marriage of Sacco, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990); White v. Kent Medical Center, Inc., 61 Wn.Ap. 163, 168, 810 P.2d 4 (1991). If permitted, this would deny the adverse party a fair chance to respond and the court will not, therefore, entertain such rebuttal as a basis for granting summary judgment. Id.

4. Certain actions, by their very nature, do not lend themselves to resolution by way of summary judgment. It has been long recognized that summary judgment is not appropriate in certain circumstances, contexts and types of actions before the trial court. For example, cases involving issues of gross negligence and recklessness, public policy interests, cases involving novel questions of law and the like, are not well-suited to resolution on

summary judgment. See, 10B Chas. Allen Wright, et al., Federal Practice and Procedure, § 2732 (3rd ed. 1998); see also, Pearce v. Utah Athletic Foundation, 179 P.3d 760, 765, 767-68 (Utah 2008); Berry v. Greater Park City Co., 171 P.3d 442 (Utah 2007); Wycalis v. Guardian Title of Utah, 780 P.2d 821, 825 (Utah Ct.App. 1989); see generally, Vodopest v. MacGregor, 128 Wn.2d 840, 847, 855, 913 P.2d 779 (1996). Also, when the "reasonableness" of a party's actions is at issue, it is customarily deemed improper to grant summary judgment and, thereby, remove the issue from the trier of fact. See, Morris v. McNicol, 83 Wn.2d 491, 495, 519 P.2d 7 (1974).

By the same measure, where the operative facts are "particularly with the knowledge" of the moving party, the cause will normally be allowed to proceed to trial in order that the non-movant is afforded the opportunity to disprove the moving party's facts by way of cross-examination and the demeanor of that party on the witness stand. United States v. Logan Co., 147 F.Supp. 330 (W.D.Pa. 1957); Felsman v. Kessler, 2 Wn.App. 493, 496-97, 468 P.2d 691 (1970); see also, Subin v. Goldsmith, 224 F.2d 753 (2d Cir. 1955). This includes such issues of motive, information, knowledge, and intent on the part of the moving party. Id.

Additional standards and related rules of construction are set forth below as they relate to a particular issue and argument posed before the court on this appeal.

### **E. ARGUMENT [RAP 10.3(a)(6)].**

It is axiomatic for purposes of this appeal that it be remembered that preinjury sports releases or waivers are not sacrosanct, nor are they without limit, and well may be held invalid and unenforceable when (1) the release is unclear, ambiguous or otherwise inconspicuous within an agreement, (2) the release offends public policy, or (3) otherwise implicates the public interest in an unacceptable fashion such as when the negligent act at issue falls greatly below the standard established by law and which is acceptable for protection of the public and others. See, Vodopest v. MacGregor, 128 Wn.2d 840, 848, 913 P.2d 779 (1996); Scott v. Pac. Mountain Resort, 119 Wn.2d 484, 492, 834 P.2d 6 (1992); Wagenblast v. Odessa Sch. Distr., 110 Wn.2d 845, 856, 758 P.2d 968, 85 A.L.R.4th 331 (1988); Pearce v. Utah Athletic Foundation, 179 P.3d 760, 765, 767-78 (Utah 2008); Hojnowski v. Vans Skate Park, 187 N.J. 323, 333, 901 A.2d 381 (2006). Here, the subject preinjury release is invalid and unenforceable for all of these reasons. Id.

1. Ambiguity. First, to be deemed enforceable, a preinjury release must be "communicated in a clear and unequivocal manner." Berry v. Greater Park City Co., 171 P.3d 442 (Utah 2007); see also, Johnson v. Rapid City Softball Ass'n, 514 N.W.2d 693, 700 (S.D. 1994)(Wuest, J. concurring in result and concurring specifically). Even in the context of high-risk adult sporting activities, the established rule is that any exculpatory

clause from liability is to be strictly construed against the party seeking to enforce such release or waiver, and benefitting from its protection. Id.

In other words, it must be absolutely clear under the precise terms of the release that the injury suffered was, in fact, contemplated by the parties to be exempt and excluded from any claim of liability asserted by the injured party. Otherwise, the courts of Washington will not give any credence to such purported agreement. Scott, at 490; see also, Finch v. Carlton, 84 Wn.2d 140, 145-46, 524 P.2d 898 (1974); Conradt v. Four Star Promotions, Inc., 45 Wn.App. 847, 849, 850-52, 728 P.2d 617 (1986).

An ambiguity will customarily be found when an alternative, semantically reasonable interpretation of the release can be offered by the opposing party. See, Cohen v. Five Brooks Stable, 159 Cal.App.4th 1476, 1485, 2 Cal.Rptr.3d 471 (Cal.App.1st.Distr. 2008). Otherwise, the risk must be shown to be inherent to the nature of the particular sporting activity involved, or the release cannot be enforced under any situation. Id.; Johnson, 514 N.W.2d at 700 (Wuest, J. concurring in result and concurring specifically); see also, Reed v. Univ. Of N. Dakota, 589 N.W.2d 880, 886 (N.D. 1999); Schlobohn v. Spa Petite, Inc., 326 N.W.2d 920, 923 (Minn. 1982).

Here, there are at least two [2] identifiable factors which make the proffered preinjury release invalid and unenforceable from the standpoint of

ambiguity and the corresponding rule of strict construction concerning such preinjury waiver of liability. Initially, it is abundantly clear that there is the anomaly in terms of an additional release, or surplusage, contained in the body of the electronic on-line release pertaining to "Spokane to Sandpoint, LLC" and identified in the initial "Waivers" section. [See, Exhibit A to March 20, 2012 Decl. of Kelly Pace] [CP 347-50]. The unresolvable anomaly or ambiguity in the precise language of said release, or Exhibit A, then goes on to specify that the additional release language "Waiver and Release of Liability, Assumption of Risk and Indemnity Agreement" pertains to the unrelated release of "USA Triathlon ("USAT")" which organization is in no way associated with the defendant, and respondent herein, "SPOKANE TO SANDPOINT, LLC," or its long distance relay race sporting event. In fact, as indicated from the October 12, 2011 Depo. of Benjamin Phillip Orth, at pages 46-47 and 54 [CP 118-19, 120], "SPOKANE TO SANDPOINT, LLC" and its organizers were "not privy to what additional language [was] but in the on-line waiver" by its on-line server. [See, Exhibit A [CP 99-133] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98]. Hence, it is apparent that this language and any purported release associated therewith was never intended to apply to participants in the subject relay race from Spokane to Sandpoint [Id.].

Furthermore, it is clear this additional language contained in the "Waiver and Release of Liability, Assumption of Risk and Indemnity Agreement" was never provided to those registrants who did not register on-line. [See, Id.; see also, Exhibit B [October 12, 2011 Depo. of Robin R. Johnson, at page 72] [CP 159] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98]. However, even as to her on-line registration, ROBIN JOHNSON testified during her deposition on March 12, 2011, that she herself had never seen a copy of the extended release form prior to her deposition. [See, Exhibit B [October 12, 2011 Depo. of Robin R. Johnson, at page 72, and Exhibit 3, thereto, at pages 1 through 3] [CP 159, 246-48] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98]. Consequently, these undisputed facts raise a serious question or ambiguity whether the March 20, 2012, declaration of Kelly Pace, as submitted by the defendant on summary judgment, accurately reflected all aspects of the on-line process of securing a registrant's waiver of liability such as in Ms. JOHNSON's case. [Id.].

By way of reasonable inferences, the defendant, "SPOKANE TO SANDPOINT, LLC," also seemed on summary judgment to recognize this particular anomaly, and the accompanying lack of legal effect to be attributed to this additional release verbiage or surplusage associated with the extend release form [see, Exhibit "A" to the March 20, 2012 Decl. of Kelly Pace"]

[CP 342-50] see also, Exhibit "A" to March 20, 2012 Decl. of Benjamin Orth" [CP 365-71], since said sports organizer attempted to invoke this surplus language or ambiguous verbage from its quotation of the governing release, or "Waivers," on pages 6 and 7 of its March 22, 2012 legal memorandum in support of summary judgment, identified as "Spokane to Sandpoint, LLC's Motion for Summary Judgment." [CP 81-82].

As to the initial "Waivers" section of the document itself, a simple, basic reading of this preinjury release makes clear that it pertains only to those particular injuries which are associated with, and inherent to, a person's medical fitness and level of training required when participating in any sporting activity, as well as the risks associated with a person's "traveling to or from the event, falls, contact with other participants or spectators, the effect of weather, surface conditions of the road/trail, all such risks being known and appreciated by" the person. See, pages 6 and 7 of Spokane to Sandpoint, LLC's March 20, 2012 memorandum [CP 81-82]. Thus, by its precise terms, the applicable document language or "Waivers" section of the subject preinjury release does not apply to injuries suffered in connection with a motor vehicle/pedestrian collision such as occurred in this lawsuit. [CP 81-82].

By the same measure, ROBIN JOHNSON never assumed the subject release and waiver of liability would be effective in this particular instance.

Simply put, she was hit by a car due to the gross and irrefutable negligence, carelessness, and recklessness of SPOKANE TO SANDPOINT, LLC, and its organizers in failing to provide even a modicum of warnings to oncoming vehicles to be aware of runners in the area and exercise due care and caution for the safety of those pedestrians when they were crossing the subject roadway at this particular location where Ms. JOHNSON was struck and injured. Stated differently, Ms. JOHNSON never understood the so-called waiver of liability "was releasing [the promoters of SPOKANE TO SANDPOINT, LLC] of the obligations they owed [her and other participants] to put on a safe race." [Emphasis added]. [See, Exhibit B [October 12, 2011 Depo. of Robin R. Johnson, at page 70] [CP 157] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98].

Clearly, any other reading of the "Waivers" section would be a pure distort of its language and would inevitably create an ambiguity and uncertainty as to its scope and application in this particular case. Berry, 171 P.3d 442; see also, Johnson, 514 N.W.2d at 700 (S.D. 1994)(Wuest, J. concurring in result and concurring specifically). The defendant, and respondent herein, chose the language used in this release. It must now live with the ambiguous character and unenforceable nature of the release. Id. In other words, such ambiguity must be resolved against the drafter, SPOKANE TO SANDPOINT, LLC. Dwellely v. Chesterfield, 88 Wn.2d 331, 336, 560

P.2d 353 (1977); Hepler v. CBS, Inc., 39 Wn.App. 838, 845, 696 P.2d 596 (1984).

By the same measure, such anomaly or ambiguity in the subject release or waiver has the net effect of making any claimed exemption from liability "inconspicuous" in terms of such ambiguousness in language and wording. See, Conradt, at 849. Therefore, no exemption from liability claimed by SPOKANE TO SANDPOINT, LLC, should have been entertained by the superior court and, instead, plaintiffs' opposing motion under CR 56(d) should have been granted. Scott, at 490; see also, Finch, at 145-46; Conradt, at 850-52.

2. Public policy and implication of public interest. In Wagenblast v. Odessa Sch. Distr., 110 Wn.2d 845, 851-56, 758 P.2d 968, 85 A.L.R.4th 331 (1988)(citing Tunkl v. Regents of Univ. of Cal., 60 Cal.2d 92; 32 Cal.Rptr. 33, 383 P.2d 441, 444-46, 6 A.L.R.3d 693 (1963), the Washington Supreme Court identified six [6] nonexclusive factors commonly present in releases that violate public policy. These factors include 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 the 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 the bargaining powers between the parties, and (6) the release is a standardized adhesion contract. See also, Vodopest v. MacGregor, 128 Wn.2d 840, 855, 913 P.2d 779 (1996). As duly noted in Justice Phillip Talmadge's concurring opinion in Vodopest, at 865-67, the first four Wagenblast factors address the substance of the exculpatory clause, while the last two factors are directed to the procedural fairness of the release. Vodopest, 865-67 (Talmadge, J. concurring). "[T]he more of the foregoing six characteristics that appear in a given exculpatory agreement case, the more likely the agreement is to be declared invalid on public policy grounds." Wagenblast, at 852; see also, Chauvier v. Booth Creek Ski Holdings, 109 Wn.App. 334, 343, 35 P.3d 383 (2001).

As to these six [6] identified factors, it should be borne in mind by the reviewing court that it was not only the runners participating in this cross-county race who were put at risk, but also members of the traveling public, including the defendant MADILYN K. YOUNG, who utilized the included public roadways such as Highway 2 in this case. Unlike such racing events as the "Bloomsday" run and other marathon runs, this pedestrian race did not encompass a venue closed to vehicle traffic.

In other words, there was no blocking off roadways and controlling or otherwise stopping motor vehicle traffic so as to insure and protect the

public in general. [See, Exhibit A [October 12, 2011 Depo. of Benjamin Phillip Orth, at pages 28, and 58 through 59] [CP 116, 123-24] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98]. Instead, this cross-country race was entirely an open or public venue, and not closed to vehicular traffic. [See, Exhibit A [October 12, 2011 Depo. of Benjamin Phillip Orth, at pages 58 through 59] [CP 123-24] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98].

With the factor of public safety in mind, it can easily be understood that, as to factor no. 1, the preinjury waiver agreement concerns an endeavor of a type thought suitable for public regulation in turns of any possible hazard of motor vehicle and pedestrian collisions. By the same measure, the factor no. 4 is clearly present in this case. The party seeking to invoke the release alone had control over all persons, including the participants and the public in general, as well as the particular venue it had selected and was providing its registrants in terms of the subject cross-country relay race.

Finally, the last two [2] factors identified in Wagenblast are also implicated in this case. As to factor no. 5, there is clearly a decisive inequality of the bargaining powers between the parties and, with respect to factor no. 6, the release can readily be deemed a standardized adhesion contract by way of context as well as by inference.

In addition to the foregoing, nonexclusive factors, the bottom line is that if the defendant, SPOKANE TO SANDPOINT, LLC, was unwilling to take all reasonable and necessary steps, and to go to the time and expense, required to provide all members of public with a safe venue for its particular sporting event, then it should not be heard to claim exemption or waiver from liability to those who have been injured by its choices and omissions. Wagenblast, at 851-56. Nevertheless, under the majority of the Wagenblast criteria, at 852-56, ROBIN JOHNSON's case clearly presents itself as one for which the subject "Waivers" should not be upheld or enforced in terms of the indisputable fact that such basis for immunity clearly offends public policy and inescapably implicates the public interest not only from the racers' standpoint but also the traveling public in general. See also, Vodopest, at 855.

Even assuming, arguendo, that this were not so clear cut a case for entry of partial summary judgment against the defendant, SPOKANE TO SANDPOINT, LLC, the issue of invalidity and unenforceability of the "Waivers" should then have been left to be decided by the trier of fact, or jury in this case, insofar as the issue posed herein is arguably one of first impression regarding an unnecessarily dangerous adult sporting activity. As was duly emphasized before the Superior Court in this matter, that cases such as this involving issues of public policy interests and novel questions of law

and fact are not well-suited for resolution on summary judgment. See, 10B Chas. Allen Wright et al., Federal Practice and Procedure, § 2732 (3rd ed. 1998). Thus, for this additional reason, the Superior Court's grant of summary judgment in favor of the defendant, and respondent herein, on this unique question of preinjury immunity should not have been an option under the considerations governing CR 56(c). Id.

3. Gross negligence. "Gross negligence" is generally understood as negligence substantially and appreciably greater than ordinary negligence. Spencer v. King Cy., 39 Wn.App. 201, 206, 692 P.2d 874 (1984); see also, Conradt v. Four Star Promotions, Inc., 45 Wn.App. 847, 849, 852, 728 P.2d 617 (1986). In comparison, wilful or wanton misconduct falls between simple negligence and intentional tort and is present when an actor either knows, or has reason to know, "of circumstance which would bring home to the realization of the ordinary reasonable [person] the highly dangerous character of" the conduct or omission of care involved. Jenkins v. Snohomish Cy. PUD 1, 105 Wn.2d 99, 106, 713 P.2d 79 (1986); see also, Conradt, at 852.

Generally speaking, "where the negligent act falls greatly below the standard established by law for the protection of others against unreasonable risk of harm," the public interest exception to enforceability of a preinjury release will be held to apply. Blide v. Rainier Mountaineering, Inc., 30

Wn.App. 571, 574, 636 P.2d 492 (1981); see also, Conradt, at 852. In other words, even a sports waiver will not be deemed valid, or upheld, in the context of gross negligence or other reckless misconduct on the part of the defendant, and any suggestion otherwise is plainly at odds with the public interest. See, Hojnowski v. Vans Skate Park, 187 N.J. 323, 333, 901 A.2d 381 (2006). Suffice it to say, the Superior Court chose to overlook this controlling point of law. Id.

Grants of summary judgment in negligence cases involving an issue of gross negligence or recklessness are generally considered to be inappropriate in resolving such claims and can only be employed in the most clear cut of cases. Pearce v. Utah Athletic Foundation, 179 P.3d 760, 767-68, 767-78 (Utah 2008); Berry v. Greater Park City Co., 171 P.3d 442 (Utah 2007). This is especially true where the standard of care for designing, constructing, and establishing a particular sports venue is not "fixed in law" so that ultimately the determination of the appropriate standard to be applied becomes a factual issue to be resolved only by the trier of fact. Pearce, 179 P.3d at 768; Wycalis v. Guardian Title of Utah, 780 P.2d 821, 825 (Utah Ct.App. 1989); see also, Vodopest v. MacGregor, 128 Wn.2d 840, 847, 913 P.2d 779 (1996). In fact, Mr. Orth readily acknowledged during his deposition that there is no single set of rules or guidelines for arranging, creating, or putting on a particular race. [See, Exhibit A [October 12, 2011

Depo. of Benjamin Phillip Orth, at page 14] [CP 110] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98].

As stated before, ROBIN JOHNSON fully expected SPOKANE TO SANDPOINT, LLC, to provide her and other participants with a safe place to run. [See, Exhibit B [October 12, 2011 Depo. of Robin R. Johnson, at page 70 [CP 157] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98]. Instead, the defendant, and respondent herein, undertook no professional traffic study or safety investigation of the various roadways, intersection and crossings situated between Spokane and Sandpoint before designing and establishing the particular racing venue to be utilized by its registrants and runners. [See, Exhibit A [October 12, 2011 Depo. of Benjamin Phillip Orth, at pages 12, 109 through 110] [CP 108, 130-31] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98]. Rather, Mr. Orth and his brother "solicited [only random verbal information] from other race directors [and] friends in the racing community for advice" and, upon this general information alone, decided to build the cross-county race route on their own "from the ground up." [See, Exhibit A [October 12, 2011 Depo. of Benjamin Phillip Orth, at pages 10-11, and 13] [CP 106-07, 109] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98].

Without the benefit of any independent, professional safety or traffic study, SPOKANE TO SANDPOINT, LLC, and its organizers simply decided

of their own random volition that this 185 mile venue for cross-country runners would be open or public rather than closed to motor vehicle traffic. [See, Exhibit A [October 12, 2011 Depo. of Benjamin Phillip Orth, at pages 28, and 58 through 59] [CP 116, 123-24] and Exhibit B [October 12, 2011 Depo. of Robin R. Johnson, at pages 54 through 55] [CP 146-47] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98]. Although not necessarily pertinent to this particular injury case--except to further establish its gross carelessness and reckless actions, SPOKANE TO SANDPOINT, LLC, also chose to have the relay race run continually throughout the day and nighttime hours which resulted in another participant and runner being hit and killed after dark by another motor vehicle operator, albeit: a drunk driver, in Idaho. [See, Exhibit A [October 12, 2011 Depo. of Benjamin Phillip Orth, at page 74] [CP 125] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98].

More to the point, under the measures taken by the defendant, and the respondent herein, there were no traffic enforcement officers situated, or signs or lights posted, on Highway 2 warning motorists in advance, and in both directions, to slow down and watch for runners as they crossed the highway at the intersection with Colbert Road. [See, Exhibit A [October 12, 2011 Depo. of Benjamin Phillip Orth, at pages 22, 28 and 32] [CP 114, 116, 117] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98]. Instead, the only posted signs in the area were located on Colbert road, and were

relatively small and directed runners to use caution when crossing the highway. [Id.; Exhibit A [October 12, 2011 Depo. of Benjamin Phillip Orth, at page 88] [CP 127] and Exhibit D [October 14, 2011 Depo. of Kristy Ervin, at page 26] [CP 264] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98].

In Mr. Orth's unprofessional and cavalier view, there was no need to post signs "warning drivers [on Highway 2] that there were runners crossing the [Colbert] road." [See, Exhibit A [October 12, 2011 Depo. of Benjamin Phillip Orth, at pages 32 and 106] [CP 117, 128] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98]. By the same measure, it was decided by the defendant that this "uncontrolled" intersection at Colbert Road and Highway 2 would be utilized rather than a nearby controlled intersection with crossing lights. [See, Exhibit A [October 12, 2011 Depo. of Benjamin Phillip Orth, at pages 54, 55 and 57] [CP 120, 121, 122] and Exhibit B [October 12, 2011 Depo. of Robin R. Johnson, at page 73] [CP 160] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98]. During his deposition, Mr. Orth's explanation was that the controlled crossing was "not on the way that our route went" and, in his uninformed view, the uncontrolled intersection was a safe location to cross, and posed less of a hazard than having the runners proceed along the shoulder of Highway 2 in order to reach the controlled intersection and marked crosswalk. [See, Exhibit A [October 12, 2011 Depo.

of Benjamin Phillip Orth, at pages 57 and 107] [CP 122, 129] to March 20, 2012 Decl. of Thomas C. Stratton] [CP 96-98].

Aside and contrary to any bald assertion of the defendant's witness, Charles R. Lewis, that "SR 2 was not an unsafe location for pedestrians to cross," see, page 5 and 6 of the March 13, 2012, Decl. of Charles R. Lewis [CP 355-56], the "accident report" of Ms. Young puts such claim or conclusory allegation directly into doubt in terms of that driver's alleged inability to see pedestrians or runners within the intersection and unmarked crosswalk in question because of the "turn" and "dip" in the southbound roadway of Highway 2. [See, Exhibit I [September 8, 2011 Depo. of Madilyn K Young, at pages 41 and 44, and Depo. Exhibit A, thereto [cp 322-23, 331] to March 20, 2012 Decl. of Thomas C. Stratton].

For that matter, the fact of the accident itself further deflects any claim of this crossing area being a "safe" route for runners. Id. At a minimum, there is a genuine issue of material fact foreclosing any right of this defendant to seek summary judgment under CR 56(c). See, Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 p.2d 1030 (1982); Morris v. McNichol, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

Furthermore, because there is no standard of care "fixed by law" with regard to the particular sports venue chosen by the defendant, the foregoing identified factors, omissions and other considerations suggest that SPOKANE

TO SANDPOINT, LLC, acted recklessly and with gross negligence, and perhaps even willfully or wantonly, in designing, creating and operating this venue for its long distance relay foot race in 2010. Id. Therefore, in the event that the subject preinjury release is not declared invalid on the basis of ambiguity or public policy [as discussed above, in Parts D.1 and D.2], the issue whether it is unenforceable on the basis of the defendant SPOKANE TO SANDPOINT, LLC's gross negligence must be submitted to the trier of fact, and is not a proper subject to be decided under CR 56(c). Id.

Finally, and to the extent the defendant attempted to suggest on pages 3 through 4, and 16 through 17, of its motion for summary judgment [CP 78-79, 91-92], as well as on page 2 of the March 22, 2012, Declaration of Benjamin Orth [CP 366], that SPOKANE TO SANDPOINT, LLC, acted without negligence, common sense dictates that simply because promoters and organizers of "overland races," posing their own individual issues of safety and situated in their own unique settings and differing venues, have chosen not to place "signs or notices on cross-street to the race route that notify drivers of runners being on the race route" does not render such omission by SPOKANE TO SANDPOINT, LLC, in this instance free of a claim of gross negligence as posed by the plaintiffs, and appellants herein. [Id.]. In other words, what others have or have not done in other cross-country events is totally irrelevant to this case given its unique facts and

circumstances concerning the defendant's failure to provide runners with a safe venue when being required to cross a busy thoroughfare or roadway.

Likewise, having obtained all permits required by the various government authorities involved does not equate with there being an absence of negligence on the part of a promoter or organizer of a sporting event such as in this case. Clearly, the issuance of a permit does not immunize a promoter of a sporting event from a claim of liability. If it did, there would be no need for the promoter such as SPOKANE TO SANDPOINT, LLC, to seek a preinjury release or waiver from its registrants and participants.

At the very least, the spurious and self-serving claims of lack of gross negligence, raised by this defendant-promoter, should have been dismissed out of hand by the Superior Court and left, at the very minimum, for the jury to decide rather than the court itself to weigh. This is particularly true insofar as any underlying, supporting facts are "particularly with the knowledge" of the promoters and organizers of that moving party. In such case, the governing law is clear that the case should have been allowed to proceed to trial in order that the plaintiffs JOHNSON were afforded the opportunity to disprove the moving party's facts by way of cross-examination of the moving party's witnesses as well as their demeanor on the witness stand. United States v. Logan Co., 147 F.Supp. 330 (W.D.Pa. 1957); Felsman v. Kessler, 2 Wn.App. 493, 496-97, 468 P.2d 691 (1970); see also, Subin v. Goldsmith,

224 F.2d 753 (2d Cir. 1955). This included issues as motive, information, knowledge of dangers and intent on the part of the moving party, to wit: SPOKANE TO SANDPOINT, LLC. Id.

In sum, the challenged April 20, 2012 decisions of the Superior Court, wherein the court granted the respondent's motion for summary judgment, were in error and should now be reversed on this appeal. See, RAP 12.2. Simply put, the standards governing summary judgment as outlined in Part D of this brief have not been met, so as to warrant any final decision of dismissal in favor of the defendant, and respondent herein, SPOKANE TO SANDPOINT, LLC, under CR 56(c).

**F. CONCLUSION [RAP 10.3(a)(7)].**

Based upon the foregoing points and authorities, appellants, ROBIN JOHNSON and CRAIG JOHNSON, wife and husband, and the marital community composed thereof, respectfully request that the challenged decisions of the Superior Court on summary judgment [see, Assignments of Error Nos. 1 through 3] be reversed, and that this matter be remanded for trial before a jury. In the alternative, and at the very minimum, a ruling by the Superior Court on the issue of validity and enforceability of the subject preinjury waiver and release should have been held in abeyance pending a jury determination had been made on the underlying issue whether the claimed actions of the defendant, and respondent herein, were of a nature

amounting to gross negligence and recklessness so as to render said release invalid and unenforceable. Once again, appellants respectfully request that the challenged decisions of the trial court be reversed and the matter remanded for trial before a jury at least on the issues of gross negligence, recklessness and the respondent's liability in light of a determination on the same. RAP 12.2.

RESPECTFULLY SUBMITTED this 9<sup>TH</sup> day of November,  
2012.



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MARTIN A. PELTRAM, WSBA 23681  
Attorney for Plaintiffs/Appellants  
Attorney for Plaintiffs/Appellants  
900 North Maple, Suite 200  
Spokane, WA 99201  
(509) 624-4922

### CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the state of Washington that on the \_\_\_\_ day of November, 2012, I caused a true and correct copy of the foregoing Brief of Appellants Johnson to be served on the following persons by depositing in a U.S. Post Office Box in Spokane County, Washington, by first class mail, postage pre-paid, and bearing the following correct names and addresses of these addressees:

Attorney for Defendants/Respondents Spokane to Sandpoint, LLC, herein:

Thomas C. Stratton

Attorney at Law

200 West Mercer St., #208

Seattle, WA 98119

SIGNED this 9 day of November, 2012, in Spokane, Spokane County, Washington.



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DANA A. PELTRAM