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APPEAL NO. 69845-1

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

(Whatcom County Court Case No. 10-4-00287-5)

IN RE THE ESTATE OF MICHELLE RENEE WESTER,
Deceased,

SAMANTHA TOWNSON,
Appellant,

vs.

PASTOR ARVIN AND BARBARA WESTER,
Respondents.

Appellant Samantha Townson's Reply Brief

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE

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I – ISSUES

A. Whether attorney Bode’s testimony was properly excluded under the Dead Man’s Statute or as inadmissible hearsay.

B. Whether the physician-patient privilege was waived by Townson.

C. Whether substantial evidence was presented to demonstrate Michelle Wester lacked testamentary capacity to execute the Michelle R. Wester Living Trust Agreement (“the Trust”) on January 13, 2010.

D. Whether a constructive trust should have been created as an appropriate alternative to the Michelle Wester Living Trust.

II – ARGUMENT

This Court has the power to correct an erroneous decision by a lower court.

The appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require.

RAP 12.2; *See also In re Heidari*, 174 Wn.2d 288, 297, 274 P.3d 366 (2012).

A. Admissibility of Attorney Keith Bode's Testimony

1. Attorney Bode was not an interested party under the Dead Man's Statute.

At trial, attorney Bode was asked, in part, who did Michelle Wester "tell you she wanted to leave her property to?" RP 198. Wester's parents objected to the question as ". . . hearsay. It's an out of court statement." RP 198. The trial court incorrectly ruled: "Sustained. It's a violation of the dead man statute, I think." RP 199.

The purpose of the Dead Man's Statute is to prevent interested parties from giving self-serving testimony about conversations or transactions with the deceased. *McGugart v. Brumback*, 77 Wn.2d 441, 444-45, 463 P.2d 140 (1969). "A person is a party in interest . . . when he or she stands to gain or lose' by the operation and effect of the action or judgment in question." (Internal quotations omitted) *Ebel v. Homeowners' Ass'n*, 136 Wn.App. 787, 791-92, 150 P.3d 1163 (Div. 3, 2007)

(Citing *Bentzen v. Demmons*, 68 Wn.App. 339, 344, 842 P.2d 1015 (Div. 1, 1993)). "To be a party in interest, a witness must have a direct pecuniary interest in the outcome of litigation." *Deacy v. College Life Ins. Co.*, 25 Wn.App. 419, 422, 607 P.2d 1239 (Div. 1, 1980).

Attorney Bode, at the direction and instruction of Michelle Wester, prepared her Trust, Will and Power of Attorney. The trial court apparently applied the Dead Man's Statute based on the trial judge's incorrect belief that there was testimony "from Mr. Bode that he is concerned that he will be sued for malpractice depending upon the outcome of this case." RP 209. That alleged testimony cannot be found in the record. Respondents ignore the lack of testimony by attorney Bode and argue, without citing to any place in the record that "Mr. Bode was interested in the litigation because he faced potential liability if the Trust Agreement was declared invalid." Resp. Brief, p. 28. The facts supporting that argument are made up. However, even assuming that an attorney who prepares a will and/or trust is concerned about his preparation and the remote possibility that he could be sued for malpractice, a

possibility of being sued for malpractice is not a direct pecuniary interest. Under Respondents Arvin Wester and Barbara Wester's (Westers) argument, any lawyer that prepares a will or trust would have an interest in will or trust contest litigation. Attorney Bode did not have a direct pecuniary interest in the outcome of this litigation, and his testimony was wrongfully excluded under the Dead Man's Statute.

Townson could find no Washington case which has clearly adopted a testamentary exception to the attorney-client privilege. However, attorney witnesses to wills or those who prepare wills or trusts, unless beneficiaries of the documents, have been allowed to testify in Washington courts for decades. *In re Miller's Estate*, 10 Wn.2d 258, 272, 116 P.2d 526 (1941). It is only "while a client is alive, [that] his or her communications with an attorney concerning preparation of a will remain privileged." *In Re York*, 44 Wn.App. 547, 552, 723 P.2d 448 (Div. 3, 1986) (Citations omitted). The United States Supreme Court has determined that the privilege does not survive the testator's death. "But, whatever view be taken of the facts, we are of opinion that, in a suit between

devises under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged." *Glover v. Patten*, 165 U.S. 394, 406, 17 S.Ct. 411 (1897).

2. Attorney Bode's hearsay testimony is admissible.

Attorney Bode's hearsay testimony falls within the "Then Existing Mental, Emotional, or Physical Condition" exception to the hearsay rule.

(3) A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed **unless it relates to the execution, revocation, identification, or terms of declarant's will.**

ER 803(a)(3) (emphasis added). Clearly, ER 803(a)(3) allows statements of a declarant's intent, plan, and motive, in relation to the execution, revocation, identification, or terms of the declarant's will (or trust).

The trial court was apparently confused when it sustained the hearsay objections on the line of questioning regarding

attorney Bode's interactions with Michelle Wester. Townson made the following offer of proof:

[Mr. Bode's] testimony would be that when she appeared on January 6 of 2010, she advised Mr. Bode that the documents he prepared were not consistent with her present intent; that he was instructed to prepare the documents that he brought to her instructed by her; to prepare the documents in accordance with the language that he incorporated in the documents that he brought to the hospital room on January 13 of 2010; and that the documents were prepared consistent with her instructions and consistent with what he believed to be her intent and her plan for her assets and her estate.

RP 211. The trial court erroneously prohibited attorney Bode from testifying regarding Michelle Wester's intent, plan, and motive in relation to execution and revocation of her estate documents. The Court erred in excluding attorney Bode's testimony, as it falls squarely within the "then existing mental, emotional, or physical condition" exception to the hearsay rule.

B. Physician-Patient Privilege Was Not Waived by Townson.

The physician-patient privilege is not waived upon the patient's death. The physician-patient privilege does not terminate with the death of the client, but continues until waived by the

decedent's personal representative. *Martin v. Shaen*, 22 Wn.2d 505, 511, 156 P.2d 681 (1945).

Westers argue that Townson waived Michelle Wester's physician-patient privilege by not objecting to the taking of Dr. Lombard's deposition, by not making a motion in limine to preclude the admission of Dr. Lombard's deposition testimony, and by failing to object to the admission of Wester's medical records. At the time of the trial, Townson was not the personal representative, and therefore had no standing to waive the privilege. Thus, Westers' arguments are without merit, as Townson was unable to waive the privilege.

Westers' argument that the privilege belonged to Townson is interesting in light of Westers' counsel's arguments at the beginning of Dr. Lombard's deposition: "I advised you that I wasn't willing to allow you to have an ex parte contact with an expert witness." CP 122. And, in light of Dr. Lombard's testimony during cross examination: "There was a question raised by Mr. Skinner about patient privileges and the fact that discussing anything regarding her care with an outside physician in the absence of a

waiver from her next of kin does run issues of HIPA [sic] violations." CP 172.

Admittedly, the testimony of Dr. Lombard, in the context of his opinion of capacity at the time of the execution of the Trust, were not harmful to Townson. Dr. Lombard refused to opine about Michelle's mental state when signing the Trust documents:

Q. Okay. So given what you know about her condition on that day, she -- it's possible, but you cannot say for sure. You cannot offer a medical opinion as to whether she could make that kind of decision?

A. I cannot.

CP 186.

Also, admittedly there were medical records, offered by Westers, of Dr. Lombard's treatment which were beneficial to Townson. On his January 13, 2010, chart note, Dr. Lombard wrote, at 2:45 p.m., that Michelle Wester's confusion or distractibility was better and that she answered questions fairly. Ex. 2, p. 209. In a January 13, 2010 procedure note, dictated by Dr. Lombard, he noted that there was "no evidence of deterioration of the patient's neurologic status." Exhibit 2, p. 2.

However, at trial, Townson objected to Dr. Lombard's testimony:

MR. SHEPHERD: Except I don't believe there's an appropriate waiver of the physician-patient privilege for the witness to testify.

THE COURT: Didn't we just go over an issue where you were objecting to their claiming a privilege and now you're saying you want to raise a privilege? You can't have it both ways. Which is it?

MR. SHEPHERD: **I can't waive the privilege. I'd like to have this doctor testify. I'd like to go forward. There's been no waiver of the privilege.** I just wanted to put it on the record.

...

MR. SHEPHERD: I don't believe it's a privilege that belongs to the plaintiff, I mean, with my client.

THE COURT: She has no standing to raise that objection. So let's proceed.

RP 115-16. The physician-patient privilege does not terminate upon the death of the patient. At the time of trial, no personal representative was appointed. Therefore, the Court erred in ruling that Dr. Lombard's testimony was admissible where there was no waiver of the privilege.

C. Westers Did Not Provide Substantial Evidence of Incapacity.

Westers failed to offer any testimony which established that Michelle Wester lacked capacity when she signed the Trust

documents. Evidence is not substantial unless "it is sufficient to persuade a fair-minded, rational person of the declared premise." *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010).

Dr. Lombard signed the Durable Power of Attorney certifying that Michelle Wester was "physically and/or mentally disabled or incapacitated" to allow Townson to tend to some household affairs that needed attention while Michelle Wester was in the hospital. CP 201. In testimony offered by Westers, Dr. Lombard, explained this certification as follows:

Q. Can you tell us why you believed that she was physically disabled or incapacitated on the 13th of January?

A. Well, she was physically incapacitated in that she was unable to leave her hospital bed to conduct anything – any business that may have needed to be conducted. She was too weak. She was not able to be mobile. She was too confused. She wasn't able to get out of the hospital or her room.

...

Q. Would you want to make an important legal decision about your estate plan under those circumstances?

A. Personally, no.

CP 146, 148.

Dr. Lombard did testify that he would not like to make important legal decisions while dying in a hospital. One could

accurately speculate a large majority of the population would not like to make important legal decisions while in the hospital dying. However, Dr. Lombard refused to opine about Michelle's mental state when signing the Trust documents:

Q. Okay. So given what you know about her condition on that day, she -- it's possible, but you cannot say for sure. You cannot offer a medical opinion as to whether she could make that kind of decision?

A. I cannot.

CP 186.

The only other evidence apparently relied upon by Westers is the below testimony of Rick Wester, Michelle Wester's brother. He was present at the time of the signing of the Trust. He testified that he was unsure of Wester's mental state at the time:

Q. (By Mr. Skinner) How did Michelle react to Mr. Bode's questions?

A. She never spoke, never really acknowledged who was there. Whether or not she knew it was him, **I honestly don't know.**

Q. How would you characterize her appearance at that point beyond just being sedated? Was she confused?

A. She would hold her head a lot. I don't know if that was confusion or pain. But she wasn't speaking at that time. And, like I said, she was sedated or, you know, at least most of the time would just kind of lay her head

back and rest. And whether or not she was conscious and hearing anything that was going on at this point, **I'm not sure.**

RP 99. (Emphasis added.)

D. Constructive Trust

Westers attempt to avoid Townson's constructive trust arguments by erroneously arguing that the Trust was not properly funded. Michelle Wester signed the Living Trust documents on January 13, 2010. Exhibit 11. Also on that date, Michelle Wester signed the Quitclaim Deed, transferring title of the home to the Trust. Exhibit 22. On January 15, 2010, Townson, as attorney-in-fact for Michelle Wester, signed Exhibit A to the Living Trust, completing its funding consistent with Michelle Wester's wishes. Exhibit 13; RP 284. Also on that date, Townson, again as attorney-in-fact, signed the vehicle title transfer. Exhibit 24. Michelle Wester died on January 16, 2010. Exhibit 2. Townson was explicitly given the power to fund any living trusts of Michelle Wester as attorney in fact. Exhibit 20. Furthermore, the trust itself explicitly

allowed property to be added to the corpus at a later date.
Exhibit 11, Article 1.

The trial court could have and should have, in equity, determined that it would have been unjust for Michelle Wester's estate to have any right, title, or interest in the home or vehicle, thereby creating a constructive trust.

But, Mr. and Ms. Wester, you're going to be seeing your daughter soon. It's not going to be long in the overall scheme of things. And when you see her, you're going to have to deal with the issue of whether or not you did what she wanted. . . . Because I know that you want and would like for this case to be resolved in a way that would be in accordance with Michelle's wishes as well as the rest of the family's wishes. And I just ask that you think about that.

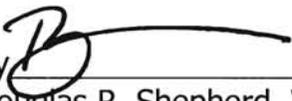
RP 314-15. Despite the above comments indicating that it felt compelled by the equitable factors in the case, the trial court, unfortunately determined it could not act in equity: "THE COURT: As I say, I'm compelled under the decision I have based upon the law and not upon equity because I just don't do, I can't do what I think should be done." RP 316.

III – CONCLUSION

Wester's Living Trust, at the time of her death, contained her interests in the home and one car. This Court should reverse the trial court and hold that upon Wester's death, title to the home and car belonged to Townson, pursuant to the Wester Living Trust.

Respectfully submitted this 9th day of September 2013.

SHEPHERD AND ABBOTT

By 

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the Estate of
MICHELLE RENEE WESTER
Deceased.

SAMANTHA G. TOWNSON,
individually, and as Trustee of the
Michelle R. Wester Living Trust,
Appellant,

vs.

PASTOR ARVIN AND BARBARA
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Respondents.

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**Whatcom County
Superior Court
Case No. 10-4-00287-5**

DECLARATION OF SERVICE

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**DECLARATION OF
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I, Heather Shepherd, declare that on September 9, 2013, I caused to be served a copy of the following documents: **Appellant Samantha Townson's Reply Brief**; and a copy of this **Declaration of Service**, in the above matter, on the following persons, at the following address, in the manner described:

Christon C. Skinner, Esq.	<input checked="" type="checkbox"/>	U.S. Mail
Law Office of Skinner & Saar, P.S.	<input type="checkbox"/>	FedEx Mail
791 SE Barrington Drive	<input type="checkbox"/>	Fax
Oak Harbor, WA 98277	<input type="checkbox"/>	Hand Delivered
	<input type="checkbox"/>	E-Mail

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

DATED this 9th day of September, 2013, at Bellingham, WA.



Heather Shepherd