

69203-8

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CAUSE No. 69203-8-I

COURT OF APPEALS, DIVISION ONE
IN THE STATE OF WASHINGTON

BRENT STROBECK, Appellant,

v.

DAVID BROCK, Respondent.

BRIEF OF RESPONDENT BROCK

Marvin M. Lee, WSBA No. 30740
Jill R. Skinner, WSBA No. 32762
Attorneys for Respondents Brock

Hollenbeck, Lancaster, Miller & Andrews
15500 SE 30th Place, Suite 201
Bellevue, WA 98007
Telephone: (425) 644-4440
Fax: (425) 747-8338
Email: marvin.lee@farmersinsurance.com
jill.skinner@farmersinsurance.com

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Rules

CR 269, 11
ER 40315
FRE 40315

I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Did the trial court act within its discretion in admitting surveillance video of Brent Strobeck?

If the trial court did abuse its discretion in admitting surveillance video of Brent Strobeck, was the error harmless?

II. STATEMENT OF THE CASE

The Brocks wish to add a few facts to Mr. Strobeck's Statement of the Case.

Mr. Strobeck testified at trial upon cross-examination regarding the accident at issue as follows:

Q. When Mr. Brock stopped, you got out of the front passenger seat, you went to the rear passenger seat, and you got your things out, correct?

A. Yes.

Q. You got the door open, you grab your things, you took them out of the car, and you were able to pull all of your belongings out of the back of the car before Mr. Brock left, correct?

A. Yes.

Q. You were able to close the rear passenger door before Mr. Brock left, right?

A. Yes.

Q. You indicated to the jury that you closed the door. And the next thing that happened, your foot was run over; is that right?

A. Yes.

VRP, April 19 & 23, 2012, at 66. Defense counsel then asked Mr.

Strobeck to explain the accident in more detail:

Q. And you would agree that the door in four-passenger vehicles, that the end of the door is roughly over the rear wheel?

A. Some of it yes.

Q. Mr. Brock's was, correct?

A. I believe so, yes.

Q. Show us how you were able to close the right rear passenger door without moving away from the vehicle. So say this is the seat. So the door was here, it was just over the wheel, right? Go ahead and show us how you were able to do that.

A. The wheels on the chair?

Q. This is the chair, so the opening to the door would be right here, and the wheel would be right below.

A. I opened the door, went in, grabbed my things, set them down, shut the door, and that was it.

Q. And you are indicating how your left foot was underneath the wheel of the car?

A. Correct. I closed the car to grab my things, and when I came back.

Q. You shut the door and your foot got run over?

A. Correct.

VRP, April 19 & 23, 2012, at 67. Mr. Strobeck testified that his

foot was under the car as he took his belongings out of the car:

Q. So your testimony is that you got your things out of the car. While you were pulling things out of the car, your left foot was – you would admit your left foot was under the car at some point?

A. It must have been because it was run over.

Q. Absolutely, right?

A. Yes.

Q. So you are saying it must've been under there as you got your things out and as you closed the door,

because you were immediately run over after you closed the door, correct?

A. Correct.

VRP, April 19 & 23, 2012, at 68. Mr. Strobeck testified that it would not have been reasonable to place his foot under the car wheel after closing the door because the driver would need to drive off at some point:

Q. Mr. Strobeck, would you agree that is a scenario where someone was dropping you off, that if you had pulled your things out of the vehicle, if you had closed the door, and then after closing the door, put your foot underneath the car immediately in front of the right rear wheel, that would not have been reasonable on your part?

MR. KEHOE: Objection to the form of the question, Your Honor. Calls for a legal conclusion, reasonableness.

* * *

A. No, it wouldn't have been reasonable, because I would have shut the door and then put my own foot under there.

Q. That wouldn't have been safe, right?

A. No.

Q. Because, obviously, the person dropping you off has to leave at some point, right?

A. Yes.

Q. Shutting the door indicates that you got your things out and were ready to go, right?

A. For the most part, when people do that, yes.

VRP April 19 & 23, 2012, at 68-69. Mr. Strobeck agreed that pedestrians should be aware of their surroundings and try to avoid causing accidents:

Q. You would agree that pedestrians in general should be aware of vehicles, motorcycles, other people around them, correct?

A. Yes.

Q. They should be aware of injury or accidents that occur based on their own actions, correct?

A. Yes.

Q. They should do their best to avoid causing injuries or accidents on their own part, correct?

A. Yes.

VRP, April 19 & 23, 2012, at 69-70.

At the conclusion of the parties' arguments regarding whether to admit the video, the trial court ruled that the video was rebuttal evidence, Mr. Brock did not know whether the video would be needed until after Mr. and Mrs. Strobeck testified, and any objection was waived:

I cannot get past the fact that it's rebuttal. First of all, in a way, the objection is waived because the surveillance video has already been admitted. There was no objection raised.

There was originally a hearsay objection raised and then it was withdrawn. So the surveillance video has already been admitted.

In addition to that, it's rebuttal. One does not need to disclose rebuttal. Defense did not know they were going to use the video until your client testified. And his wife testified as to – or even, I guess, appeared in court, how he appeared and then testified the limp was long standing.

So I don't think there has been a violation, and my ruling stands.

VRP, Motion to Exclude Surveillance Video, at 15-16.

III. ARGUMENT

A. Standard of Review is Abuse of Discretion.

The standard of review as to the admission of evidence at trial is abuse of discretion:

The trial court's decision to admit or exclude evidence and the court's balancing of probative value against prejudicial effect are entitled to a 'great deal of deference, using a "manifest abuse of discretion" standard of review.'

Degroot v. Berkley Const., Inc., 83 Wn. App. 125, 920 P.2d 619 (1996), quoting State v. Luvene, 127 Wn.2d 690, 707, 903 P.2d 960 (1995). The trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds.

Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 168, 876 P.2d 435 (1994).

A trial court's ruling on the admissibility of evidence may be sustained on alternative grounds. Maick v. RDH, Inc., 37 Wn. App. 750, 683 P.2d 227 (1984).

B. The Video Was Not Requested in Discovery.

A trial court has broad discretion under CR 26 to manage the discovery process and, if necessary, to limit the scope of discovery. Nakata v. Blue Bird, Inc., 146 Wn. App. 267, 277, 191 P.3d 900 (2008). In the instant case the trial court ruled that the

video was admissible even though it had not been produced in response to Interrogatory No. 21. The video did not fall within the types of videos requested in the interrogatory; therefore, the trial court did not abuse its discretion in admitting the video even though it had not been produced in discovery.

Contrary to Mr. Strobeck's claim, none of his discovery requests covers the video at issue. Mr. Strobeck never asked for all videos depicting himself. In reality, Interrogatory No. 21 asked Mr. Brock to list all videos "depicting the INCIDENT scene, the vehicles, any property damage, or any injuries." CP 27. The surveillance video does not depict the incident scene, the vehicles, any property damage, or any injuries. Rather, the video depicts Mr. Strobeck walking with a seemingly normal gait free from any injury or impairment. Therefore, the video is not covered by the interrogatory, and Mr. Brock was not required to produce it.

Further, because the video was not covered by Interrogatory No. 21, Mr. Brock had no duty to amend his response to the interrogatory. As a result, the "knowing concealment" analysis does not apply. Mr. Strobeck avers in his brief that a failure to amend a response is a "knowing concealment" and that Mr. Brock knowingly concealed the video. However, Mr. Brock

was never obligated under Interrogatory No. 21 to produce the video, and thus he did not fail to amend his response by not producing the video later in the lawsuit. Therefore, Mr. Brock did not knowingly conceal the video under CR 26(e)(2).

Mr. Strobeck discusses the law on discovery in his brief, noting that some courts interpret the discovery rules liberally. This is often true. However, Mr. Strobeck cannot escape the fact that he did not request the surveillance video in discovery. As broadly as the discovery rules may be interpreted, the rules cannot be stretched to the point that they require parties to produce items that were not requested in discovery. None of Mr. Strobeck's interrogatories covers the video at issue here. Therefore, Mr. Brock was under no obligation to produce it.

C. The Trial Court Did Not Abuse its Discretion in Admitting the Surveillance Video.

1. The Video Was Admissible as Rebuttal Evidence.

The trial court did not abuse its discretion in admitting the surveillance video as rebuttal evidence. Rebuttal evidence is admitted to enable a party to answer new matters presented by the opponent. Kremer v. Audette, 35 Wn. App. 643, 647-48, 668 P.2d

1315 (1983). The Kremer court found that the trial court erred in refusing to admit impeaching testimony in rebuttal:

Mary Kremer's testimony was offered to directly contradict and impeach the testimony given by Skogmo and Aubel as defense witnesses. Her testimony was not admissible as part of Kremer's case-in-chief because Skogmo and Aubel had not yet testified. This was proper rebuttal testimony and should have been admitted.

Id. at 648.

Many of the cases discussing rebuttal evidence are in criminal law, but they nonetheless provide guidance here. In criminal cases, the names of witnesses used in rebuttal by the state need not appear on the information. State v. Bashor, 175 Wash. 230, 27 P.2d 121 (1933). This rule has stayed in force over the decades. For example, in State v. White, 74 Wn.2d 386, 444 P.2d 661 (1968), our Supreme Court held that where rebuttal witnesses were called by the prosecuting attorney,

it is not error to admit the testimony even though the witness's name has not been endorsed upon the information or furnished to the defendant in advance of trial for genuine rebuttal witnesses need not be listed.

Id. at 395. Moreover, criminal discovery provisions "do not require that the state anticipate defense evidence and that it search out, discover and disclose all evidence which it may be called upon

to offer in rebuttal.” State v. Falk, 17 Wn. App. 905, 907, 567 P.2d 235 (1977).

The concept of admitting rebuttal evidence exists in civil cases as well as in criminal cases. See Kremer v. Audette above. Whether the case is criminal or civil in nature, rebuttal evidence does not need to be given to the opposition before a party seeks to have it admitted. A defendant, for example, should be entitled to expect that the plaintiff will testify truthfully, and a defendant does not know whether he will need to present rebuttal evidence until after the plaintiff has testified. If a plaintiff testifies as to certain subjects, the plaintiff creates the possibility that the defendant may seek to admit evidence that contradicts the plaintiff’s testimony. Upon the plaintiff’s testimony, the defendant is allowed to present rebuttal evidence that contradicts or impeaches the plaintiff.

In the instant case, the video was offered and admitted as rebuttal evidence. As the trial court held, a party does not need to disclose rebuttal evidence. Thus, the video was admissible.

2. The Video Was Admissible as Impeachment Evidence.

The surveillance video is also admissible as impeachment evidence. Video evidence was held admissible in a situation nearly identical to the instant case. Tamburello v. Dep’t of Labor

and Industries, 14 Wn. App. 827, 545 P.2d 570 (1976). In Tamburello, the plaintiff had sought review in superior court of an order by the Board of Industrial Insurance Appeals denying an application to reopen his L&I claim. The superior court sustained the denial, and the plaintiff appealed. The superior court had admitted a surveillance video taken by an investigator showing the plaintiff performing functions that the plaintiff claimed he could no longer do. The court found that the video was properly admitted:

Plaintiff testified to his present physical condition and the degree of impairment from which he presently suffered. In so testifying, his credibility was place in issue. The motion picture and testimony of the investigator served to impeach plaintiff's testimony in regard to a material issue of fact. We find this evidence was properly admitted.

Id. at 828.

If a testifying party makes a claim for which the opposing party has contradictory evidence, that evidence may become admissible even if it were originally inadmissible. Woodruff v. Spence, 88 Wn. App. 565, 945 P.2d 745 (1997). In Woodruff, the defendant claimed that he did not receive the summons and complaint, did not learn of the lawsuit until after the default judgment, and had always responded to service of process in other cases in the past. Id. at 570. Because of the defendant's claim, the

plaintiff was allowed to introduce evidence of past lawsuits where the defendant failed to respond to service of process, resulting in default judgments against him. Id. While evidence of the other lawsuits would normally have been irrelevant, the defendant “opened the door to evidence directly contradicting his assertion....” Id.

“The trial court has considerable discretion in administering this open-door rule.” Ang v. Martin, 118 Wn. App. 553, 562, 76 P.3d 787 (2003). The rule is aimed at fairness and truth-seeking:

‘To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.’

Ang, 118 Wn. App. at 562, quoting State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

Surprise is not a basis for excluding the evidence: “Surprise has been eliminated as one of the bases for permitting the exclusion of relevant evidence under ER 403 and FRE 403 except for circumstances which amount to prejudice.” Lockwood v. AC & S, Inc., 44 Wn. App. 330, 363, 722 P.2d 826 (1986). In Lockwood, the trial court admitted a photograph by plaintiff at trial

that was not disclosed in discovery. One of the defendants objected and requested a continuance to develop additional witnesses, which the court denied. After trial the court reversed its denial of the continuance and granted a new trial. Significantly, the trial court still admitted the new evidence. The appellate court affirmed.

Mr. Strobeck testified as to his present physical condition and the degree of impairment that he allegedly suffered. In so testifying, he placed his credibility at issue and opened the door to rebuttal evidence showing that he may not have been injured to the extent he claimed. If inadmissible evidence can become admissible if the plaintiff opens the door, then surely admissible evidence, such as the video here, can be admitted to impeach the plaintiff's testimony. The video serves to impeach Mr. Strobeck's testimony regarding a material issue of fact, i.e., his damages. Therefore, the video is admissible, just as the video was in Tamburello.

The Brocks were not required to disclose the video in advance of trial. As the above cases show, evidence being offered purely as impeachment evidence need not be disclosed prior to the time the evidence becomes relevant at trial. Moreover, surprise is

not a basis for excluding the video. The video of Mr. Strobeck did not become relevant until he testified as to his present physical condition and the degree of impairment that he allegedly suffers. Mr. Brock had no obligation under the law to disclose the video before the time at which it became relevant at trial.

Finally, Mr. Strobeck is not prejudiced by the admission of the video. The video does not offer new testimony or expert opinion that would require developing new witnesses. If Mr. Strobeck felt that he was prejudiced by admission of the video, he could have asked for a continuance, but he did not do so. Moreover, the trial court found that Mr. Strobeck waived any objections to admission of the video, so he cannot claim prejudice now on appeal.

3. The Cases Cited by Mr. Strobeck are Distinguishable.

Mr. Strobeck cites cases outside of Washington to support his claim that the video should not have been admitted. Not only do the cases have no precedential value in Washington, but also they address situations where the surveillance videos were covered by discovery requests, unlike the instant case. In Papadakis v. CSX Transportation, Inc., 233 F.R.D. 227 (D. Mass. 2006), the defendant sought an order protecting surveillance reports and

videos that the plaintiff had requested in discovery. In Wegner v. Cliff Viessman, Inc., 153 F.R.D. 154 (N.D. Iowa 1994), the plaintiffs filed a motion to compel responses to interrogatories including the following: “Identify any person or agency employed by Defendant conducting personal or photographic surveillance of Plaintiff...” Id. at 155. In Chiasson v. Zapata Gulf Marine Corp., 988 F.2d 513 (5th Cir. 1993), the plaintiff had asked the defendant for “any still or motion pictures taken of [Chiasson] either before, on, or after the date of the occurrence in this cause of action.” Id. at 514.

In the above cases, the discovery requests covered surveillance videos. The instant case is different—the discovery request at issue did not cover surveillance videos. Therefore, the reasoning in the cases above does not apply here. The Brocks were simply not compelled to produce the video in question. Further, even if the interrogatory from Mr. Strobeck covered the video, the above cases do not reflect Washington law regarding surveillance videos. Rather, cases such as Tamburello state the law in Washington; according to Tamburello, the Brocks were not required to produce the video prior to Mr. Strobeck’s testimony at trial.

D. If the Trial Court Did Abuse its Discretion in Admitting the Surveillance Video, the Error is Harmless.

If the Court were to find that the trial court abused its discretion, the error would be harmless. Washington courts “do not reverse a verdict based on an evidentiary error unless the error was prejudicial.” Diaz v. State, 175 Wn.2d 457, 472, 285 P.3d 873 (2012). “[E]rror is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” Maicke v. RDH, Inc., 37 Wn. App. 750, 754, 683 P.2d 227 (1984), quoting State v. Tharp, 95 Wn.2d 591, 599, 637 P.2d 961 (1981).

“Error relating solely to the issue of damages is harmless when a proper verdict reflects nonliability.” American Oil Co. v. Columbia Oil Co., Inc., 88 Wn.2d 835, 842, 567 P.2d 637 (1977); see also Kramer v. J.I. Case Manufacturing Co., 62 Wn. App. 544, 815 P.2d 798 (1991) (possible error regarding court’s application of Tort Reform Act regarding allocation of damages was harmless because jury found no liability).

There is a strong presumption in Washington that a verdict is adequate. Cox v. Charles Wright Academy, Inc., 70 Wn.2d 173, 422 P.2d 515 (1967). Unwarranted exercise of a trial court’s

authority may constitute a violation of the right to a jury trial. Green v. McAllister, 103 Wn. App. 452, 14 P.3d 795 (2000). The trial court has no discretion to modify a verdict if the verdict is within the range of the credible evidence. Green, 103 Wn. App. 452.

Matters pertaining to the credibility of witnesses, conflicting testimony, and the persuasiveness of the evidence are the exclusive province of the jury. State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990). The court should not alter a verdict unless the record unmistakably indicates that the jury was prejudiced against a party or its reasoning was overcome by passion. Jacobs v. Calvary Cemetery & Mausoleum, 53 Wn. App. 45, 765 P.2d 334 (1988).

If a court simply threw out jury verdicts every time there was a possible error, regardless of how harmless, then jury verdicts would seldom stand. However, Mr. Strobeck suggests that the Court take this approach of tossing aside verdicts. If appellate courts were to toss aside jury verdicts simply because the courts cannot predict how the outcome of a trial might have changed without the error, it would create havoc in the court system. In Washington, unless there is evidence that an error is prejudicial,

the error is to be disregarded and the jury's verdict allowed to stand.

In the instant case, if the Court found that the trial court erred in admitting the video, any error would be harmless because the video relates solely to Mr. Strobeck's damages and is unrelated to the issue of liability. The jury found that Mr. Brock was not liable, and therefore the jury never reached the issue of damages. CP 30. Any alleged error regarding the video is harmless because the verdict reflects nonliability.

If Mr. Strobeck suggests that the video influenced the jury's decision on liability, such a suggestion would be baseless. There is no evidence that the jury allowed the video to affect its decision on liability. Rather, Mr. Strobeck is merely speculating, and speculation as to how a jury reached its decision is insufficient to reverse that decision.

There is nothing in the record that indicates that the jury was improperly prejudiced against Mr. Strobeck on the issue of liability. Thus, there is no reason to alter, or even doubt, the verdict. There was undoubtedly enough evidence presented to the jury to support the jury's finding of no liability. Mr. Strobeck testified that he was able to shut the car door while his foot was

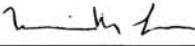
still under the car, in front of the wheel. Clearly, the jury found this to be physically impossible and concluded that Mr. Strobeck placed his foot back under the vehicle after he closed the door. Another rationale for the jury's decision on liability is that it concluded that it was reasonable for a driver to assume that his passenger was not in the way of the car's wheels after the passenger retrieved his belongings from the back seat and closed the car door. There was more than sufficient evidence to support the jury's finding that Mr. Brock's actions met the standard of care. The jury's verdict was certainly within the range of the credible evidence. Therefore, the jury's verdict should be upheld.

IV. CONCLUSION

Respondent David Brock respectfully requests that the Court affirm the trial court's decision to admit the surveillance video, an item of evidence never requested in the discovery process. The trial court did not abuse its discretion in admitting the video as rebuttal or impeachment evidence. Moreover, even if the trial court did abuse its discretion in admitting the video, such error would be harmless because the jury found that David Brock was not liable and never reached the issue of damages. Therefore, the trial court's decision to admit the video should be affirmed.

RESPECTFULLY SUBMITTED this 17th day of
December, 2012.

Hollenbeck, Lancaster, Miller & Andrews

By: 

Marvin M. Lee, WSBA No. 30740
Jill R. Skinner, WSBA No. 32762
Attorneys for Respondent Brock
15500 SE 30th Place, Suite 201
Bellevue, WA 98007
Telephone: (425) 644-4440
Fax: (425) 747-8338
Email: marvin.lee@farmersinsurance.com
jill.skinner@farmersinsurance.com

DECLARATION OF SERVICE

I declare that I served the foregoing BRIEF OF
RESPONDENTS BROCK on the party below

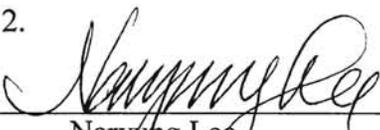
Robert F. Kehoe
Attorney for Appellant
1900 W. Nickerson St., Suite 320
Seattle, WA 98119

by causing a full, true and correct copy thereof to be
MAILED in a sealed, postage-paid envelope, addressed as shown
above, which is the last-known address for the party's office, and
deposited with the U.S. Postal Service at Bellevue, WA, on the
date set forth below;

By causing a full, true and correct copy thereof to be
HAND-DELIVERED BY ABC MESSENGER SERVICE to the
party, at the address listed above, which is the last-known address
for the party's office, on the date set forth below;

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

Executed at Bellevue, Washington, on this 18 day of
December, 2012.



Naryung Lee
Assistant to Marvin M. Lee