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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 320855

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

(Klickitat County Cause No. 12-2-00012-9)

DORI CARDON

Appellant,

vs.

ESTATE OF JAMES LEROY BREDESEN, by and through the Estate's
Personal Representative, SUSAN MARIE BARNES

Respondent.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. The appellate court reviews the same record as the trial court; a party objecting to the evidence submitted to the trial court must make such objections to the trial court.

1. The appellate court reviews the same record as the trial court when it conducts *de novo* review of a trial court's summary judgment ruling.

Under well-established case law, the reviewing court reviews the same record as the trial court—no more, no less. *American Universal Ins. Co. v. Ranson*, 59 Wash.2d 811, 816, 370 P.2d 867 (1962). An appellate court reviews a ruling on a motion for summary judgment based on the precise record considered by the trial court. *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wash. App. 743, 162 P.3d 1153 (Div. 1 2007); *Wash. Fed'n of State Employees, Council 28 v. Office of Fin. Mgmt.*, 121 Wash.2d 152, 163, 849 P.2d 1201 (1993); *Green v. Normandy Park Riviera Sec. Cmty. Club*, 137 Wash.App. 665, 678, 151 P.3d 1038 (2007); *see also, Marincovich v. Tarabochia*, 114 Wash.2d 271, 274, 787 P.2d 562 (1990) (We review *de novo* an order on summary judgment, and engage in the same inquiry as the trial court.)

Under RAP 9.12, the appellate court considers “only evidence and issues called to the attention of the trial court.”

As *American Universal* states,

“The reason is obvious: it would be unfair to consider, on appellate review, matters not presented to the trial court for its consideration. We must have before us the precise record--no more and no less--considered by the trial court.”

- *American Universal* at 816.

In *Jacob’s Meadow, supra*, the court explains how the appellate court determines the content of the record on review, stating as follows:

It is our task to review a ruling on a motion for summary judgment based on the precise record considered by the trial court. *Wash. Fed’n of State Employees, Council 28 v. Office of Fin. Mgmt.*, 121 Wash.2d 152, 163, 849 P.2d 1201 (1993); *Green v. Normandy Park Riviera Sec. Cmty. Club*, 137 Wash.App. 665, 678, 151 P.3d 1038 (2007).

That record includes those documents designated in an order granting summary judgment and any supplemental order of the trial court. RAP 9.12.

--*Jacob’s Meadow* at 754-755.

B. Party objecting to evidence must move the trial court to strike such evidence, bringing the issue to the attention of the trial court.

In *Jacob’s Meadow*, a general contractor brought an action against a defendant subcontractor, alleging breach of contract and contractual indemnity. On appeal, the defendant argued for the first time that the

evidence submitted by plaintiff for the summary judgment hearing should not have been considered by the trial court, *Id at 755*.

Rejecting defendant's argument, the court explained as follows:

Where a party believes that proffered evidence is not properly before the trial court, *it must move the trial court to strike such evidence from the record*. Upon obtaining an unfavorable ruling from the trial court, error may be assigned thereto on appeal.

It is our duty to review evidentiary rulings made by the trial court; we do not ourselves make evidentiary rulings.

Similarly, it is our duty to review a trial court's ruling on summary judgment on the record actually before the trial court. *Wash. Fed'n of State Employees*, 121 Wash.2d at 163, 849 P.2d 1201.

-- *Jacob's Meadow* at 755-756 (emphasis added)

1. Defendant made no objection to plaintiff's evidence to the trial court.

At the trial court level, defendant made no objection or motion to strike plaintiff's evidence submitted in opposition to defendant's motion for summary judgment. *CP 26-96(D); CP 97-101*.

Now, for the first time, defendant argues that "portions" of the record should be ruled inadmissible by the appellate court.

2. Plaintiff's evidence was considered by the trial court

In her opposition to summary judgment to the trial court, plaintiff introduced her affidavit, portions of her deposition testimony, affidavit and deposition testimony of Steve Lyon, Affidavit of Richard Gill, Ph.D., photos, correspondence from defense counsel, defendant's statements to Safeco Insurance Company, and other evidence.

The trial court specifically sets out the evidence it considered in its Order granting summary judgment. *CP 103-105*. The court fully considered plaintiff's evidence, including all of the above-referenced affidavits, deposition excerpts, defendant's statements to Safeco about the accident, along with the pleadings, briefing, and arguments filed by counsel. *Id.*

3. Defendant fails to identify any specific evidence it now seeks to exclude.

In its briefing, defendant fails to identify what portions of the record it now seeks to have stricken. We are left to guess as to what specific evidence defendant is referring. Defendant fails to specifically identify any evidence it now argues should be inadmissible--defendant provides no citations or references whatsoever to either the clerk's papers

or the report of proceedings to identify any evidence it now seeks to have excluded.

C. Defendant’s attempted use of the “deadman’s statute” is improper where 1) defendant did not object to the evidence at the trial court level; and 2) defendant waived applicability of the statute when defendant itself submitted evidence to the trial court of conversations and transactions of the deceased.

1. Failure to object at the trial court level constituted a waiver of the deadman’s statute

RCW 5.60.030 is generally known as the “deadman’s statute”.

Applicability of RCW 5.60.030 may be waived by an adverse party by (a) failure to object, (b) cross examination which is not within the scope of direct examination, and (c) testimony favorable to the estate about transactions or communications with the decedent. *McGugart v. Brumback*, 77 Wn.2d 441, 451, 463 P.2d 140 (1969). See also *In re Estate of Davis*, 23 Wn. App. 384, 385-86, 597 P.2d 404, review denied, 92 Wn.2d 1026 (1979).

The defendant waived any argument regarding the deadman’s statute when it chose not to raise the issue whatsoever to the trial court. Defendant relies upon *Wildman v. Taylor* to argue application of the statute. However, *Wildman* is inapposite. Unlike our case, the defendant estate in *Wildman* specifically raised the issue to the trial court and

objected to the evidence at the summary judgment hearing. Thus, the appellate court in *Wildman* was able to review *whether the trial court's rulings on the evidence* were properly made by the trial court.

Here, there is no ruling for the appellate court to review because defendant chose not to make any objection to the evidence to the trial court. Instead, defendant seeks to modify the record, at the appellate level, by application of a statute that was never raised, argued, or even mentioned to the trial court.

2. Defendant waived application of the deadman's statute by itself submitting evidence of conversations and transactions between the deceased and plaintiff in defendant's original motion for summary judgment.

The protection of the deadman's statute may be waived when the protected party introduces evidence concerning a transaction with the deceased. *McGugart v. Brumback*, 77 Wn.2d 441, 450, 463 P.2d 140 (1969); *Ellis v. Wadleigh*, 27 Wn.2d 941, 952, 182 P.2d 49 (1947); *Percy v. Miller*, 115 Wash. 440, 444-45, 197 P. 638 (1921); *Thor v. McDearmid*, 63 Wn. App. 193, 202, 817 P.2d 1380 (1991).

When the adverse party testifies in favor of the estate about transactions or conversations with the decedent, the door is open for the party in interest to testify because the adverse party's testimony constitutes

a waiver. *Fies v. Storey*, 21 Wn. App. 413, 420, 585 P.2d 190 (1978),
overruled on other grounds in Chaplin v. Sanders, 100 Wn.2d 853, 676
P.2d 431 (1984). Once the protected party has opened the door, the
interested party is entitled to rebuttal. *Johnston v. Medina Imp. Club, Inc.*,
10 Wn.2d 44, 59-60, 116 P.2d 272 (1941).

3. Evidence submitted by the defense

When defendant filed its motion for summary judgment, defendant introduced testimony regarding statements and transactions between plaintiff and defendant. The evidence submitted by defendant includes the following: that plaintiff would drive the ATV to get mail and go to and from the shop (*CP 16*); that plaintiff had ridden the ATV many times before the accident (*CP 16*); that her dad told her not to wind the engine out (*CP 17*); that her dad told her not to go over jumps (*CP 17*); that most of the family rode the ATV (*CP 17*); that everybody in the family was familiar with it (father is part of the family) (*CP 17*); that the family members taught one another how to ride (*CP 17*); that defendant's ATV was modified prior to the accident (*CP 17*); that defendant was on the property on the accident date (*CP 11*); and that defendant transported plaintiff to the hospital (*CP 11*).

As shown, defendant itself submitted evidence regarding transactions and discussions between the parties to the trial court when defendant moved

for summary judgment. By submitting these discussions and transactions to the court in its motion, defendant also opened the door to plaintiff to similarly provide evidence to the court of conversations and transactions between the parties.

D. Absence of an “ATV instruction statute”.

1. Defendant had duties to exercise ordinary care toward plaintiff-- the absence of an “ATV instruction statute” does not change those duties.

Defendant argues that since there is no specific statute requiring particular instruction on an ATV, defendant is absolved of any duties whatsoever to plaintiff.

Defendant’s argument is misplaced -- Washington law is clear that an owner or occupier of land has a duty to exercise reasonable care to avoid injuring a person who is on the land with his permission. That is, defendant owed a duty to plaintiff *to exercise reasonable care* to avoid injuring plaintiff.

Plaintiff presented evidence to the trial court that defendant, provided the ATV to plaintiff to perform chores on the property, instructed plaintiff on how to operate the ATV, and that defendant specifically directed plaintiff to operate the ATV to perform the chore of going to the shop and starting a fire, so that the shop would be warm for defendant

when he returned from town. In so doing, defendant had duties to exercise ordinary care. The trial court's ruling that no duties existed was error.

Defendant cites *Robbins v. Hansen*, 184 Wash. 677 (1935), but that case is inapposite. In *Robbins*, the court analyzed the issues of a bailment, along with master and servant principles. Plaintiffs argued that defendants were liable under the general law of bailment, citing a Texas case. *Id at 683*. The court found that plaintiffs could not prevail under a bailment theory.

The plaintiff in *Robbins* was injured when a "Garford truck of ancient vintage" was driven by Mr. Owens. *Id. at 680*. The truck was in poor condition and the owner (Mr. Hansen) gave "positive instructions" that the truck "not be used" until the owner obtained a release for any damages caused by the old truck. *Id at 682*. Notwithstanding, Mr. Owens took the truck against the directions of the owner.

The truck's axle broke on the road and Owens left the truck on the road. Owens testified that he later returned to hang a lantern on the truck in a conspicuous position because the taillight was not functioning. *Id at 679-680*. Later that evening plaintiff was a passenger in a car driver by co-plaintiff Mr. Bach. Mr. Bach crashed his car into the rear of the truck and he and plaintiff were injured.

The plaintiffs in *Robbins* contended that because Mr. Hansen did not take the truck away, but left it by Owen's house, that Mr. Hansen was liable to plaintiffs. The court rejected this contention stating as follows:

We cannot agree with this contention. We are satisfied that, in forbidding the further use of the truck, Mr. Hansen was acting in entire good faith, and he had no reason to suppose that his instructions would be disregarded.

--*Robbins v. Hansen at 685.*

Contrary to defendant's briefing, *Robbins* does not support defendant's position. The *Robbins* defendant specifically prohibited use of the dangerous truck. That case is in direct contrast to the present case, where defendant specifically directed plaintiff to perform a chore using the modified ATV.

Defendant's arguments about the *Robbins* court are misleading and erroneous. Defendant appears to be relying upon (at best) dicta, where the *Robbins* court found that plaintiff's reliance on the Texas case was not persuasive and where the accident was not caused by any known defect of the vehicle.

Defendant also argues that this case should be viewed the same as driving automobiles that have "all-wheel drive, front wheel drive, or rear wheel drive," (*Defendant's brief at 7*). However, defendant's analogy is not applicable. All-wheel drive automobiles are typically clearly labeled with

outside stickers from the factory and also on the dash and steering wheel. In contrast, defendant's ATV still had the large, original, factory 4x4 stickers on the body of the vehicle and there were no lights, gauges, or other warning devices to warn a user when it was in 2WD or that the ATV had been modified from the original, factory full-time 4WD. *CP at 72*. The only way a rider would know about the modification is by seeing a small, non-factory lever next to the gas tank by a rider's left knee, and by also recognizing that the lever represented a non-factory modification to the internal transmission of the ATV.

Plaintiff provided evidence that expert Steve Lyon, with his extensive experience on ATVs, had never before seen such a lever and he thought it looked like a choke mechanism. *CP at 72*.

Defendant argues that plaintiff should have noticed this sticker and understood what it meant. Counsel is entitled to make this argument to the jury for comparative fault application, but whether plaintiff is at fault for failing to recognize this lever, and what percentage comparative fault should apply, are certainly issues for the jury.

2. Plaintiff's expert witness affidavits are not "conclusory", where the affidavits specifically set out factual bases for the experts' opinions.

As earlier noted, defendant did not object to admissibility of any of plaintiff's evidence at the trial court level. At the appellate level, defendant asserts that plaintiff's affidavits are "conclusory". However, the defendant fails to provide a definition of conclusory, fails to identify what "portions" it believes are conclusory, and fails specify any basis for its own argument.

The general definition of conclusory in the context of expert witness affidavits is as follows: The conclusion of the expert is stated with no reference to facts or evidence that support the expert's conclusion. See, e.g., *Baldwin v. Silver*, 165 Wash. App. 463, 269 P.3d 284 (Div. 3 2011); *Thun v. City of Bonney Lake*, 164 Wash. App. 755, 265 P.3d 207 (Div. 2 2011), review denied, 173 Wash. 2d 1035 (2012) (expert's unsupported conclusions do not create an issue of fact on summary judgment).

Plaintiff's expert affidavits are not conclusory -- they set forth specific factual bases for the opinions contained therein. For example, plaintiff's experts explain that they both personally visited and inspected the accident site, along with comprehensively reviewing the testimony, photos, and evidence in the case. *CP 70*, 83. In addition, Steve Lyon personally started and rode the ATV involved in the accident. *Id.*

Both experts clearly articulate facts upon which their opinions are based. Dr. Gill explicitly stated “The bases for my opinion are as follows:” then list numerous specific facts and evidence upon which his opinion regarding a latent dangerous condition is based. *CP 87-90*.

As a further example, Mr. Lyon testified as follows:

In my opinion, I believe that the ATV was in two-wheel drive at the time of the accident. **The basis for my conclusion is as follows:** The back wheels lost traction and caused the rear of the ATV to slide to the left in a clockwise motion. This occurred at the time of Dori’s upshift from first to second and with the ATV’s characteristic of immediate power to the wheels, a loss of traction under the circumstances of this case can be expected.

Indeed, when I rode the ATV myself in 2WD in gravel, it had a loss of traction at the time of shifting. This loss of traction would be more pronounced on a snowy/icy surface. If the ATV had been in 4WD, all four wheels would have been driven forward at the same time and a slide out from the rear, as happened to Dori, would be unlikely. The 2WD operation of the ATV likely caused the rear slide out and caused a loss of control and a direction change directly over the steep roadway and into the creek.

CP at 72-73, (emphasis added).

In addition, Steve Lyon’s testimony about reasonable actions of an ATV owner are properly submitted. Expert testimony that helps the trier of fact to determine a fact in issue is proper under ER 702 (i.e. whether defendant exercised ordinary care toward plaintiff). The overwhelming majority of jurors would have never ridden or owned an ATV, in contrast to

the overwhelming majority of jurors who have owned or driven a car. Mr. Lyon is an exceptionally well-qualified ATV expert. His affidavit and deposition testimony provided specialized knowledge and expertise regarding reasonable actions of an ATV owner.

E. Causation

1. Defendant's assertions in its brief regarding causation are factually incorrect.

At the trial court, defendant made only one argument about causation. Namely, that the defective rear brake on the ATV was not a cause of the accident. *CP 23- 24*. In its response to the trial court, plaintiff *agreed* that the defective brake did not cause the accident and further that plaintiff was making no such claim. *CP 46-47*.

At the appellate level, defendant attempts to rewrite and broaden its argument on causation. In so doing, defendant makes repeated assertions regarding causation that are factually incorrect. By way of example defendant claims in its briefing includes the following:

- ◆ No admissible evidence that “the ATV was in 2 wheel drive mode at the time of the accident” (*Defendant's brief at 10*)

Evidence in the record: “In my opinion, I believe that the ATV was in two-wheel drive at the time of the accident. The basis for my conclusion is as follows: The back wheels lost traction and caused the rear of the ATV to slide to the left in a clockwise motion . . . If the ATV had been in 4WD, all four wheels would have been driven forward at the same time and a slide out from the rear, as happened to Dori, would be unlikely.” *CP at 72.*

- ◆ No admissible evidence that operating the ATV in 2 wheel drive mode caused the ATV to leave the road” (*Defendant’s brief at 10*)

Evidence in the record: “The 2WD operation of the ATV likely caused the rear slide out and caused a loss of control and a direction change directly over the steep roadway and into the creek.” *CP 72-73 (Lyon affidavit).*”

- ◆ No admissible evidence that “had plaintiff been aware of the two drive modes she would have shifted the ATV to 4 wheel mode on the day of the accident.” (*Defendant’s brief at 10*).
- ◆ “And even if plaintiff had known of the 2 wheel drive modification, it is sheer speculation whether she would have placed it in 4 wheel mode” (*Defendant’s Brief at 10*)

Evidence in the record: “I thought it was a full time four-wheel drive, like the stickers on the ATV show. If I had known that the ATV could be operated in either 2WD or 4WD, I would have put it in 4WD on the day of the accident because of the snowy conditions.” *CP at 56.*

2. Defendant fails provide any argument regarding several issues raised by the appeal.

Defendant fails to address several points made in plaintiff’s assignments of error. In its briefing, defendant has elected to not respond to the following important issues:

1. Duties of ordinary care applied where defendant provided the ATV for use upon the land;
2. Duties of ordinary care applied where defendant specifically instructed plaintiff to perform a chore by using the ATV in the snow and ice;
3. Duties of ordinary care applied where defendant chose to instruct plaintiff on the operation of the ATV;
4. Creating a hazard negates notice requirement -- no notice required where defendant himself constructed and maintained the driveway.

5. Expert testimony provided evidence that the dangerous conditions on the premises were NOT open and obvious.

II. CONCLUSION

This case should not have been dismissed on summary judgment by the trial court. Plaintiff respectfully requests that the summary judgment dismissal of her claims be reversed and that the case be remanded back to the trial court.

DATED this 9th day of June, 2014.

LAW OFFICE OF GRANT A. GEHRMANN



Grant A. Gehrman, WSBA #21867
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that on the 4th day of June, 2014, a copy of APPELLANT'S RESPONSE TO RESPONDENT'S BRIEF was sent as stated below:

Raymond Schutts Law Offices of Raymond Schutts 24001 E. Mission Ave, Suite 101 Liberty Lake, WA 99019-9514	<input type="checkbox"/> via efiling/email <input type="checkbox"/> via hand delivery <input checked="" type="checkbox"/> via US Mail <input type="checkbox"/> via Certified Mail <input type="checkbox"/> via fax
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COURT OF APPEALS DIVISION III Renee Townsley 500 N. Cedar St. Spokane, WA 99201 (served with original)	<input type="checkbox"/> via efiling/email <input type="checkbox"/> via hand delivery <input checked="" type="checkbox"/> via US Mail <input type="checkbox"/> via Certified Mail <input type="checkbox"/> via fax
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Vancouver, Washington, this 4th day of June, 2014.


 Amber Batten