

FILED

MAR 03 2014

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.

OPENING BRIEF OF APPELLANT

GRANT A. GEHRMANN
LAW OFFICE OF GRANT A. GEHRMANN, P.S.
203 SE Park Plaza Drive, Suite 215
Vancouver, WA 98684
(360) 253-3667
Attorney For Appellant

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR1

II. ISSUES PRESENTED.....2

III. STATEMENT OF THE CASE.....4

A. Statement of Facts.....4

B. Procedural History8

IV. ARGUMENT.....8

A. Standard of Review.....8

B. The trial court erred in finding as a matter of law that defendant owed no legal duties to warn about ATV modifications, where such modifications changed the handling characteristics of the ATV and made the ATV more dangerous to operators.....9

1. Defendant modified the ATV to be 2WD or 4WD12

2. Modification was unusual12

3. Modification to 2WD made the ATV more dangerous13

4. Plaintiff not aware that ATV could be operated in 2WD13

5. 2WD operation of the ATV proximately caused a loss of control and injury to plaintiff.....14

C. The trial court erred by making findings of fact that defendant’s modifications to the ATV were “benign” and “clearly labeled” where experts affidavits supported the opposite conclusion15

1. Expert affidavits provided evidence that the ATV modification was not benign – the modification caused the accident and severe injuries to plaintiff15

2. ATV not clearly labeled	16
D. The trial court erred when it found that defendant had no legal duties when he specifically instructed plaintiff to perform a chore by using the ATV	17
1. Defendant told plaintiff to ride ATV to perform a chore for defendant	17
2. Expert testimony provided evidence that defendant failed to exercise reasonable care when he directed plaintiff to perform a chore by using the ATV	18
E. The trial court erred in dismissing plaintiff's claims where plaintiff submitted evidence that defendant negligently instructed plaintiff how to operate the ATV.....	20
1. When defendant chose to instruct plaintiff about the ATV, he assumed duties of ordinary care and thereafter breached those duties.....	20
F. The trial court erred when it ruled as a matter of law that dangerous conditions of the premises were open and obvious, where plaintiff provided expert testimony to the contrary	22
1. In her opposition to summary judgment, plaintiff provided expert testimony establishing that the driveway area had latent dangerous conditions that proximately caused injury to plaintiff.....	22
2. Plaintiff's primary theories of liability were predicated on dangerous conditions of the driveway area itself – <u>not</u> upon the failure to clear snow or ice	26
G. The trial court erred when it found that defendant had no knowledge about a condition that defendant himself created or maintained.....	26
1. Notice requirement is not applicable where defendant created and maintained the latent dangerous conditions.....	26

2. Plaintiff submitted evidence of constructive notice28

V. CONCLUSION30

TABLE OF AUTHORITIES

Washington Cases

<i>Alston v. Blythe</i> , 88 Wash.App. 26, 943 P.2d 692, (Div. 2,1997).....	21
<i>Carlyle v. Safeway Stores, Inc.</i> , 78 Wash.App. 272, 275, 896 P.2d 750 (1995)	26
<i>Degel v. Majestic Mobile Manor, Inc.</i> , 914 P.2d 728, 129 Wash.2d 43, (1996).....	8, 10
<i>Dorr v. Big Creek Wood Products, Inc.</i> 84 Wash.App. 420, 927 P.2d 1148 Wash.App. Div. 1,1996	19,20
<i>Falconer v. Safeway Stores, Inc.</i> , 49 Wash.2d 478, 480, 303 P.2d 294 (1956)	27
<i>Holland v. City of Auburn</i> , 161 Wash. 594, 297 P. 769	28
<i>Ingersoll v. DeBartolo, Inc.</i> , 123 Wn.2d 649, 652, 869 P.2d 1014 (1994).....	27
<i>Iwai v. State</i> , 129 Wn.2d 84, 90–91, 915 P.2d 1089 (1996)	26
<i>Jasko v. F.W. Woolworth Co.</i> , 177 Colo. 418, 420-21, 494 P.2d 839 (1972)	28
<i>Leber v. King County</i> , 69 Wash. 134, 124 P. 397 (1912)	25
<i>Morton v. Lee</i> , 75 Wn.2d 393, 397, 450 P.2d 957 (1969)	28
<i>Owen v. Burlington 23 Northern and Santa Fe R.R. Co.</i> , 153 Wn. 2d 780, 788 (2005)	24
<i>Pimentel v. Roundup Co.</i> , 100 Wash.2d 39, 44, 666 P.2d 888 (1983)	26, 28
<i>Potts v. Amis</i> , 62 Wash.2d 777, 384 P.2d 825, WASH. 1963.....	10, 11
<i>Presnell v. Safeway Stores, Inc.</i> , 60 Wn.2d 671, 374 P.2d 939 (1962)....	28

<i>Provins v. Bevis</i> , 70 Wash.2d 131, 422n P.2d 505 (1967)	25
<i>Sherman v. Seattle</i> , 57 Wash.2d 233, 356 P.2d 316	10
<i>Smith v. Manning's, Inc.</i> , 13 Wn.2d 573, 580, 126 P.2d 44 (1942) ...	27, 28
<i>Tanguma v. Yakima County</i> , 18 Wash. App. 555, 563, 569 P.2d 1225 (1977)	25
<i>Tincani v. Inland Empire Zoological Soc.</i> , 124 Wash.2d 121, 875 P.2d 621 Wash.,1994	9, 22, 24, 25
<i>Wiltse v. Albertson's Inc.</i> , 116 Wash.2d 452, 453-54, 805 P.2d 793 (1991)	28
<i>Van Dinter v. City of Kennewick</i> , 121 Wash.2d 38, 44, 846 P.2d 522 (1993).....	22
<i>Younce v. Ferguson</i> , 106 Wash.2d 658, 666-67, 724 P.2d 991 (1986) ...	22

Jury Instructions

WPI 120.03 Duty to Licensee or Social Guest— Activities of Owner or Occupier	11
WPI 10.01 Negligence—Adult—Definition	11

I. ASSIGNMENTS OF ERROR

1. The trial court erred in finding as a matter of law that defendant owed no legal duties to warn about ATV modifications, where such modifications changed the handling characteristics of the ATV and made the ATV more dangerous to operators.
2. The trial court erred by making findings of fact that defendant's modifications to the ATV were "benign" and "clearly labeled" where expert affidavits supported the opposite conclusion.
3. The trial court erred when it found that defendant had no legal duty when he specifically instructed plaintiff to perform a chore by using the ATV.
4. The trial court erred in dismissing plaintiff's claims where plaintiff submitted evidence that defendant negligently instructed plaintiff how to operate the ATV.

5. The trial court erred when it ruled as a matter of law that the dangerous conditions of the premises were open and obvious, where plaintiff provided expert testimony to the contrary.

6. The trial court erred when it found that defendant had no knowledge about a condition that defendant himself created or maintained.

II. ISSUES PRESENTED

1. Whether this Court should reverse and remand the Order of Summary Judgment because the trial court found as a matter of law that defendant owed no legal duties to warn about ATV modifications, where such modifications changed the handling characteristics of the ATV and made the ATV more dangerous to operators. (Assignment of Error No. 1).

2. Whether this Court should reverse and remand the Order of Summary Judgment because the trial court found that defendant's modifications to the ATV were "benign" and "clearly labeled" where expert affidavits supported the opposite conclusion. (Assignment of Error No. 2).

3. Whether this Court should reverse and remand the Order of Summary Judgment because the trial court found that defendant had no legal duty when he specifically instructed plaintiff to perform a chore by using the ATV. (Assignment of Error No. 3).

4. Whether this Court should reverse and remand the Order of Summary Judgment because the trial court dismissed plaintiff's claims despite plaintiff's evidence that defendant negligently instructed plaintiff how to operate the ATV. (Assignment of Error No. 4).

5. Whether this Court should reverse and remand the Order of Summary Judgment because the trial court found as a matter of law that the dangerous conditions of the premises were open and obvious, where plaintiff provided expert testimony to the contrary. (Assignment of Error No. 5).

6. Whether this Court should reverse and remand the Order of Summary Judgment because the trial court found defendant had no knowledge about a condition that defendant himself created or maintained. (Assignment of Error No. 6).

III. STATEMENT OF THE CASE

A. Statement of Facts

In January 2009, Plaintiff Dori Cardon, was staying with her father, James Bredesen, at James' house and surrounding property, which is located in Klickitat County. CP 55:8-14. James was ill with lung cancer and Dori was staying with James to cook, clean, and care for James, along with doing chores for James around the house and property. CP55:8-14. Subsequent to the ATV accident at issue, James died. CP 64:81:13-14.

James' property is on extensive acreage and includes a house and a shop. CP 55:3-6. The property is served by a long driveway that was constructed by James. *Id.* From the house, the driveway slopes downhill for approximately 100 yards, then turns to the right, crosses a culvert over a creek, continues right, and then goes past the shop and then out to the main road, approximately a mile away. CP 56:24-57:4.

There is a shoulder that runs along the road for most of the distance between the house and the culvert. CP 87:14-17. Near the culvert, the shoulder had collapsed into the creek, leaving a cliff on the side of the road by the culvert. CP 57:21-58:1.

There is a guardrail on the upstream side of the creek, but no guardrail on the downstream side. CP 57:4-6. On January 21st, 2009, James drove his truck into town to get some parts for his pickup truck.

James was bringing the parts back to the shop on the property. CP 56:13-15. The weather was cold and prior to leaving, James instructed Dori to ride the ATV from the house down to the shop to start a fire in the shop stove, so that the shop would be warm when James returned with the truck parts. CP 56:15-18.

The driveway on the property was mostly covered with snow and ice —conditions where the snow would melt and then re-freeze. CP 56:20-23. There were also spots of gravel that were showing through the ice and snow. *Id.*

Prior to the accident, Dori had only limited experience with ATVs. CP 55:23-24. Prior to the accident, Dori had ridden James' ATV several times to get the mail, but only once in the snow or ice. *Id.*; CP 62:95:12-25. Dori did not regularly ride the ATV around the premises. *Id.*

About one year prior to the accident, Dori had received training from James on how to drive a commercial vehicle. CP55:16-20. James was a commercial truck driver and he taught Dori how to drive a commercial truck. *Id.* Dori was able to obtain her CDL with her father's guidance and Dori trusted his guidance, training, and expertise. *Id.*

Dori's father gave her general instruction on how to ride the ATV, including to not wind out the motor, not to go over jumps, and not to use a right foot brake because it would stick in the down position.

CP 64:78:17-79:21; CP 56:1-4.

The ATV is a Honda Rancher 4x4, which is normally a full-time four-wheel-drive model (4WD). CP 56:8-9; CP 64:80:19-81:1.

Unbeknownst to Dori, James had modified the ATV so that it could be operated in either two-wheel drive or four-wheel drive modes. CP 64:80:14-22; CP 56:6-8. This modification was done by installation of a small (approximately 1.5 inch) round lever near the left side of the gas tank. CP 67:83:2-7. At the time of the accident, Dori was not aware that the ATV could even be operated in two wheel drive – she did not notice the small lever, nor did her father tell her of the modification. CP 64:80-81. The stickers on the vehicle indicated that the ATV was a full time 4 wheel-drive vehicle. CP 56:8-9. Also, there were no warning lights or other indicators of when the ATV was in 2WD mode. CP 72:1-3.

As instructed, Dori rode the ATV towards the shop to start a fire in the stove. CP 57:7-10. Unbeknownst to Dori, the ATV was in 2WD and not in 4WD as she rode down the driveway toward the shop. CP72:8-CP 73:1; CP 56:6-12.

As Dori rode the ATV down the hill and approached the culvert, she began to turn right and shifted from first to second gear. CP 63:68:1-11. The ATV shifted and immediately lost traction, with the rear of the ATV sliding to Dori's left in a clockwise direction. CP 63:68:12-69:24. Dori

tried to control the ATV but was unable to do so. She finally let go of the ATV and it went over the embankment into the creek. CP 63:67:10-23. The front wheels of the ATV were already in the air (going over the embankment) when she let go of the handlebars. CP 66:73:9-15. Plaintiff landed on her stomach and was in shock. CP 61:92:25-93:3. Dori was able to get off the ATV as it went over the ledge, but was still seriously injured in the accident.

When James found Dori in the creek, he called Dori's mother (who was at the house) and told her to call the neighbors. The neighbors came and pulled the ATV out of the creek. CP 67:84:2-9. Plaintiff was then taken by James to the hospital for a broken leg. CP 67:84:11-12.

Following the injury, plaintiff learned from her brother that the ATV had been changed from full time 4-wheel drive to a 2WD or 4WD drive to save gas. CP 64:80:14-81:14.

B. Procedural History

Plaintiff filed this lawsuit in Klickitat County, Washington on 1/10/2012. Plaintiff's complaint had two separate and independent general theories of liability: 1) That defendant was liable to plaintiff for

defendant's direct negligence; and 2) that defendant was liable to plaintiff under theories of premises liability. CP 5:22-24.

Defendant filed its Answer 2/29/2012. CP 13:1. Defendant filed a Motion for Summary Judgment on 8/14/2013. CP 24:17.

On 9/3/2013 plaintiff filed her response and opposition to defendant's motion, which included affidavits from experts, deposition excerpts, and an affidavit of plaintiff. CP 52:2-11.

Following oral argument, the trial court granted defendant's motion for summary judgment, ruling that all claims of plaintiff were thereby dismissed. CP 103-105.

IV. ARGUMENT

A. Standard of Review

The standard of review for summary judgment dismissal of a case is *de novo*, with the reviewing court to view the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996). Summary judgment is appropriate only if the pleadings, depositions, admissions on file, and affidavits show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c).

B. The trial court erred in finding as a matter of law that defendant owed no legal duties to warn about ATV modifications, where such modifications changed the handling characteristics of the ATV and made the ATV more dangerous to operators.

The analysis presented in this section is identification and application of legal duties that defendant owed to plaintiff for his own actions that proximately caused harm to plaintiff. That is, duties defendant owed to plaintiff *to exercise reasonable care* to avoid injuring plaintiff. This is in contrast to the duties defendant owed to plaintiff as a licensee *for dangerous conditions on the land*, which will be separately discussed later in the brief.

A claim of negligence requires the plaintiff to establish (1) the existence of a duty owed, (2) breach of that duty, (3) resulting injury, and (4) proximate cause between the breach and the injury. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wash.2d 121, 127–28, 875 P.2d 621 (1994). The threshold determination of whether the defendant owes a duty to the plaintiff is a question of law. *Id.* at 128, 875 P.2d 621. The existence of a duty may be predicated upon statutory provisions or on common law principles. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wash.2d 43, 49, 14 P.2d 728 (1996).

In the seminal case of *Potts v. Amis, infra*, a guest at host's summer home was entitled to recover from host for injuries sustained when the host negligently struck the guest with a golf club while demonstrating its proper use. The fact that the injury occurred while the guest stood upon land of his host did not relieve the host of liability. *Potts v. Amis*, 62 Wash.2d 777, 384 P.2d 825 (1963). The *Potts* court held 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 and of whose presence he is, or should be, aware. *Id.*

The *Potts* court analyzed a prior ruling in *Sherman v. Seattle*, 57 Wash.2d 233, 356 P.2d 316 (1960), where the court applied the doctrine of foreseeability in a case where a child was injured by a lift apparatus at a dam site owned by the city:

‘In view of the peculiar facts of this case, we feel that the standard of care owed respondent by appellant cannot be made to depend upon respondent's technical status on appellant's premises at the time of the accident. On the contrary, **we think that regardless of respondent's status-- be it that of an invitee, licensee, or trespasser--appellant owed him the duty to use reasonable care.**’

- *Potts* at 786-787

In turning back to the facts of a negligent host swinging a golf club, the *Potts* court stated:

(U)nder the well-established principles of the law of negligence, the plaintiff is entitled to recover. The mere fortuitous circumstances that this injury occurred while the plaintiff stood upon land belonging to the defendant should not relieve the latter of liability.” *Id.*

* * *

But we hold 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 and of whose presence he is, or should be, aware.

--*Potts v. Amis, supra*, at 787.

The *Potts* holding was used by subsequent courts to craft the now familiar Washington Pattern Jury Instruction:

WPI 120.03 Duty to Licensee or Social Guest—Activities of Owner or Occupier

An owner of premises has a duty to exercise ordinary care in conducting activities to avoid injuring any person who is on the premises with permission and of whose presence the owner is, or should be, aware.

Jury Instruction 120.03 is used in conjunction with the standard negligence instruction as follows:

WPI 10.01 Negligence—Adult—Definition

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

Plaintiff submitted substantial evidence to the trial court that defendant failed to exercise ordinary care.

1. Defendant modified the ATV to be 2WD or 4WD.

Defendant had modified the ATV so that it could be operated in either two-wheel drive or four-wheel drive modes. This modification was done by installation of a small (approximately 1.5 inch) round lever near the left side of the gas tank. CP 71:22-CP 72:3. At the time of the accident, plaintiff was not aware that the ATV could even be operated in two wheel drive – she did not notice the small aftermarket lever, nor did her father tell her of the modification. CP 64:81:14-24.

2. Modification was unusual

Steve Lyon is an ATV riding expert who provided testimony in the form of an affidavit. Steve owns and operates an ATV riding school and has himself ridden the ATV that is the subject of this case. CP 70:1-4; CP 70:22-24. As explained in his Affidavit, the changing a 4WD ATV to a 2WD or 4WD is not common and that he had never before seen such a lever system that was on defendant's ATV. CP 72:3-6. Steve explains as follows:

The ATV at subject in this case was modified from a full-time four-wheel drive to a two-wheel drive (2WD) or four wheel-drive (4WD) vehicle. There is a small, non-factory lever for this shifting mechanism. There are no warning lights or other

indicators showing when the ATV is in 2WD, or even that it can be placed into 2WD. This type of modification is not common on ATVs and I have not previously seen this lever system of 2WD or 4WD installed on another ATV.

--CP 71:22-CP 72:6

3. Modification to 2WD made the ATV more dangerous

Plaintiff provided evidence that the modification to 2WD made the ATV more dangerous by increasing the likelihood that the rear wheels would lose traction and cause a crash, particularly in ice and snow conditions. Steve Lyon's affidavit excerpts are 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.

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.

-CP72:8-CP 73:1

4. Plaintiff not aware that ATV could be operated in 2WD.

Plaintiff submitted an affidavit explaining that she was not aware of the modification to the ATV that changed it from being a full-time 4WD. Plaintiff testified as follows in her affidavit:

My dad did not tell me that the ATV had been modified so that it could be operated in two-wheel drive and I did not know that it could be operated in two-wheel drive at the time of the accident. 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 56:6-12

5. 2WD operation of the ATV proximately caused a loss of control and injury to plaintiff

ATV expert Steve Lyon explained in his affidavit that the ATV was in 2WD at the time of the accident, his testimony was based upon Mr. Lyon's training, expertise, review of the depositions, site inspection, and also his personal riding of the ATV at issue. Mr. Lyons further testified as follows:

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.

In my opinion, James' actions and his failure to provide proper information to Dori, as explained previously, were each proximate causes of the ATV accident.

- CP 72:19-CP 73:5

Plaintiff submitted considerable evidence to establish a duty and subsequent breach of that duty by defendant. In addition, plaintiff also submitted evidence establishing such breach of duty proximately caused injury to plaintiff. The court's complete dismissal of all of plaintiff's claims was error.

C. The trial court erred by making findings of fact that defendant's modifications to the ATV were "benign" and "clearly labeled" where expert affidavits supported the opposite conclusion.

In its oral ruling, the trial court found that the defendant had "no duty to warn about a modification that was benign and clearly labeled."

RP 18:14-16

1. Expert affidavits provided evidence that the ATV modification was not benign – the modification caused the accident and severe injuries to plaintiff.

Plaintiff submitted deposition testimony, plaintiff's affidavit, expert affidavits, and other materials to the court. This evidence established that defendant's modification to the ATV proximately caused the ATV accident, and that such accident caused severe injuries to plaintiff. The trial court gave no further explanation of what it meant by "benign" in either its oral ruling or written Order. CP 104:15-22.

2. ATV not clearly labeled.

The ATV was originally a 4WD and had stickers on the body of the ATV that identified it as a 4WD. CP 56:8-9; There were no warning lights or other indicators showing when the ATV is in 2WD, or even that it can be placed into 2WD. CP 72:1-3.

There is a small (approximately 1.5 inch), non-factory shifting lever for the shifting mechanism. CP 71:24-CP 72:1. This lever is down near a rider's left knee by the gas tank.

As explained in Steve Lyon's affidavit:

There is a small, non-factory lever for this shifting mechanism. There are no warning lights or other indicators showing when the ATV is in 2WD, or even that it can be placed into 2WD. This type of modification is not common on ATVs and I have not previously seen this lever system of 2WD or 4WD installed on another ATV.

- CP 71:24-CP 72:6

Plaintiff also provided deposition excerpts to the trial court that including the following from Steve Lyon:

A. I did check out that lever.

Q. Okay. Did it seem to working in the manner that – set by the factory?

A. It was not a factory lever.

* * *

A. It's not really clear what it's for. It does have a four by two written on it. It appears that the sticker's partially gone. In the deposition she wrote that it appeared to be a choke lever. That's what it appeared to me. I had not seen one of those before on a quad.

- CP 79:34:4-35:6

Plaintiff also provided deposition excerpts to the trial court that including the following from Dori Cardon:

A. My brother asked me, Did you have it it two-wheel drive or four-wheel drive? And I was, what? I didn't know you could put it-- I thought it was a four-wheel drive. It says it on the side, Honda four-wheel drive, Honda four by four.

Q. And what in the picture were you looking at so that you could tell what -- whether it was a two- or four-wheel drive?

A. It was this thing on the side of the quad that was mounted to the glove box. It looked like a choke.

-CP 67:82:11-CP 67:83:7

The trial court's weighing of the evidence and concluding that the modification was "clearly labeled" was error – such weighing of the evidence is a proper function of the jury.

D. The trial court erred when it found that defendant had no legal duties when he specifically instructed plaintiff to perform a chore by using the ATV.

1. Defendant told plaintiff to ride ATV to perform a chore for defendant.

It is undisputed that on the day of the accident, Plaintiff was instructed by her father to do a chore by using the ATV. As explained in plaintiff's affidavit as follows:

On January 21, 2009 at approximately 9:30 a.m., my father was going to take his truck into town to get some parts for his pickup truck. The weather was cold and prior to leaving, my dad instructed me to take the ATV down to the shop to start a fire in the shop stove, so that the shop would be warm when he returned with the parts.

-CP 56:13-18

2. Expert testimony provided evidence that defendant failed to exercise reasonable care when he directed plaintiff to perform a chore by using the ATV.

Plaintiff provided expert testimony from Rick Gill, Ph.D., an engineer and human factors expert. Dr. Gill explained as follows in his affidavit:

On the day of the accident, James instructed Dori to use the ATV to drive to the shop to start a fire in the woodstove. From a human factors perspective, this instruction likely created transference of authority because Dori was reasonably relying on her father's knowledge of the ATV and the condition of the premises. It is important to note that James, as the owner, would have superior knowledge of both the ATV and of the premises.

The task of riding the ATV to the shop in the snow was given to Dori by James, in an environment created or controlled by

James, using an ATV that was modified by James, and where James was in the best position to evaluate and understand the danger of the premises and understand the danger that Dori would likely encounter from the ATV, from the premises, and also the interaction of using the ATV on the premises to perform the chore requested by James.

- CP 89:11- CP 90:4

Plaintiff further provided evidence from which a reasonable juror could find that defendant did not act with reasonable care in providing his ATV to plaintiff to perform chores. Steve Lyon's affidavit noted as follows:

When an owner of an ATV provides his ATV to others to ride, the owner has responsibilities to provide information about the ATV. In my opinion, James had a duty to tell Dori important things about the ATV, its use, and also about the property. **First, that James had modified the ATV to be able to operate in 2WD; . . .**

- CP 71:2-8

In *Dorr v. Big Creek Wood Products, Inc.* 84 Wash.App. 420, 927 P.2d 1148 (1996), a licensee was injured when he was struck by falling tree branch during a logging operation brought negligence action against property owner, alleging that owner waved him into area where tree had just been cut down. The Court of Appeals held that: (1) licensee did not assume risk that property owner would give him misleading directions, and (2) owner was not entitled to instruction that every person has duty to see what would be seen by person exercising ordinary care.

The *Door* court noted as follows:

But Dorr did not base his claim of negligence on the presence of the ordinary hazard of widow-makers. Dorr claimed in part that Knecht negligently directed him into the hazard. The specific duty at issue in that claim was a duty to avoid giving misleading directions.

The jury could conclude that the duty to avoid giving misleading directions was within the limited duty Knecht owed to his licensee, and that Knecht breached it by indicating to Dorr the way was clear when in fact a widow-maker hung poised over his path.

-Dorr at 430.

- E. The trial court erred in dismissing plaintiff's claims where plaintiff submitted evidence that defendant negligently instructed plaintiff how to operate the ATV.**
 - 1. When defendant chose to instruct plaintiff about the ATV, he assumed duties of ordinary care and thereafter breached those duties.**

As plaintiff explained in her affidavit:

When I was staying with my father, I rode his ATV periodically and my dad gave me some basic instruction on riding the ATV such as don't wind it out or go over jumps. He also explained that I should not use the right foot brake since it would stick and the brake light would run down the battery. Also, my dad demonstrated operation of the ATV by riding with one knee on the seat.

- CP 55:22-CP 56:4

Steve Lyon explained in his affidavit as follows:

When an owner of an ATV provides his ATV to others to ride, the owner has responsibilities to provide information about the ATV. In my opinion, James had a duty to tell Dori important things about the ATV, its use, and also about the property. First, that James had

modified the ATV to be able to operate in 2WD; Second, that the shifting mechanism was a direct-drive clutch-less shifting mechanism with unique operating characteristics; and Third, that James' demonstrated "knee on the seat" driving technique should not be used when the ATV was operated in icy conditions or conditions involving limited traction; Fourth, that Dori should not drive the ATV near the right side of the driveway because there was a cliff instead of a shoulder at that location.

It is my further opinion that James' failure to tell Dori about each of these issues was each a likely contributing cause of Dori's accident.

-CP 71:2-21

In *Alston v. Blythe*, 88 Wash.App. 26, 943 P.2d 692, (Div. 2,1997), a pedestrian was crossing the street when a truck stopped and the driver waved the pedestrian forward; the pedestrian was then struck and injured by another vehicle. The *Alston* court held that where a bus driver or truck driver undertakes to help a pedestrian cross the street safely, the driver assumes a duty of care to act reasonably, and the pedestrian may rely on the driver not to act negligently. *Id.* at 37.

As the *Alston* court explained:

Even *after* he (driver) stopped his truck, he still did not owe a duty to help Alston cross the street safely—unless and until he undertook to wave her in front of the truck and across the southbound lanes. If he did that, a jury could find that he assumed a duty to help Alston cross the street; that he was obligated to discharge that duty with reasonable care; and that he failed to exercise reasonable care by not perceiving Blythe, or by failing to warn of Blythe's presence.

-*Alston, supra*, at 37.

Plaintiff presented that defendant instructed plaintiff on how to operate the ATV, and that defendant specifically directed her to operate the ATV to perform the chore of going to the shop and starting a fire. In so doing, defendant had duties to exercise ordinary care. The trial court's ruling that no duties existed was error.

- F. The trial court erred when it ruled as a matter of law that the dangerous conditions of the premises were open and obvious, where plaintiff provided expert testimony to the contrary.**
- 1. In her opposition to summary judgment, plaintiff provided expert testimony establishing that the driveway area had latent dangerous conditions that proximately caused injury to plaintiff.**

Plaintiff herself testified that she had not noticed the relatively short portion of driveway area that had no shoulder, but instead had a steep cliff. CP 58:1-4.

In premises liability actions, a person's status, based on the common law classifications of persons entering upon real property (invitee, licensee, or trespasser), determines the scope of the duty of care owed by the possessor (owner or occupier) of that property. *Tincani v. Inland Empire Zoological Soc.*, 124 Wash.2d 121, 875 P.2d 621 Wash., 1994 *Van Dinter v. Kennewick*, 121 Wash.2d 38, 41, 846 P.2d 522

(1993); *Younce v. Ferguson*, 106 Wash.2d 658, 666-67, 724 P.2d 991 (1986).

In her opposition to summary judgment, plaintiff submitted the affidavit of Richard Gill, Ph.D., a well-credentialed expert in human factors analysis and premises safety. Dr. Gill testified that in his opinion, the driveway near the culvert was a dangerous latent condition on the premises at the time of the accident. Dr. Gill testified as follows:

- 1) The driveway has a gradual shoulder throughout most of its length from the house down to culvert;
- 2) The area by the culvert, unlike the rest of the road, had a relatively steep cliff, and the cliff was directly alongside a stream – the long, intact shoulder would tend to mislead a user into believing that the driveway was safe throughout its entire length, even though it was not;
- 3) The landowner did not provide any warning signs about the lack of shoulder and cliff;
- 4) The landowner did not mark the edge of the driveway with flagging or other markings for icy or snowy conditions, as is often seen in Eastern Washington;
- 5) The landowner did not provide any verbal warnings to Dori about the danger of the driveway;
- 6) There was a protective guardrail on only one side of the road, which, from a human factors perspective, is likely to lead a user of the roadway to believe that road danger at the culvert area was at the place of the protective barrier, and not on the side where no similar safety device existed; and

7) The guardrail on one side of the road would also likely create a false sense of security about the driveway for an ATV rider on the driveway.

- CP 87:14-88:10.

In its oral ruling, the trial court repeatedly returns to the theme that a landowner has no legal duty to clear naturally accumulating snow and ice. See, e.g, RP 16:21-24. (“In this case the dangerous condition was readily apparent the accumulation of snow and ice on a gravel roadway.”) The trial court did not address any of the expert testimony regarding latent dangerous conditions of the roadway area itself.

In *Owen*, the Washington Supreme Court held that the issue of whether a roadway was maintained in reasonably safe condition by the landowner was an issue of fact that precluded summary judgment. *Owen v. Burlington Northern and Santa Fe R.R. Co.*, 153 Wn. 2d 780, 788 (2005). The Court also noted that whether a condition is or is not dangerous is generally a question of fact. *Id. At 788*.

The *Owen* court further explained as follows:

Questions of fact may be determined as a matter of law “when reasonable minds could reach but one conclusion.” If reasonable minds can differ, the question of fact is one for the trier of fact, and summary judgment is not appropriate.

We have noted before that “issues of negligence and proximate cause are generally not susceptible to summary judgment.”

--*Owen v. Burlington Northern and Santa Fe R.R. Co.* at 788

Generally, a landowner has no duty to warn licensees about open and apparent dangers from a natural condition on the land. *Tincani v. Inland Empire Zoological Soc.*, 124 Wash.2d 121,135, 875 P.2d 621, 629 Wash. (1994). Importantly, the *Tincani* court held that natural conditions **are not open and apparent dangers as a matter of law**; whether a natural hazard is open and apparent depends on fact questions of whether the licensee know or had reason to know of the full extent of the risk posed by the natural condition. *Id. at 135* (emphasis added).

In addition, the court in *Tincani* stated that whether a condition is inherently dangerous or misleading is generally a question of fact. *Tincani v. Inland Empire Zoological Soc.*, also see *Leber v. King County*, 69 Wash. 134, 124 P. 397 (1912); *Provins v. Bevis*, 70 Wash.2d 131, 422 P.2d 505 (1967); *Tanguma v. Yakima County*, 18 Wash. App. 555, 563, 569 P.2d 1225 (1977).

As the *Tincani* court explained:

The phrase “open and apparent” assumes knowledge on the part of the licensee. Whether a natural hazard is open and apparent depends on whether the licensee knew, or had reason to know, the full extent of the risk posed by the condition. **That is a question of fact.**

--*Tincani* at 135(emphasis added)

Plaintiff presented evidence of an even stronger claim than would be the case in a pure “natural condition” case because the evidence showed that the driveway was not a “natural condition” on the land. Rather, the driveway was physically constructed and maintained by James. This is not the situation where an ATV rider was merely recreating on open land and encountering natural dangers such as rocks and plants.

2. Plaintiff’s primary theories of liability were predicated on dangerous conditions of the driveway area itself – not upon the failure to clear snow or ice.

The trial court found that “defendant had no duty to clear ice and snow from the roadway or warn plaintiff of the condition.” CP 104:17-18.

This finding is consistent with the court’s oral ruling finding no duty to clear ice or snow or to warn of such conditions. RP 17:9-12.

Importantly, as explained by plaintiff in her written materials and also at oral argument to the trial court, plaintiff was not premising her claims on any duty to clear ice or snow.

G. The trial court erred when it found that defendant had no knowledge about a condition that defendant himself created or maintained.

1. Notice requirement is not applicable where defendant created and maintained the latent dangerous conditions.

As explained in *Iwai v. State* Wn.2d 84, 90-91, 915 P.2d 1089 (1996), there are two exceptions to the notice requirement in premises

liability cases. The first exception, known as the *Pimentel* exception, is an unsafe condition that is inherent in the nature of the business – this exception is not applicable to the case at bar.

A second exception to the notice requirement arises when the landowner caused the hazardous condition. *Carlyle v. Safeway Stores, Inc.*, 78 Wash.App. 272, 275, 896 P.2d 750 (1995) (citing *Pimentel*, 100 Wash.2d at 49, 666 P.2d 888). In this situation, a plaintiff's duty to establish notice is also waived. *Id.*; accord, *Falconer v. Safeway Stores, Inc.*, 49 Wash.2d 478, 480, 303 P.2d 294 (1956) (“The rule requiring such notice is not applicable where the dangerous condition of the premises was created in the first instance by the occupant.... **One is presumed to know what one does.**”) (emphasis added)

The driveway was constructed by defendant with the use of heavy equipment to excavate the land, build the driveway, and clear the land for his shop, pump house, and manufactured home. CP 55:1-6. Defendant completed this construction several years prior to plaintiff's ATV accident. *Id.* As such, the driveway, guardrail placement, and shoulder construction were artificial conditions upon the land created by defendant himself.

2. Plaintiff submitted evidence of constructive notice.

Constructive notice arises when a dangerous condition ‘has existed for such time as would have afforded [the possessor] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger.’ *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652, 869 P.2d 1014 (1994) (quoting *Smith v. Manning's, Inc.*, 13 Wn.2d 573, 580, 126 P.2d 44 (1942)). Ordinarily, it is a question of fact for the jury, whether under all of the circumstances, a defective condition existed long enough so that it would have been discovered by an owner exercising reasonable care. *Morton v. Lee*, 75 Wn.2d 393, 397, 450 P.2d 957 (1969) (quoting *Presnell v. Safeway Stores, Inc.*, 60 Wn.2d 671, 374 P.2d 939 (1962)).

Constructive notice to the [defendant] may be inferred from the elapse of time a dangerous condition is permitted to continue when it is long enough to be able to say that [the defendant] ought to have known about the condition. *Holland v. City of Auburn*, 161 Wash. 594, 297 P. 769 [(1931)].

To prove constructive notice, Plaintiff carries the burden of showing the specific unsafe condition had “existed for such time as would have afforded [the defendant] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to

have removed the danger.” *Pimentel v. Roundup Co.*, 100 Wash.2d 39, 44, 666 P.2d 888 (1983) (quoting *Smith v. Manning's, Inc.*, 13 Wash.2d 573, 580, 126 P.2d 44 (1942)). The notice requirement insures liability attaches only to owners once they have become or should have become aware of a dangerous situation. *Wiltse v. Albertson's Inc.*, 116 Wash.2d 452, 453-54, 805 P.2d 793 (1991) (quoting *Jasko v. F.W. Woolworth Co.*, 177 Colo. 418, 420-21, 494 P.2d 839 (1972)).

As noted, plaintiff provided evidence that the driveway area was constructed and maintained by defendant for several years prior to the ATV accident. The trial court was provided with facts and evidence sufficient to at least create a jury question on constructive notice, particularly when all facts and reasonable inferences should have been seen in a light most favorable to plaintiff.

V. CONCLUSION

For the above-stated reasons, 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 28th day of February, 2014.

LAW OFFICE OF GRANT A. GEHRMANN



Grant A. Gehrmann, WSBA #21867
Attorney for Petitioner

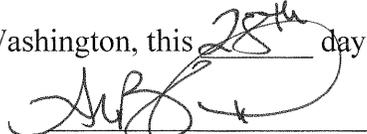
CERTIFICATE OF SERVICE

I certify that on the 28th day of February, 2014, a copy of OPENING BRIEF OF APPELLANT 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
NORMA S. NINOMIYA 650 NE Holladay St. Portland, OR 97232-2045 (served with complete copy)	<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
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
CHARLES TOOLE Dunn, Toole, Carter & Coats, LLP 112 W 4 th Street The Dalles, OR 97058	<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

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 28th day of February, 2014.



 Amber Batten