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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 320855-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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DORI CARDON,

Appellant,

v.

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

Respondent.

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RESPONDENT'S BRIEF

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Raymond W. Schutts  
Attorney for Respondent  
Law Offices of Raymond W. Schutts  
24001 E. Mission Ave., Ste. 101  
Liberty Lake, WA 99019  
(509) 944-2171  
WSBA No. 19061

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## I. COUNTERSTATEMENT OF THE ISSUES<sup>1</sup>

Issue 1.: With respect to plaintiff's negligence claim, is defendant entitled to summary judgment because Mr. Bredesen had no duty to instruct or warn the plaintiff as to the operation of an ATV?

Issue 2.: Alternatively, should the negligence claim be dismissed as a matter of law because there is no admissible evidence establishing a causal relationship between Mr. Bredesen's conduct and plaintiff's injury?

Issue 3.: Was summary judgment appropriate on plaintiff's premises liability theory because Mr. Bredesen had no duty to warn of conditions on his property that were open, obvious, and known to plaintiff?

## II. COUNTERSTATEMENT OF THE CASE

Plaintiff resided with her father at 279 Oak Flat Road during the four months leading up the accident on January 21, 2009. (CP 112). A private driveway approximately one mile long provided access to the residence. (CP 56). The driveway was an appropriate place to use an ATV. (CP 139).

Plaintiff was a licensed driver with a CDL endorsement to operate commercial vehicles. (CP 55). She had driven the ATV in question many times since 2007, when her brother taught her how to ride using the gear shift and brakes. (CP 111, 118, 126)). Plaintiff had driven the ATV

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<sup>1</sup> Plaintiff has incorrectly premised several of her assignments of error and associated statement of issues on factual findings made by the trial court. Because this Court will reconsider both the facts and the law on a de novo basis, findings of fact made by the trial court are superfluous and are not reviewed on appeal. *Redding v. Virginia Mason Medical Center*, 75 Wn. App. 424, 878 P.2d. 483 (1994).

up and down her father's driveway many times to get the mail and go to and from a shop building on the property. (CP 115, 118).

About three feet of snow fell on the Bredesen property in December of 2008. (CP 113-114). The driveway surface was not plowed anytime prior to the accident. (CP115). During that time, plaintiff drove both the ATV and a 4 wheel drive pickup truck with tire chains down the driveway. (CP 56, 114-115). The design and features of the driveway and the adjacent embankment were clearly visible as shown in photographs taken after the accident. (CP 27, 28, 93, 94, 145).

On January 21, 2009, ice and snow still covered portions of the driveway. (CP 56, 130). Plaintiff had previously driven the ATV on ice and snow. (CP 56, 111-116). When she got on the ATV that day, it had water on the seat from melting snow. Because she did not want to get her jeans wet, she rested her right knee on the top of the seat, put her left foot on the foot rest, and rode down the road in this manner until she lost control of the ATV. She had never ridden in this manner before. She always had sat on the seat of the ATV prior to that particular morning. (CP 119-120).

While traveling down the driveway, plaintiff wound up the engine in first gear. (CP 67-68). As she approached a sharp corner, she shifted to

second gear. (CP 61, 93, 120-121, 145). Plaintiff does not know what happened next, other than that the ATV slid and then “kicked up,” causing her to lose control. She does not know what caused the ATV to slide and kick up. (CP 121, 122). She injured herself when she let go of the handlebars and fell off the machine. (CP 124).

The ATV had been modified by the Honda dealership so that it could be operated in 2 or 4 wheel drive. (CP 64). There was a visible lever for switching from 4 to 2 wheel drive with a sticker on it labeled “2x4.” (CP 144). Plaintiff does not know if the ATV was in 2 or 4 wheel drive at the time of the accident. (CP128, 129).

### III. ARGUMENT

#### **A. The issues on appeal are decided on a de novo basis using the same analysis the trial court applied.**

In reviewing an order granting summary judgment, this Court engages in a de novo review of the facts and the law. *Brouillet v. Cowles Pub. Co.*, 114 Wn. 2d 788, 791 (1990). Under CR 56, summary judgment is proper when there are no genuine issues of material fact. CR 56(c); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

A defendant may support its motion by challenging the sufficiency of plaintiff’s evidence as to any material issue. *Las v. Yellow Front Stores*, 66 Wn. App 197, 198 (1992). The burden then shifts to the non-moving

party to prove the existence of a genuine issue of material fact on that issue. *Id.* The party opposing summary judgment must submit “competent testimony setting forth specific **facts**, as opposed to general conclusions to demonstrate a genuine issue of material fact.” *Thompson v. Everett Clinic*, 71 Wn.App. 548, 555 (1993) *emphasis added*, and CR 56(e). Further, the non-moving party may not rely on speculation or argumentative assertions that unresolved fact issues remain, but instead the opposition “must set forth specific facts that sufficiently rebut the moving party’s contentions.” *Seven Gables Corp. v. MGM/USA Entertainment Co.*, 106 Wn.2d 1, 13 (1986).

Issues regarding the openness of a hazard and issues regarding notice do not necessarily preclude summary judgment. While these issues may often create a question of fact, it “does not preclude trial courts from weeding out meritless claims prior to trial.” Summary judgment should be entered against a licensee on a premises claim if a genuine issue of material fact does not exist over a licensee’s awareness of an obvious danger, or over a landowner’s lack of knowledge of a hidden risk. *Tincani v. Inland Empire Zoo. Soc.*, 124 Wash.2d 121, 135 FN4, 875 P.2d 621 (1994).

CR 56(e) requires plaintiff's response to the summary judgment motion to contain **admissible evidence** that demonstrates a material issue of fact. Although the defendant Estate generally challenged the admissibility of certain evidence from plaintiff in its summary judgment papers, the Estate on appeal has identified more specific reasons why significant portions of the declarations of plaintiff and her experts must be excluded from evidence. Because the appellate court applies a *de novo* standard in reviewing the trial court decision in a summary judgment proceeding, the general rule that only arguments made to the trial court may be raised on appeal has no applicability in the present setting. The appellate court engages in the same inquiry as the trial court; therefore, arguments challenging the admissibility of evidence may be raised for the first time on appeal. *See Parkin v. Colocousis*, 53 Wash. App. 649, 769 P.2d 326 (1989). In *Parkin*, the court of appeals expressly allowed the plaintiff to challenge the sufficiency of conclusory defense expert affidavits even though the argument had not been raised with the trial court.

**B. Mr. Bredesen had no duty to instruct or warn plaintiff about the operation of the ATV.**

To state a claim for negligence, the plaintiff must state facts to show the existence of all four essential elements: 1) duty, 2) breach, 3) injury and 4) a

proximate cause relationship between the claimed breach and the resulting injury. *Hostetler v. Ward*, 41 Wash. App. 343, 349, 704 P.2d 1193 (1985). Duty is a question of law. *Hutchins v. 10001 Fourth Avenue Assocs.*, 116 Wash.2d 217, 220, 802 P.2d 1360 (1991); *Hostetler v. Ward*, 41 Wash. App. 343, 349, 704 P.2d 1193 (1985). Therefore, if there is no legal duty owed to plaintiff based on the undisputed facts, then defendant is entitled to summary judgment as a matter of law.

In this case, plaintiff is an adult with a valid driver license and a commercial driver's license endorsement. There is no statutory or common law duty in Washington imposed on one adult to teach another adult to properly operate an ATV or to warn an adult about the characteristics of such a vehicle. Plaintiff has cited no legal authority that Mr. Bredesen had a legal duty to specifically instruct Plaintiff about the use of the ATV. Nor could her ATV safety expert point to any such requirement in Washington. (CP 135, 136-138). Under Washington common law, the owner of a vehicle loaned to another owes no duty for injuries caused by the vehicle unless the vehicle had known defects rendering it inherently dangerous. *Robbins v. Hansen*, 184 Wash. 677, 52 P.2d 908 (1935). In the instant case, plaintiff has not produced any evidence that the ATV was defective or inherently dangerous.

Absent evidence that the ATV was defective or inherently dangerous when operated in 2 wheel drive mode, the duty to operate the vehicle safely shifts entirely to Ms. Cardon, who admittedly had ridden the ATV before in snow or icy conditions. The situation here is analogous to driving automobiles having all wheel drive, front wheel drive, or rear wheel drive, or being equipped with summer, winter, or studded tires. Each vehicle may perform differently with various road conditions, but that does not make any of the vehicles defective or inherently dangerous. Significantly, plaintiff's ATV expert was likewise unable to opine that the ATV in question, even with the modification, was in any way defective or inherently dangerous.

In an effort to establish a duty on the part of her father, plaintiff has resorted to the use of inadmissible evidence that she was "instructed by her father" to use the ATV on the day of the accident, that Mr. Bredesen had taught her the "knee on the seat" riding stance she used that day, and that he failed to advise her about the 2 wheel drive modification to the ATV. This evidence presented in plaintiff's affidavit purports to recount statements and conduct attributed to her father, now deceased, in violation of RCW 5.60.030, commonly known as the dead man statute. The statute specifically bars a party bringing a claim against the estate of an alleged

tortfeasor from offering testimony about any statements made by the deceased or any transaction between the plaintiff and the deceased.

An alleged act of negligence qualifies as a transaction under the dead man statute. *Hofsvang v. Estate of Brooke*, 78 Wash. App. 315, 897 P.2d 370 (1995). Testimony involves a transaction with the deceased if the testimony could be contradicted by the deceased if he or she were still alive. Whether the deceased would have contradicted the testimony is immaterial. *Wildman v. Taylor*, 46 Wash. App. 546, 731 P.2d 541 (1987). Moreover, the court in *Wildman* specifically held that a plaintiff cannot rely upon an affidavit or declaration in a summary judgment proceeding, where the document is offered simply as a substitute for live testimony that would be barred by the statute. *Id.*

Rather than relying on legal authority to establish a duty, plaintiff has merely shared the inadmissible statements concerning the conduct of Mr. Bredesen with her experts, who then used the information to generate a myriad of conclusory statements based wholly on conjecture and speculation that cannot be relied upon as evidence to defeat summary judgment. In the following cases, the appellate court found speculative expert opinions insufficient to overcome motions for summary judgment. *Watters v. Aberdeen Recreation, Inc.*, 75 Wash. App. 710, 879 P.2d 337

(1994); *Guile v. Ballard Community Hospital*, 70 Wash. App. 18, 851 P.2d 689 (1993). Nor will the court consider conclusory statements contained in declarations filed by the nonmoving party in a summary judgment proceeding. *Public Utility Dist. No. 1 v. WPPSS*, 104 Wn. 2d 353, 361, 705 P.2d 1195 (1985); *Overton v. Consolidated Insurance Co.*, 145 Wash. 2d 417, 430-31, 38 P.3d 322 (2002).

Since plaintiff lacks support in the law, she is left with no other option than to have her experts testify that a duty exists. This is improper, and such testimony was properly disregarded by the trial court. Legal opinions and opinions on pure issues of law, such as the existence of a legal duty, must be disregarded by the court in deciding a summary judgment motion. *Molsness v. City of Walla Walla*, 84 Wash. App. 393, 928 P.2d 1108 (1996) (expert's opinion on legal issue disregarded); *Terrell C. v. DSHS*, 120 Wash. App. 20, 84 P.3d 899 (2004) (refusing to consider an expert opinion that the State had a legal duty to warn of risks posed by children under its supervision); *Tores v. King County*, 119 Wash. App. 1, 84 P.3d 252 (2003) (trial judge properly disregarded an expert's opinion that a transit authority failed to adequately protect its bus passengers from injury in an accident).

**C. The trial court properly granted summary judgment on the negligence claim because there was no admissible evidence to establish a casual relationship between Mr. Bredesen's conduct and plaintiff's injury.**

Plaintiff cannot point to any admissible evidence that:

1. the ATV was in 2 wheel drive mode at the time of the accident;
2. Mr. Bredesen knew the ATV was in 2 wheel drive mode on the day of the accident;
3. 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;
4. operating the ATV in 2 wheel drive mode caused the ATV to leave the road; and
5. given the manner in which plaintiff was riding the ATV and shifting the gears, she would been able to retain control even if it was in 4 wheel mode.

Plaintiff's ATV expert merely surmises that the machine was in 2 wheel drive because Mr. Bredesen typically used that mode. Such an inference is impermissible since it is equally plausible that he had switched the ATV to 4 wheel drive because of the wintery road conditions. Nor can it be inferred that Mr. Bredesen knew which mode the ATV was in, as the imputation of such knowledge would violate the dead man statute. 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.

Although Mr. Lyon opines that the use of two wheel drive caused the machine to lose traction, he also states that plaintiff's action of revving or "winding out" the engine in first gear before shifting to a higher gear would cause the ATV to "lunge forward," leading to a loss of control. Mr. Lyon admittedly did not attempt to duplicate the revving and shifting action on the Bredesen ATV because he was concerned he would damage the ATV's engine. (CP 80). Nor did he operate the ATV on an icy road using the "knee on the seat" method attempted by plaintiff. For those reasons, he has no reasonable basis for his conclusion about the cause of the accident.

**D. Mr. Bredesen had no duty to correct or warn of dangerous conditions on his property that were open and obvious.**

Plaintiff concedes her status was that of a social guest or licensee on the defendant's premises,<sup>2</sup> even citing, despite it being inapplicable, Washington Pattern Instruction 20.03, Duty to Licensee or Social Guest, in her brief. Under Washington law, a possessor of land owes a duty of ordinary care to a social guest or licensee in connection with dangerous conditions on the premises of which the owner has knowledge or should have knowledge, and of which the guest cannot be expected to have knowledge. *Younce v. Ferguson*, 106 Wn. 2d 658, 724 P.2d 991 (1986).

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<sup>2</sup> Plaintiff was staying with her parents on the property indefinitely after she was laid off from her job as a bus driver.

The duty of ordinary care includes a duty to warn, but no warning is required for open and apparent dangers from natural conditions. *Tincani v. Inland Empire Zoological Soc.*, 124 Wn. 2d 121, 875 P.2d 621 (1994).

In *Memel v. Reimer*, 85 Wn. 2d 685, 538 P.2d 517 (1975), the court held that a possessor of land owes a duty to exercise reasonable care toward licensees or social guests when there is a known dangerous condition on the property that the possessor can reasonably anticipate the licensee will not discover or realize the risks involved. *Memel* specifically adopted the duty of care set forth in Restatement (Second) of Torts § 342.

That section states:

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

- (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
- (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
- (c) the licensees do not know or have reason to know of the condition and risk involved.

Restatement (Second) of Torts § 342.

Thus, a landowner has no duty to warn licensees about open and apparent dangers from a natural condition. Further, dangerous conditions

due to natural accumulations of snow do not give rise to liability. *Birdsall v. Abrams*, 105 Wash. App. 24 (2001). In *Thompson v. Katzer*, 86 Wash. App. 280, 936 P.2d 421 (1997), the appellate court affirmed summary judgment for the defense because the plaintiff-licensee clearly saw and perceived the risk of the snow upon which he slipped.<sup>3</sup>

Plaintiff alleges that the road was dangerous because it sloped towards an adjacent creek and lacked guard rails. Whether a 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. While the test of whether a hazard is open and apparent may often create a question of fact, a trial court may still enter summary judgment if there is no dispute over material facts regarding plaintiff's awareness of a danger, or over a landowner's lack of knowledge of a hidden risk. *Tincani v. Inland Empire Zoo. Soc.*, 124 Wash.2d 121, 135 FN4, 875 P.2d 621 (1994).

In this case, plaintiff had been staying on the property since September 2008. She used the driveway often both before and after it snowed in December 2008. She had driven the ATV on the driveway several times before the day of the accident. The undisputed facts are that plaintiff knew or had reason to know the conditions of the driveway with and without snow

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<sup>3</sup> Even if plaintiff were considered to be an invitee, the landowner's duty is still "predicated on a superior knowledge concerning the dangers of the premises..." *Caron v. Grays Harbor Co.*, 18 Wn.2d 397, 139 P.2d 626 (1943).

as she had been using the driveway for several months. The icy road surface, the sharp corner, and the unguarded embankment were all open and obvious conditions, as demonstrated by the photos offered by plaintiff, and there is no evidence of any hazard known to Mr. Bredesen which was not equally apparent to plaintiff. Even plaintiff's expert concedes that the driveway was appropriate for use by an ATV. There is simply no evidence of a dangerous condition or of superior knowledge of Mr. Bredesen to support a premises liability claim. Plaintiff's experts cannot create a duty to warn of a condition on the property where no legal duty exists.

Plaintiff's reliance on *Potts v. Amis*, 62, Wa.2d 777, 384 P.2d 825 (1963), *Sherman v. Seattle*, 57 Wa.2d 233, 356 P.2d 316 (1960), and WPI 120.03 Duty to Licensee or Social Guest – Activities of Owner or Occupier is misplaced. In reaching its decision in *Potts*, the Court quotes from 2 Harper & James, Law of Torts § 27.10, p. 1475:

‘The prevailing view is to the contrary, however, and it is now generally held that in cases involving injury resulting from **active conduct**, as distinguished from conditions of the premises, the landowner or possessor may be liable for failure to exercise ordinary care towards a licensee whose presence on the land is known or should reasonably be known to the owner or possessor.’ (Emphasis in original).

It is this emphasis on “active conduct” that distinguishes *Potts*, *Sherman* and WPI 120.03 from this case. Plaintiff was not injured by any active conduct by Mr. Bredesen. He did not engage in any action which equates to

a host hitting a guest in the jaw with a golf club while demonstrating a golf swing (Potts) or a City of Seattle employee running over a small child with the lift that he is operating (Sherman). There was no active conduct on the part of the Defendant at all.

#### IV. CONCLUSION

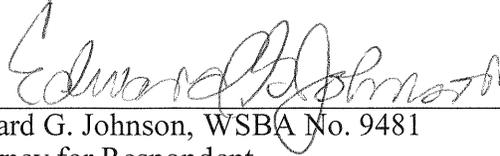
Plaintiff's claims based on premises liability fail as the undisputed facts show that plaintiff was a frequent user of the driveway and was well aware of the condition of the driveway. There was no duty for Mr. Bredeesen to warn of open and obvious dangers involving the surface of the driveway or the adjacent embankment. Plaintiff's expert concedes the driveway was appropriate for use by an ATV.

Plaintiff's negligence claim also fails as there was no duty for Mr. Bredeesen to warn his adult daughter or instruct her on how to safely operate an ATV that was not defective or inherently dangerous. Moreover, the undisputed facts indicate that the plaintiff was a licensed driver, her brother taught her to use the ATV, and she had driven it for several months over the very driveway on which she was injured.

For these reasons, this Court should affirm the trial court's summary judgment ruling dismissing plaintiff's negligence and premises liability causes of action.

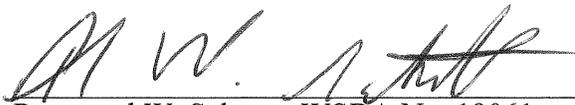
Respectfully submitted this 15th day of May, 2014.

LAW OFFICES OF RAYMOND W. SCHUTTS

A handwritten signature in cursive script, appearing to read "Edward G. Johnson".

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Edward G. Johnson, WSBA No. 9481  
Attorney for Respondent

A handwritten signature in cursive script, appearing to read "Raymond W. Schutts".

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Raymond W. Schutts, WSBA No. 19061  
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 15<sup>th</sup> day of May, 2014 I caused to be served a true and correct copy of the foregoing RESPONDENT'S BRIEF by the method indicated below, and addressed to the following:

Grant A. Gehrman  
Law Office of Grant A.  
Gehrman, P.S.  
203 SE Park Plaza Drive  
Suite 215  
Vancouver, WA 98684

<input type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input type="checkbox"/>	EMAIL
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<input type="checkbox"/>	FACSIMILE

Charles K. Toole  
Dunn, Toole, Carter & Coats LLP  
112 West 4th Street  
The Dalles, OR 97058

<input type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
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Debi R. Vocca