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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No 95827-1

No. 346714

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

MONICA DIAZ BARRIGA FIGUEROA, AS PARENT AND NATURAL GUARDIAN OF BRAYAN MARTINEZ, A MINOR,

Appellant/Plaintiff,

vs.

CONSUELO PRIETO MARISCAL,

Respondent/Defendant.

BRIEF OF RESPONDENT

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INTRODUCTION

The disputed factual issues as to how the accident occurred, including the route Brayan pedaled his bike before impact and whether he was obscured by the parked vehicles or their shadows and whether his shoelace became tangled, were properly submitted to and decided by the jury.

STATEMENT OF FACTS

Prior to the accident plaintiff Monica Figueroa washed her son Brayan's shoes with the laces in them in a washing machine. VRP 293-94. When Ms. Figueroa put the shoes in the washer, the shoelaces were the same length, but when she took them out of the washer the shoelaces were not the same length. VRP 295. Ms. Figueroa did not try to do anything to correct the length of the laces to make them equal. VRP 296.

Brayan testified that the shoelaces he was wearing at the time of the accident were tied in a double knot. VRP 324. The bike had an oversized chain guard. Exhibit 117 and VRP 192-93.

On the day after the accident Brayan told his mother the accident occurred as he was riding the bike back toward their house and the bike went down and he ended up next to the parked truck where he was trying to get his shoelace unstuck from the bike. VRP 291. Ms. Figueroa subsequently had an initial consultation with her attorney and then signed the blank PIP application, Exhibit 101, which contained the following accident description:

> Vehicle was traveling on North Cedar when child on bike rode into road. There were two parked cars on the road, creating a blind spot for the driver. Child was struck and had right leg ran over.

VRP 299.

This accident description was completed by an assistant in the plaintiff attorney's office, Josie Keipke. VRP 469. Ms. Keipke looked at documentary information from the initial consultation with the plaintiff. VRP 472. Ms. Kiepke testified that the information in those documents stated that Brayan "was a boy on a bike who was hit by a vehicle, with a broken leg." VRP 473. Ms. Kiepke did not recall any information in the documents about Brayan's shoelace being tangled in the

bike. VRP 473. Nor was there information about Brayan only being on the sidewalk at all times before being hit by the car while on the bike. VRP 473. There were persons in the plaintiff attorney's office who spoke both Spanish and English who would have been available to write down Ms. Figueroa's description of the accident. VRP 474.

Plaintiff's accident reconstructionist, Patrick Stadler, reviewed physical evidence and secondary evidence including the Police Traffic Collision Report prepared by Pasco Police Department Officer Flanagan, the deposition of defendant Consuelo Prieto, the report of Defendant's accident reconstructionist Eric Hunter, and also interviewed Brayan at the accident scene twice. VRP 163. In the first meeting with Stadler, Brayan stated he rode his bicycle off of the sidewalk in front of the parked orange pickup to do a U-turn type maneuver in Cedar Street. VRP at 165-66. Brayan gave this first description to Stadler in January of 2015, which was approximately one year and two months after the October 30, 2014 accident. VRP 167. Also present were Brayan's mother

and attorney Eddie Morfin, who speaks Spanish and English and was able to serve as an interpreter. VRP 218.

Stadler drew a diagram, Exhibit 106, depicting the description given by Brayan showing that while making the U-turn maneuver Brayan pedaled his bike into the southbound lane of Cedar Street. VRP 168. Stadler considered the factual scenario where Brayan pedaled in front of the parked pickup into defendant Prieto's southbound lane of travel before bailing out at the last second. VRP 170, 173. In that scenario Stadler testified that defendant Prieto would have approximately 1.5 seconds of perception/reaction time. VRP 174.

Stadler admitted that during their first meeting Brayan did not say that the bike veered into the street as a result of his shoelace being tangled. VRP 185. Further, Stadler was not sure where Brayan was when his shoelace did allegedly get tangled other than it was in the "proximity of where he came to rest." VRP 185.

Stadler subsequently reviewed the video and transcript from Brayan's deposition which was taken after Stadler's first meeting with Brayan at the scene. VRP 214-15. There was a

"discrepancy" between Brayan's original description and his deposition description about the alleged route he pedaled the bike to get to the location where the shoelace allegedly got tangled. VRP 215. Stadler testified there was "quite a bit of difference in the versions," and Brayan's deposition "story of his last maneuver was not that which I interpreted" because it placed Brayan on the sidewalk at the time his shoe allegedly became tangled. VRP 216-17.

Because of the discrepancy, Stadler thought it was necessary for him to visit with Brayan again "to discuss the discrepancy and to discuss this other version." VRP 215. Stadler then met with Brayan for the second time at the accident scene to get more details. VRP 215. Stadler testified that apparently there was a "miscommunication" when he first met with Brayan at the scene even though one of Plaintiff's attorneys, Eddie Morfin, was also present to serve as a Spanish-English interpreter. VRP 216-2018. Stadler admitted that he "became aware of the second version" after reviewing Brayan's deposition which was taken one month after Stadler's deposition. VRP 219. However, even under Brayan's second

version Stadler testified Brayan would have been blocked from defendant Prieto's line of sight for some time until Brayan came out from behind the parked orange pickup. VRP 219.

Immediately before the accident, defendant Prieto was driving a minivan southbound on Cedar at approximately 20-25 miles per hour and no one was in the roadway of her lane of travel. VRP 370-71. Ms. Prieto's teenage daughter Melissa was riding in the front passenger seat. VRP 358. There were parked vehicles on the right along the curb, one of which was the orange pickup and behind it a van. VRP 371. As Ms. Prieto drove toward the front of the orange pickup, she heard a noise on the passenger side of her van and felt her van jump a little. VRP 371. She immediately stopped, got out and went to where Brayan was located. VRP 372. When she got to Brayan, none of his laces were tangled in the bike. VRP 373. Melissa also got out and went to where Brayan was located. Melissa immediately called 911. VRP 373.

Melissa testified as they drove south on Cedar toward the accident scene, her mother was not distracted and was not using a cell phone. VRP 359-60. The first indication Melissa

had of anything unusual was when she heard a noise on the passenger side of the van and felt a bump. VRP 361. Before Melissa heard the sound, there was no one in the roadway. VRP 361. When Melissa got out and went to where Brayan was located, his shoelace was not tangled in the bicycle and the bicycle was about two feet away from Brayan. VRP 362.

Brayan's father and uncle then arrived at the scene and Melissa saw Brayan's uncle remove the bike from the scene, and when he did so Brayan's shoelace was not tangled in the bike. VRP 363-64. Brayan's father was trying to pick Brayan up and place him in a truck at the time Melissa was calling 911. VRP 364. Melissa conveyed to Brayan's father the 911 operator's instruction to not move anything until the police officers arrived, at which time he put Brayan back where he was. VRP 364.

Defendant's accident reconstructionist Eric Hunter completed his investigation and report within three months after the accident. Hunter testified that accident reconstructionists reasonably rely on facts and data contained in police reports in forming opinions in accident reconstruction work. VRP 390.

Hunter opined that the perception/reaction time for a driver faced with an unknown hazard entering the roadway from a blind spot created by a parked vehicle would be approximately 1.6 seconds or less. VRP 397.

Experts Stadler and Hunter each testified that the parked vehicles could have created a shadow over the area in which Brayan was struck. VRP 241, 454.

Nurse Practitioner Aaron Johnson testified that Brayan "states that he was kneeling on the ground and tying his shoelaces, when he was ran over." VRP 66. However, Johnson admitted that at the only time he saw Brayan as a patient, one year after the accident, there was nothing recorded in the history portion of the chart note about Brayan kneeling in the roadway or his shoelace. VRP 70. Johnson had reviewed the accident reconstruction reports of Plaintiff's expert, Patrick Stadler, Defendant's expert Eric Hunter, the emergency room notes and Benton-Franklin Orthopedic records. VRP 68-69. Johnson admitted that there is no information in the medical records about Brayan's shoelace being tangled. VRP 70.

ARGUMENT

1. Standard of review for evidentiary rulings.

The standard of review for evidentiary rulings is abuse of discretion. *R.W.R. Management, Inc. v. Citizens Realty Co.*, 133 Wn. App. 265, 279, 135 P.3d 955, 962 (2006). Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* at 279.

2. Standard of review for judgment notwithstanding the verdict.

An appellate court reviews the denial of a motion for judgment notwithstanding the verdict de novo, applying the same standard of review as the trial court. *Hizey v. Carpenter*, 119 W.2d 251, 271, 830 P.2d 646 (1992). A judgment notwithstanding the verdict is only appropriate if, when reviewing the material evidence most favorable to the non-moving party, the court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the non-moving party. *Id.* at 271-72.

3. Standard of review for a motion for new trial.

The standard of review for a motion for a new trial on review is abuse of discretion. *Portch v. Sommerville*, 113 Wn. App. 807, 810, 55 P.3d 661, 663 (2002). Judicial discretion is abused if exercised on untenable grounds or for untenable reasons. *Id.* at 810. However, even if the trial court abuses its discretion, in order for error to be reversible, the appellant must demonstrate prejudice. *Id.* at 810.

4. Exhibit 101 was properly admitted.

The trial court properly admitted Exhibit 101 as an admission against interest pursuant to ER 801(d)(2). The exhibit was a PIP (Personal Injury Protection) application signed by plaintiff Monica Figueroa, Brayan's mother, on November 21, 2013, three weeks after the accident. Ms. Figueroa testified that the day after the accident Brayan advised her how the accident occurred. Subsequently, Ms. Figueroa had an initial consultation with her attorney's office. The description of the accident in Exhibit 101 was filled out by a staff person in the plaintiff attorney's office, Josie Kiepke, who had looked at documentary information from the plaintiff's initial consultation

with the plaintiff's attorney. The exhibit did not contain any reference to insurance.

There is no dispute that the plaintiff attorney's office and its employee acted in a representative capacity on behalf of the plaintiff in executing the document and had authorization by the plaintiff to provide the accident description and was acting within the scope of the authority to make the statement for the plaintiff.

Consistent with ER 801(d)(2), the description of the accident was offered against the plaintiff and was (i) the party's own statement, (ii) in either an individual or a representative capacity, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party.

The accident description is clearly not the qualified work product protected opinion of the PIP insurer's independent medical examiner as in the case relied upon by the Appellant, *Harris v. Drake*, 152 Wn.2d 480, 99 P.3d 872 (2004). Pursuant to CR 26(b)(5), *Harris* provided qualified work product

protection to the facts and opinions acquired or developed by a PIP insurer's consulting medical expert prepared in anticipation of PIP litigation or arbitration. *Id.* at 489. This CR 26(b)(5) consulting, non-testifying expert qualified work product protection does not apply to the PIP accident description.

The qualified work product protection afforded in *Heidibrink v. Moriwake,* 104 Wn.2d 392, 706 P.2d 212 (1985), involved a statement by an insured to his liability insurer in anticipation of litigation. There is no proof in the record that the description of the accident provided in Exhibit 101 was provided in anticipation of litigation. Work product privilege does not exist for documents prepared in the normal course of business. *Escalante v. Sentry Ins. Co.*, 49 Wn. App. 375, 395, 743 P.2d 832 (1987).

Ms. Figueroa is the named plaintiff in this matter. Appellant's argument that there is no way to trace the statement in the accident description to Brayan disregards Ms. Figueroa's testimony that Brayan described the facts of the accident to her the day after the accident. Brayan was not the only person present at the time of the accident and his last

version of the accident was different than his first version and contrary to the testimony of defendant Prieto and her daughter. Plaintiff's expert Patrick Stadler testified about Brayan's different versions of the accident and specifically met with Brayan a second time to discuss "the discrepancy" in Brayan's versions. VRP 215.

The description in Exhibit 101 was consistent with Stadler's testimony that Brayan had stated he was riding his bike into the road near two parked vehicles which created a blind spot for Ms. Prieto. Ms. Prieto and her daughter Melissa testified no one was in the street as they approached the parked vehicles.

When an Appellant contends that a trial court made an erroneous evidentiary ruling, the question on appeal becomes whether the error was prejudicial because error without prejudice is not grounds for reversal. *Brown v. Spokane Cty Fire Prt. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). An error will not be considered prejudicial unless it affects the outcome of the trial. *Id.* at 196.

Admitting Exhibit 101 and testimony about the accident description contained in it was not reversible error because it was an admission against interest and similar to other undisputed admissible evidence. Even assuming admission of Exhibit 101 was improper, it was harmless error because it was cumulative or only of minor significance in reference to the evidence as a whole. *Mutual of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn. App. 702, 729, 315 P.3d 1143 (2013).

5. The trial court did not err in allowing evidence regarding Brayan's medical records.

The only medical witness called by Plaintiff to testify at trial was Nurse Practitioner Aaron Johnson who saw Brayan one time approximately one year after the accident. Johnson testified that in formulating his opinions he reviewed the Emergency Room notes, Benton-Franklin Orthopedic records and the reports of the respective two accident reconstructionists. VRP 68-69. When asked by Plaintiff's counsel on direct if Johnson was aware of Brayan's version of the accident, Johnson testified "he states that he was kneeling on the ground and tying his shoelaces when he was ran over." VRP 66.

The trial court properly ruled that Plaintiff's counsel opened the door relative to the accident information in the medical records by asking Johnson about Brayan's version of the accident. When a party opens up a subject of inquiry on direct, he contemplates that the rules will permit cross examination within the scope of the examination which the subject matter was first introduced. *Ang v. Martin*, 118 Wn. App. 553, 562, 76 P.3d 787 (2003); affirmed 154 Wn.2d 477, 114 P.3d 637 (2005). The trial court has considerable discretion in administering the open door rule which is aimed at fairness and truth-seeking. *Id.* at 562.

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. 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.

Id. at 562 citing *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). Because the plaintiff opened up the subject of Brayan's versions of the accident, the trial court did not abuse

its discretion in permitting further questioning on that topic. *Id.* at 563.

6. The trial court did not err by allowing evidence of the police report.

The police report is the type of data reasonably relied upon by accident reconstructionists in forming their opinions as was done by Plaintiff's expert Patrick Stadler and Defendant's expert Eric Hunter. Importantly, Stadler testified that initially he reviewed the Police Report "and had it in my mind that that was the way things happened." VRP 197. Pursuant to ER 703, this type of data need not be admissible in evidence. The admissibility of opinion evidence pursuant to ER 703 is within the sound discretion of the trial judge. *State v. Ecklund*, 30 Wn. App. 313, 318, 633 P.2d 933 (1981). The trial court appropriately gave a limiting instruction, No. 4, which stated:

> The court allowed the experts to explain the factual bases for their opinions. To the extent one or more of the factual bases for each expert's opinion was not otherwise admitted into evidence at trial, you should consider such factual bases only for the purposes of evaluating the credibility of each expert and not as substantive evidence.

Contrary to the indication in Appellant's brief, the police report itself was not an exhibit admitted into evidence.

7. Accident reconstructionist Eric Hunter's testimony was properly admitted.

The Appellant's appeal is basically that all direct and circumstantial evidence of the accident facts other than Brayan's last version be disregarded and deemed inadmissible. Plaintiff's accident reconstructionist Patrick Stadler prepared a diagram, admitted as Exhibit 106, based upon information he obtained from Brayan when they met the first time at the scene depicting the route Brayan pedaled the bicycle off the sidewalk and onto the southbound lane of Cedar Street in front of the parked orange pickup before making a U-turn in Cedar to return to the sidewalk. VRP 168, 173. Stadler testified that if Brayan pedaled out in front of the parked vehicle Ms. Prieto would have approximately 1.5 seconds perception/reaction time.

Similarly, Defendant's expert Eric Hunter opined that the perception/reaction time for a driver in Ms. Prieto's position was 1.6 seconds. Considering the evidence as a whole, Mr. Hunter's 1.6 seconds perception/reaction time, which was also

confirmed by Plaintiff's expert Stadler, was not conclusory or speculative.

Generally expert testimony is admissible if (1) the expert is qualified, (2) the expert relies on generally accepted beliefs in the scientific community, and (3) the testimony would be helpful to the trier of fact. *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 352, 333 P.3d 388 (2014). Trial courts are afforded wide discretion in applying this test and the trial court's expert opinion decisions will not be disturbed on appeal absent an abuse of such discretion. *Id.* at 352.

Matsunaga addressed Evidence Rules 702 through 705 to be applied by the trial court in determining the admissibility of expert testimony. As in *Matsunaga*, the trial court in this case properly performed its gatekeeping function in determining Hunter had the requisite expertise and foundation to render his opinions which were relevant and helpful to the jury. The issue regarding Hunter's credibility, like the credibility of all of the witnesses, was left for the jury to decide.

/ / /

8. The trial court properly denied Plaintiff's Motion for Judgment Notwithstanding the Verdict.

The court properly denied Plaintiff's Motion for Judgment Notwithstanding the Verdict because there was substantial evidence or reasonable inference to sustain the jury's verdict in favor of the defendant.

> In ruling on a motion for judgment notwithstanding the verdict, a trial court exercises no discretion. The court must accept the truth of the nonmoving party's evidence and draw all favorable inferences that may reasonably be evinced. The evidence must be viewed in the light most favorable to the nonmoving party; the court may grant the motion only where there is no competent evidence or reasonable inference that would sustain a verdict for the nonmoving party. "'If there is any justifiable evidence upon which reasonable minds might reach conclusions that sustain the verdict, the question is for the jury.'"
>
> In reviewing a motion for judgment notwithstanding the verdict, it is essential to keep in mind that a verdict does not rest on speculation or conjecture when founded upon reasonable inferences drawn from circumstantial facts.

Douglas v. Freeman, 117 Wn. 2d 242, 247, 254-55, 814 P.2d 1160, 1167 (1991), citations omitted.

Defendant Prieto and her daughter testified that Brayan was not in the street as they approached southbound on Cedar.

They also testified that after the impact and before his father and uncle arrived at the scene, Brayan's shoelace was not tangled in the bike. Their testimony regarding the facts immediately before and after the accident is relevant and admissible. There was also evidence about the shadow from the parked vehicles in the area where Brayan was struck, creating an issue of fact as to whether a driver in Ms. Prieto's position exercising reasonable care would have been able to see Brayan.

Plaintiff's own expert, Pat Stadler, testified that he was initially told by Brayan that Brayan had been pedaling his bicycle out in front of the parked pickup truck into the southbound lane on Cedar and making loops in the roadway back to the sidewalk. Brayan also testified that his bicycle wobbled into the roadway in front of the parked pickup truck. These facts are consistent with defendant expert Eric Hunter's opinion, also admitted by Plaintiff's expert Pat Stadler, that Ms. Prieto would have a perception/reaction time of 1.6 seconds and that the parked pickup truck created a triangular view obstruction. Mr. Stadler's testimony regarding Brayan riding his bicycle into the

street and Brayan's own testimony about his bicycle wobbling into the street each place Brayan in the triangular vision obstruction.

Accepting the truth of the defendant's evidence and viewing all of the evidence and reasonable inferences in a light most favorable to the defendant, there was sufficient and justifiable evidence upon which reasonable minds might reach conclusions to sustain the verdict and the Court properly submitted the liability issue to the jury.

9. The trial court properly denied Plaintiff's Motion for a New Trial.

A trial court has broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion. *Cox v. Spangler*, 141 Wn2d 431, 439, 5 P.3d 1265 (2000). A trial court abuses its discretion when it takes a view no reasonable person would take, or applies the wrong legal standard to an issue. *Id.* at 439. Further, evidentiary rulings are reviewed only for an abuse of the trial court's sound discretion, which occurs only when evidence is admitted that is

both inadmissible and prejudicial. *Sorenson v. Raymark*, 51 Wn. App. 954, 956, 756 P.2nd 740, 741 (1988).

The Court denied the plaintiff's motion to exclude Plaintiff's medical records. Plaintiff's medical witness, nurse practitioner Aaron Johnson, relied on Brayan's medical records in forming his opinions. The Court properly allowed cross examination of Nurse Johnson regarding Brayan's medical records. ER 705. Nurse Johnson admitted that even the history he recorded in his own record pertaining to his visit with Brayan, like the other medical records, made no mention of Brayan's shoelace being tangled in the bike. Plaintiff opened the door on this issue and the Court properly allowed relevant cross examination related thereto.

Each of the accident reconstructionists, Pat Stadler and Eric Hunter, reviewed the police accident report. Each testified that the report contained facts or data of the type reasonably relied upon by accident reconstructionists in forming opinions or inferences. Pursuant to ER 703, the facts or data need not be admissible in evidence. Pursuant to ER 705, the expert may be required to disclose the underlying facts or data and be cross

examined thereon. The Court properly allowed the evidence in this regard and also properly gave a limiting jury instruction accordingly. Consequently there is no undue prejudice to the plaintiff.

The PIP application signed by the plaintiff was properly admitted pursuant to ER 801(d)(2) as an admission by the plaintiff individually or by an authorized person or agent. The case relied upon by Plaintiff, *Harris v. Drake,* 152 Wn.2d 480, 99 P.3d 872 (2004), is distinguishable because it held that a report by a non-testifying medical expert was qualified protected work product pursuant to CR 26(b)(5).

In contrast, the description of the accident contained in Plaintiff's PIP application was inconsistent with the plaintiff's court testimony and the two different accident descriptions given to the plaintiff's expert. It is also important to note that the inconsistent description was given after the plaintiff was advised by Brayan regarding the alleged facts of the accident. The inconsistencies are relevant given the disputed facts of the parties as to how the accident occurred. Plaintiff's inconsistent evidence was relevant and admissible and there is no showing

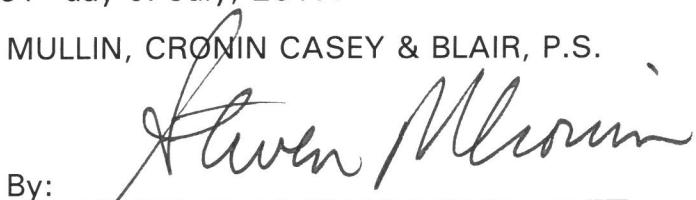
that the Court abused its discretion or that the admission of the evidence was manifestly unreasonable or that the Court exercised its discretion on untenable grounds for untenable reasons. *Associated Mortgage Investors v. GP Kent Constr.*, 15 Wn. App. 223, 229, 548 P.2d 558 (1976).

CONCLUSION

The Judgment in favor of the defendant should be upheld. Defendant requests the Court award costs and attorney fees pursuant to RAP 14.1 and 14.2, MAR 7.3 and *Arment v. Kmart Corp.*, 79 Wn. App. 694, 700, 902 P.2d 1254 (1995).

DATED this 31st day of July, 2017.

MULLIN, CRONIN CASEY & BLAIR, P.S.



By:_____
Steven M. Cronin, WSBA#14602
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of July, 2017, I caused to be served a true and correct copy of the foregoing RESPONDENT'S REPLY BRIEF by the method indicated below, and addressed to the following:

Ned Stratton / Brian Anderson	___	PERSONAL SERVICE
ANDERSON LAW	_x_	U.S. MAIL
5861 W Clearwater Ave	___	HAND DELIVERED
Kennewick WA 99336	___	OVERNIGHT MAIL
	___	TELECOPY (FAX)

Steven M. Cronin