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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

THE ESTATE OF WAI MON CHIN, by and through STANLEY CHIN, in his capacity as Personal Representative and for the benefit of beneficiaries SHIRLEY CHIN, STANLEY CHIN, SANDY CHIN and WILLIAM CHIN, Appellants, v. BRENDA NELSON and JOHN DOE NELSON, a marital community, Defendants, CITY OF RICHLAND, a municipality, Respondent.	)	No. 36187-0-III UNPUBLISHED OPINION

LAWRENCE-BERREY, J. — The Estate of Wai Mon Chin and its beneficiaries (the Estate) appeal after a jury defense verdict. The Estate argues the trial court erred by denying its motion for a directed verdict based on RCW 47.30.010(2), by denying its proposed jury instruction based on RCW 47.30.010(2), and by instructing the jury on the rules of the road, chapter 46.61 RCW. We disagree and affirm the jury's verdict.

FACTS

On a dark rainy winter evening, Brenda Nelson was driving home from work on Van Giesen Street in Richland, Washington. Wai Mon (Raymond) Chin, 83 years old, wearing dark nonreflective clothing, was completing his daily walk on Shelter Belt Trail. The south and north trailheads of that trail are divided by Van Giesen. The intersection of the trailheads and Van Giesen is in the middle of the block and there is no crosswalk between the trailheads. Mr. Chin approached Van Giesen from the south and attempted to cross that street. Ms. Nelson did not see Mr. Chin until just before her car struck him. Mr. Chin died from his injuries.

The Estate brought suit against Ms. Nelson and the City of Richland (City). The Estate alleged that Ms. Nelson's and the City's negligence caused Mr. Chin's death. With respect to the City, the Estate alleged the intersection of the trail and Van Giesen was unreasonably dangerous. Specifically, the Estate alleged the intersection lacked signage for approaching vehicles, lacked appropriate lighting, and invited pedestrians to cross where Mr. Chin crossed. Ms. Nelson and the City denied they were negligent, and the City claimed Mr. Chin's death was the result of his and Ms. Nelson's negligence.

The Estate settled with Ms. Nelson prior to trial. The Estate and the City presented their evidence to a jury. Some of the evidence concerned the history, design, and usage of the trail near where Mr. Chin was struck.

The City's traffic engineer, Thomas Ballard, testified extensively about a pedestrian/bicycle study performed by the City in the area near where Mr. Chin was struck. The study allowed him to map the paths taken by 313 pedestrians and bicycles that were in the area during the near weeklong study. Some of the 313 pedestrians and bicycles crossed between the mid-block trailheads, but many took other paths, including crossing at the marked crosswalks on either side of the trailheads.

The Estate cross-examined Mr. Ballard, and had him read to the jury subsection (2) of the trail interference statute, RCW 47.30.010.[1] Mr. Ballard testified that subsection (2) was applicable, contingent on conditions. The Estate did not ask what those conditions were.

[1] RCW 47.30.010(2) provides in relevant part: "Where a highway other than a limited access highway crosses a recreational trail of *substantial usage* for pedestrians, equestrians, or bicyclists, signing sufficient to insure safety shall be provided." (Emphasis added.) A highway includes a street. RCW 47.04.010(11).

On redirect, the City inquired about those conditions. Referring to the pedestrian/bicycle study, Mr. Ballard testified, on average, two pedestrians every four hours crossed between the trailheads, in the area where Mr. Chin was struck. In his opinion, this was far short of "substantial usage," a phrase used in RCW 47.30.010(2).

Once all evidence was presented, the Estate moved for a directed verdict on liability. The Estate argued the City had a duty to post adequate signage near the trailheads pursuant to RCW 47.30.010(2), and, by failing to post this signage, the City had breached its duty and was negligent. The trial court denied the motion for directed verdict, ruling there was a question of fact whether the intersection of the trailheads and Van Giesen was unreasonably dangerous.

While discussing proposed jury instructions, the Estate argued that RCW 47.30.010(2) applied, and the court should give the Estate's proposed instruction that quoted that subsection. The trial court construed RCW 47.30.010 as applying only if the trail preexisted the road. And because Van Giesen preexisted the trail, the trial court refused to instruct on RCW 47.30.010(2).

The trial court instructed the jury on various aspects of the rules of the road, more specifically described in chapter 46.61 RCW. The Estate did not object that those rules

were inapplicable. The trial court also instructed the jury on the measure of damages. Following closing arguments and deliberations, the jury returned a defense verdict.

The Estate timely appealed.

ANALYSIS[2]

A. DENIAL OF DIRECTED VERDICT BASED ON RCW 47.30.010(2)

The Estate argues the trial court erred by not directing a verdict in its favor based on RCW 47.30.010(2).

CR 50(a)(1) provides in relevant part:

> If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim . . . .

A trial court should direct a verdict in favor of a moving party if, as a matter of law, no competent evidence or reasonable inference exists to sustain a verdict in favor of the nonmoving party. *Harris v. Drake*, 152 Wn.2d 480, 493, 99 P.3d 872 (2004). An appellate court reviews a trial court's denial of a motion for a directed verdict by applying

[2] The Estate raises 18 separate assignments of error. The assignments argue the trial court erred either in giving or failing to give a specific jury instruction. The Estate's opening and reply briefs however contain only three broad arguments. A failure to sufficiently argue an assignment of error results in a waiver of that argument. *In re Guardianship of Lamb*, 173 Wn.2d 173, 183 n.8, 265 P.3d 876 (2011).

the same standard the trial court applied. *State v. Longshore*, 141 Wn.2d 414, 420, 5 P.3d 1256 (2000).

RCW 47.30.010(2) requires adequate signage to ensure safety where a trail of "substantial usage" crosses a road. Here, the Estate presented no evidence that the area near where Mr. Chin was struck had "substantial usage." The only evidence of usage was presented by the City. Mr. Ballard testified that only two pedestrians every four hours crossed in the area near where Mr. Chin was struck.

"Substantial usage" is not defined in chapter 47.30 RCW. When a term is not defined, we look to its usual and ordinary dictionary meaning. *Lyft, Inc. v. City of Seattle*, 190 Wn.2d 769, 781, 418 P.3d 102 (2018). "Substantial" means "considerable in amount." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1993). Here, the only evidence of trail usage in the area where Mr. Chin was struck, was that two pedestrians crossed between the trailheads every four hours. This is nowhere close to "considerable in amount." Not only was the Estate *not* entitled to a directed verdict on RCW 47.30.010(2), there was insufficient evidence as a matter of law to support application of RCW 47.30.010(2). We conclude the trial court did not err by denying the Estate's motion for directed verdict based on RCW 47.30.010(2).

B. DENIAL OF JURY INSTRUCTION BASED ON RCW 47.30.010(2)

The Estate argues the trial court erred by refusing to give its proposed jury instruction that quoted RCW 47.30.010(2).

A trial court is required to give a jury instruction on a party's theory of the case if there is substantial evidence to support the theory. *Savage v. State*, 127 Wn.2d 434, 448, 899 P.2d 1270 (1995). As noted above, there was no evidence the crossing near where Mr. Chin was struck had "substantial usage." For this reason, we affirm the trial court's refusal to give the Estate's proposed jury instruction that quoted RCW 47.30.010(2).

C. INSTRUCTING ON THE RULES OF THE ROAD

The Estate argues the trial court erred by instructing the jury on the rules of the road, when its theory of liability was that the City failed to design and maintain a safe trail and road intersection.

In general, an appellate court will refuse to review a claim of error that was not raised at the trial court. RAP 2.5(a); *Millies v. LandAmerica Transnation*, 185 Wn.2d 302, 313 n.2, 372 P.3d 111 (2016). Here, the Estate never objected to the trial court's jury instructions on the basis that the rules of the road were inapplicable. For this reason, we decline to review this claim of error.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Korsmo, A.C.J.

Melnick, J.[3]

[3] The Honorable Rich Melnick is a Court of Appeals, Division Two, judge sitting in Division Three under CAR 21(a).