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NO. 68748-4-1
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ROBERT C. LIFE and THERESA E. LIFE, husband and wife, and the
marital community,

Appellants

vs.

SUNBANKS LIMITED, dba SUNBANKS LAKE RESORT,

Respondent.

APPEAL FROM KING COUNTY SUPERIOR COURT
NO. 10-2-14445-5 SEA

BRIEF OF APPELLANT

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I. SUMMARY OF CASE AND APPEAL

This is a case about evidentiary standards for proving notice on a premises liability claim. A key element of a premises liability claim is evidencing that the landowner, or its agents, had actual or constructive notice of a dangerous condition prior to an injury. If a plaintiff is not permitted to present evidence of notice, such claims cannot succeed.

Plaintiffs/Appellants Robert “Charlie” Life and Theresa Life pursued premises liability claims against Defendant/Respondent Sunbanks Resort (hereafter “Sunbanks”). CP 1-6. The claims were a result of an injury sustained by Charlie Life on May 18, 2007 when his feet became entangled in branches growing from a tree stump while he was on the property of the Sunbanks resort for a concert. CP 1-6.

At trial, Appellants intended to offer evidence of actual notice to Sunbanks regarding the dangerous condition presented by the protruding stump and branches. CP 276-79; 357-68; RP 3-4. Prior to the concert that evening, Sunbanks volunteer security guard Lisa Eby did a walkthrough of the property and noticed a tree stump with branches growing parallel to the ground. CP 276-79; 357-68; RP 19-20. Lisa Eby was concerned about the danger posed by the stump and informed a Sunbanks groundskeeper of the hazard. CP 276-79; 357-68; RP 19-20. A few hours later, Lisa Eby also told Sunbanks manager Sandra Mcinnis of the tripping

hazard. CP 357-68; RP 21. At trial, the court excluded the entirety of Lisa Eby's testimony; as such, Appellants were unable to demonstrate to the jury that Sunbanks had notice of the dangerous condition, a key element of Appellants' premise liability claim. RP 34-37.

The trial court excluded this evidence at trial. While the basis for the court's ruling was not entirely clear, the court likely excluded the evidence because it believed that Lisa Eby's conversation with the Sunbanks groundskeeper was impermissible hearsay and because it believed that evidence of Lisa Eby's conversation with Sandra Mcinnis was prejudicial because the witness's testimony was not disclosed until the time of trial. RP 34-37. On appeal, Appellants seek a ruling that the evidentiary ruling of the trial court was an abuse of discretion. Appellants seek a ruling as follows: (a) reversal of the evidentiary decision, (b) remand for a new trial, and (c) award costs for this appeal.

II. ASSIGNMENTS OF ERROR

- 2.1 The trial court abused its discretion by finding that Lisa Eby's statements to the Sunbanks groundskeeper constituted hearsay.
- 2.2 The trial court abused its discretion by excluding Lisa Eby's statements to the Sunbanks groundskeeper.
- 2.3 The trial court abused its discretion by finding that Lisa Eby's statements to the Sunbanks manager were unduly prejudicial.

- 2.4 The trial court abused its discretion by excluding Lisa Eby's statements to the Sunbanks manager.
- 2.5 The trial court abused its discretion by denying Appellants' Motion for New Trial.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 3.1 Whether it was an abuse of discretion for the court to make a finding that Lisa Eby's statements to the Sunbanks groundskeeper was hearsay when Appellants offered this evidence for another purpose, namely, to prove notice to the defendant.
- 3.2 Whether it was an abuse of discretion for the court to exclude Lisa Eby's statements to the Sunbanks groundskeeper when there was no evidentiary basis for the exclusion and the elimination of this evidence at trial prevented the Appellants from demonstrating notice of the dangerous condition, an essential element of a premises liability claim.
- 3.3 Whether it was an abuse of discretion for the court to make a finding that Lisa Eby's statements to the Sunbanks manager were unduly prejudicial.
- 3.4 Whether it was an abuse of discretion for the court to exclude Lisa Eby's statements to the Sunbanks manager when there was no evidentiary basis for the exclusion and when such evidence was essential to the appellants' premises liability claim.
- 3.5 Whether it was an abuse of discretion for the trial court to deny Appellants' Motion for New Trial after it was alerted to the evidentiary errors made with respect to the exclusion of Lisa Eby's testimony.

IV. STATEMENT OF THE CASE

4.1 Statement of Procedure.

Appellants brought a premise liability claim against Respondent Sunbanks. CP 1-6. At trial, the court excluded evidence regarding advance notice of the tripping hazard to Respondent Sunbanks. RP 34-37. As a result, Appellants were unable to provide evidence of notice to the jury at trial, an essential element of their premises liability claim. Appellants moved for a new trial. The trial court denied Appellants' Motion for New Trial. CP 383-84. This appeal follows.

4.2 Statement of Background Facts.

Respondent Sunbanks operates a resort in Electric City, Washington. CP 85. For several years, Sunbanks has hosted a semiannual Rhythm & Blues Festival to attract patrons to its campgrounds. CP 85.

In February 2007, landscaping was conducted on the Sunbanks campgrounds, and in the process, a tree was taken down and a stump was left behind. CP 84. Between February 2007 and May 2007, branches had grown from the tree stump, parallel to the ground, creating a tripping hazard that would easily entangle a pedestrian's feet. CP 129-131.

Sunbanks' music festival was held on the weekend of May 18, 2007. CP 129. On Friday, May 18, 2007, early in the day, the security team for Sunbanks conducted its pre-festival duties. CP 129-130. The

Sunbanks security team was compromised of volunteers that worked security in exchange for free admission to the music festival events. CP 128-29. Lisa Eby, a corrections officer, served on the security detail as she had done at prior Sunbanks music festivals. CP 127-28.

Lisa Eby noticed that extensive work had been done throughout the entire campground since the last festival was held in the fall of 2006. CP 129. Specifically, trees, shrubs and bushes had been cleared away, opening up the campground area considerably. CP 129. After a short meeting, Lisa Eby and another security team member walked throughout the campgrounds to review the changes that had been made by Sunbanks and to generally look over the lay of the land. CP 129-131. Lisa Eby noticed that Sunbanks had removed a rather large bush or small tree, leaving behind a stump which was sticking up two to three inches, with branches running parallel to the ground a distance of approximately nineteen inches. CP 129-131. The location was of concern to Lisa Eby, as the stump and branches were situated on the campground lawn adjacent to the main road that led directly to the concert stage. CP 129-131. This was in a high traffic area used by festival attendees to walk, run and play. CP 129-131. Upon noticing the stump, Lisa Eby determined that the stump and branches were “an accident waiting to happen.” CP 130. While standing next to the stump, Lisa Eby noticed a Sunbanks

groundskeeper nearby. CP 130-31. She knew that this person was a Sunbanks groundskeeper because she had previously noticed the person working at previous years' festivals. CP 130-31. Lisa Eby called the groundskeeper over and pointed to the stump and branches. CP 130-31. She told the groundskeeper that the stump and branches either needed to be removed or cordoned off before the concert started that evening because otherwise someone could be hurt. CP 130. The groundskeeper agreed and stated he would remove it. CP 130. A few hours later, Lisa Eby met with Sunbanks manager Sandra Mcinnis and relayed this same information to her. RP 21.

Meanwhile, on Friday, May 18, 2007, Charlie and Theresa Life departed Seattle by car for the festival around five o'clock, arriving at Sunbanks around ten o'clock that evening. CP 134-35. As Charlie and Theresa Life arrived at the campground, they drove directly to Lisa Eby's security checkpoint. CP 135. Security team member Lisa Eby was working the security checkpoint at that time to ensure that cars stayed out of the stage area so that bands could set up. CP 131-32. Charlie and Theresa Life greeted Lisa Eby and inquired where they should pitch their tent. CP 131-32. Charlie and Theresa Life left their car at that checkpoint, walked to the camping area, and found their campsite. CP 135. Charlie and Theresa Life then walked directly from that campsite

back to their car. CP 135-36. On the way back to their car, Charlie and Theresa Life walked up the pathway where the stump and branches were located. CP 136-37. Charlie Life's feet became entangled in the branches, causing him to fall and sustain significant injury. CP 136-37.

4.3 The Trial Court Excluded Lisa Eby's Testimony Regarding Notice Provided to the Sunbanks Groundskeeper.

At trial, Appellants' witness Lisa Eby was prepared to testify regarding her interactions with the Sunbanks groundskeeper. Lisa Eby was to testify that she informed the Sunbanks groundskeeper of the tree stump and branches early in the day on May 18, 2007. CP 130-31. Further, Lisa Eby was prepared to testify that she knew the groundskeeper as a Sunbanks employee because she had seen the groundskeeper tending to the Sunbanks grounds on prior occasions. CP 130-31.

In analyzing this evidentiary issue, the trial court spent significant time considering whether the groundskeeper was a "speaking agent" of Sunbanks. RP 17, 28-34. For example, at trial, the court stated:

- "What evidence do I have that would support a finding that he [groundskeeper] was a speaking agent?" RP 28.
- "[Y]ou cannot prove agency through the acts of the person you're contending was an agent, it has to come from some act by the employer." RP 31.
- "You have to prove the agent was a speaking agent of the person to whom the notice was given." RP 33.

Eventually the issue was raised that, although she recognized the individual as a Sunbanks groundskeeper, Lisa Eby did not know the name of the Sunbanks groundskeeper. RP 5-6. The trial court concluded that one could never prove agency without proving personal identity. RP 32. The Appellants argued that agency can be apparent through actions of the agent and principal; that one does not necessarily have to prove that the principal gave a person “authority to speak” to prove agency. RP 33-34.

The trial court was not convinced, stating, “You cannot prove agency through the acts only of the person that’s performing them, speaking agent,” continuing, “then we get to the level of Ms. Eby even being able to testify that she said that to someone.” RP 34. Finally, the trial court stated, on the issue of Lisa Eby’s testimony regarding her interactions with the Sunbanks groundskeeper:

If you look at the definition of hearsay, it's an out-of-court statement by a declarant offered for the truth of the matter, and I don't know why that doesn't apply to a witness, out of court statements. As a matter of fact, 801(d)1 or (d)2, whichever it is, says that you can impeach with an out-of-court statement if it's really consistent with your testimony, really seems to reinforce that idea, that even the statement of the witness on the stand made in court previously is hearsay, you have to have an exception to that. That's my understanding, for the record, that's my understanding of the law on that, that would be hearsay, unless some exception of her prior statement could come in. And the way her prior statement comes in, is if somebody says that prior statement is inconsistent with their testimony and it's an adverse party cross-examining. It may not need to be an

adverse party, but it has to be consistent under 803(d)1 or (d)2. So I don't think her statement comes in here.

RP at 34-35. Thus, the trial court excluded the testimony of Lisa Eby on the basis that it was hearsay. RP at 34-35.

4.4 The Trial Court Excluded Lisa Eby's Testimony Regarding Notice to the Sunbanks Manager Sandra McGinnis.

During trial, it was learned that, in addition to her conversation with the Sunbanks groundskeeper, Lisa Eby also had a conversation with Sunbanks manager Sandra McGinnis about the stump and branches prior to Charlie Life's injury. RP 2-3. Upon learning of this evidence, Appellants' counsel brought it to the attention of the trial court and counsel for the Respondent Sunbanks. RP 3-5. Lisa Eby was prepared to testify that she had a conversation about the stump and branches with Sunbanks manager Sandra McGinnis shortly after informing the Sunbanks groundskeeper. RP 2-3. This testimony was not disclosed in discovery prior to trial because neither party was aware of it until trial. RP 2-3. [check cite].

The trial court judge excluded Lisa Eby's testimony regarding her comments to Sandra McGinnis:

It's denied. It goes to prejudice to the defendant in that sense. I don't know what the prejudice to the defendants might be. It might still be prejudice to the defendants, even if it was an agreed fact that just hadn't been mentioned. But if it is a fact in issue, then that raises, of course, the

discovery that defendant might have done, if that -- if Ms. Eby's testimony, as it's now been characterized, had been known at an earlier date.

RP at 26.

Appellants' counsel informed the trial court that Lisa Eby's testimony on the matter was critical evidence and there was no wrongdoing on behalf of the Appellants had occurred, as the evidence was brought before the trial court and opposing counsel as soon as it was discovered. RP 26-27. Regardless, the trial court excluded Lisa Eby's testimony regarding her conversation with Sunbanks manager Sandra McGinnis stating, "the conference with Ms. McGinnis, I just think that's too prejudicial to come in at this later date." RP 37.

4.5 The Trial Court Denies Appellants' Motion for New Trial.

Appellants filed a Motion for a New Trial based on the evidentiary errors identified above. CP 357-68. After consideration of the pleadings, the trial court denied the motion. CP 383-84.

V. LEGAL AUTHORITY

5.1 Standard of Review.

The Court reviews the correct interpretation of an evidentiary rule *de novo* as a question of law. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003); *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). Once the rule is correctly interpreted, the Court reviews the trial

court's decision to exclude evidence for abuse of discretion. *DeVincentis*, 150 Wn.2d at 17; *State v. Lord*, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007). An abuse of discretion occurs when the trial court's decision is based on untenable grounds or untenable reasons. *State v. Athan*, 160 Wn.2d 354, 376, 158 P.3d 27 (2007).

5.2 The Statements by Lisa Eby were not Hearsay.

A landowner is liable for an unsafe condition that the landowner had notice of. *Wiltse v. Albertson's, Inc.*, 116 Wn.2d 452, 460, 805 P.2d 793 (1991) (quoting *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 40, 49, 666 P.2d 888 (1983)); see also *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652, 869 P.2d 1014 (1994) (citing *Smith v. Manning's, Inc.*, 13 Wn.2d 573, 126 P.2d 44 (1942)). Thus, in order to meet this element, Appellants must provide evidence that Respondent Sunbanks knew about the unsafe condition prior to the injury.

Here, the statements by Lisa Eby to the Sunbanks groundskeeper were not hearsay, as the trial court believed, because they were not offered to prove the truth of the matter asserted. Instead, the testimony was presented to prove notice to Respondent Sunbanks; an essential element of Appellants' premise liability claim. The relevance of Lisa Eby's statements to the Sunbanks groundskeeper was not in the truth of the

matter asserted (i.e. the fact that the stump and branches existed and were dangerous), but rather the simple fact that the statements were made.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801. Thus, an out-of-court statement is hearsay if it is the content of the statement that is relevant in the case at hand. By contrast, if the statement is relevant simply because it was made, without regard to whether the statement is true or false, the statement is not hearsay. *State v. Stubsjoen*, 48 Wn. App. 139, 738 P.2d 306 (1987). Here, Lisa Eby's statements to the Sunbanks groundskeeper regarding the stump and branches are relevant because the statements were made; not because the statements were true or false.

A decision to exclude evidence is reviewed for abuse of discretion, which occurs when the decision is manifestly unreasonable or based on untenable reasons. *Reese v. Stroh*, 128 Wn.2d 300, 310, 907 P.2d 282 (1995). Hearsay is generally excludable absent a specific exception, but a statement is not hearsay if it is offered not for the truth of the matter asserted, but for some other evidentiary purpose, like notice or knowledge. *See* 5B Karl B. Tegland, Washington Practice sec. 336 (Supp.1998-99) (citing *State v. Williams*, 85 Wn. App. 271, 932 P.2d 665 (1997)).

Here, the Court's decision to exclude Lisa Eby's testimony regarding her statements to the Sunbanks groundskeeper had no evidentiary basis and were therefore manifestly unreasonable. As an element of Appellants' claim of negligence, it was essential that Appellants prove that the Respondent Sunbanks was on notice of the hazard in question. The testimony of Lisa Eby concerning her interactions with Sunbanks groundskeeper was merely offered to prove notice, a necessary element of Appellants' claim. Lisa Eby was to testify that she informed the Sunbanks groundskeeper about the stump and branches stating, "I pointed at the stump and branches and said, 'This is an accident waiting to happen and needs to be removed.'" While the statement made by Lisa Eby is an assertion that the stump and branches were dangerous and needed to be removed, the statement was not offered to prove the truth of the matter asserted. Whether the stump and branches were dangerous is immaterial to the statement. The fact that the statement was made is what makes Lisa Eby's testimony relevant to the Appellants' claims.

Hypothetically, if a jury was to decide Lisa Eby's statement was not credible (the stump and branches were not dangerous and did not need to be removed), the statement is still relevant and admissible to show the Respondent had notice of the existence of the stump and branches. The Appellants were required to establish that Respondent Sunbanks had

notice of the dangerous condition to give rise to the duty upon which Appellants' negligence claims relied. The trial court's exclusion of this evidence necessarily frustrated Appellant's ability to present their claims to the jury and have a trial on the merits.

The central issue of the case was whether the Respondent had notice of the dangerous condition. Evidence of Lisa Eby's interactions with the Sunbanks groundskeeper is highly probative to that very issue. The trial court's decision to exclude Lisa Eby's testimony on the grounds of hearsay consequently prevented Appellants from presenting evidence on the issue central to the case; actual notice to Respondent Sunbanks.

If one applies the trial court's ruling to similar cases, it quickly becomes clear that the exclusion of this evidence on the basis of hearsay is manifestly unreasonable, as it would prevent a significant number of plaintiffs from presenting evidence of actual notice in a premises liability cases. In premise liability cases, plaintiffs often must prove the notice element by providing evidence that a landowner or its agent was verbally informed about a dangerous condition by a third party.

For example, in a grocery store, a notifying customer verbally informs a store employee about a liquid spill. Afterwards, a second customer slips and injures herself on that very same spill. At trial, the notifying customer is called to testify that she informed the store employee

about the spill. This testimony in this hypothetical is not hearsay because the evidence regarding what the customer told the employee is not offered for the truth of the matter asserted, but rather to show that notice of the dangerous condition was given to the grocery store.

If the trial court's decision is applied with equal force in all instances of actual notice to a landowner, it would be impossible for a plaintiff to prevail on his or her premise liability claim. The evidence that the landowner received actual notice of the dangerous condition would be excluded and a plaintiff would be forced to rely solely on a theory of constructive notice, even when actual notice had been given. It is for these reasons that the definition of hearsay is a two-part test. If it was meant to exclude all out-of-court statements regardless of the purpose, the rule would be quite different.

The trial court's exclusion of Lisa Eby's testimony regarding her statements to the Sunbanks groundskeeper on hearsay grounds was an abuse of discretion requiring reversal.

5.3 The Groundskeeper was an Agent of Respondent Sunbanks and the Groundskeeper's Knowledge is Imputed to the Principal.

During the analysis of Lisa Eby's testimony regarding her statements to the Sunbanks groundskeeper, the trial court made several references to its concern regarding whether the groundskeeper had

“speaking agent” status under the facts of this case. The trial court’s concern was misguided. Under the facts of this case, an agency relationship could be implied by the groundskeeper’s actions, regardless of whether that person was a “speaking agent” for the Respondent.

A. The Sunbanks Groundskeeper was an Agent of the Respondent.

The Sunbanks groundskeeper that Lisa Eby notified of the dangerous condition was an agent of Respondent Sunbanks. This agency relationship is implied by the conduct of the principal and agent.

An agency relationship may be implied from the conduct of the parties and by the circumstances of the particular case. *Turnbull v. Shelton*, 47 Wn.2d 70, 72, 286 P.2d 676 (1955), overruled on other grounds, *Crown Controls, Inc., v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988). Generally, the existence of an agency relationship is a question of fact for the jury. *O'Brien v. Hafer*, 122 Wn. App. 279, 284, 93 P.3d 930 (2004), review denied, 153 Wn.2d 1022 (2005); *Lough v. John Davis & Co.*, 35 Wash. 449, 454, 77 P. 732, 734 (1904).

In this case, Lisa Eby had seen the Sunbanks groundskeeper on multiple occasions, tending to the grounds and conducting duties such as emptying garbage. Lisa Eby identified and knew the individual as a

Sunbanks groundskeeper from her previous experience working at the festival and observing the groundskeeper tending to the grounds.

In *McLean v. St. Regis Paper Company*, the plaintiff was injured in an automobile accident with an alleged St. Regis Paper Company employee. 6 Wn. App. 727, 496 P.2d 571, 574. The alleged employee had applied for a job at defendant's sawmill and was told to go to a local clinic for a physical examination. *Id.* at 728. The alleged employee was never told he was hired, no transportation was provided, and no directions were given to the clinic. *Id.* Despite the tenuous nature of the employment relationship, the *McLean* court held that there was a principal-agent relationship between the St. Regis Paper Company and the alleged employee. *Id.* at 731.

In *McLean*, the finding of a principal-agent relationship was premised on the manifestation by the principal to the agent that the agent may act on his account as well as consent by the agent to act. *Id.* at 731. Here, there is, at a minimum, an implied agency relationship between Sunbanks and the Sunbanks groundskeeper. Lisa Eby witnessed the Sunbanks groundskeeper tending to the Sunbanks property on multiple occasions and knew that individual as the Sunbanks groundskeeper. On that basis alone, a court should find that an implied agency relationship existed between Sunbanks and the Sunbanks groundskeeper.

Finally, in excluding Lisa Eby's testimony regarding her statements to the Sunbanks groundskeeper, the trial court impermissibly removed the issue of agency from the jury's consideration altogether. As stated previously, the existence of an agency relationship is a question of fact for the jury. *O'Brien v. Hafer*, 122 Wn. App. 279, 284, 93 P.3d 930 (2004), *review denied*, 153 Wn.2d 1022 (2005). Had the court allowed the testimony to be presented, the jury would have be left to decide, on the weight of the evidence, whether an implied agency relationship existed between Sunbanks and its groundskeeper.

B. As an Agent, the Sunbanks Groundskeeper's Knowledge is Imputed to the Principal.

The rule is well established that a corporation is charged with constructive knowledge, regardless of its actual knowledge, of all material facts of which its agent receives notice or acquires knowledge while acting in the course of employment within the scope of his or her authority, even though the officer or agent does not in fact communicate the knowledge to the corporation. *Hedrick v. Washington Nat. Ins. Co.*, 186 Wash. 263, 57 P2d 1038; *Guaranty Trust Co. v. Yakima First Nat. Bank*, 179 Wash. 615, 38 P2d 384; *Brower Co. v. Garrison*, 2 Wn .App. 424, 468 P.2d 469; *State v. Keypoint Oyster Co.*, 64 Wn.2d 375, 391 P.2d 979; *Sons of Norway v.*

Boomer, 10 Wn. App. 618, 519 P.2d 28 (corporation charged with notice of facts acquired by agents).

This rule is based on the premise that a corporation can act only through its agents, and when its agents act within the scope of their actual or apparent authority, their actions are the actions of the corporation itself. *Mauch v. Kissling*, 56 Wn. App. 312, 316, 783 P.2d 601 (1989); *American Seamount Corp. v. Science and Engineering Associates, Inc.*, 61 Wn.App. 793, 796–97, 812 P.2d 505 (1991). Thus, an agent need not be a *speaking agent* to receive notice of a dangerous condition.

The rule does not depend upon the agent disclosing the knowledge or information to the corporation, the law conclusively presumes that the agent has done so, and charges the corporation accordingly. In other words, the rule rests upon the presumption that the agent will communicate to the corporation the facts learned by the agent, as it is the agent's duty to do so, and whether the agent performs such duty or not, the corporation is bound. *Paulson v. Montana Life Ins. Co.*, 181 Wash. 526, 536-537, 43 P.2d 971, 975 (Wash.1935). Thus, notice to an agent of a corporation relating to any matter over which the agent has management and control is notice to the corporation.

The rule of imputed knowledge is a rule of public policy based upon the necessities of general commercial relationships. Where a

principal acts through an agent, a third person dealing with the agent is entitled to rely upon the agent's knowledge and notice and it binds the principal, who should incur the risks of the agent's infidelity or lack of diligence rather than innocent third parties. *Kiniski v. Archway Motel, Inc.*, 21 Wash.App. 555, 563, 586 P.2d 502, 508 (Wash.App.,1978).

Therefore, the Sunbanks groundskeeper's knowledge and notice to that Sunbanks groundskeeper is imputed to Respondent Sunbanks.

5.4 Exclusion of Lisa Eby's Testimony Regarding Notice to the Sunbanks Manager was an Abuse of Discretion.

The trial court excluded any and all testimony of Lisa Eby concerning discussions she had with Sandra Mcinnis regarding the stump and branches. The trial court ruled that admission of Lisa Eby's testimony regarding her conversation with Sandra Mcinnis would be unduly prejudicial to the Respondent because such testimony had not been revealed prior to trial.

Occasionally, a trial court is put in the unfortunate circumstance of excluding probative evidence due to certain discovery violations by the parties prior to trial. *State v. Hutchinson*, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998). "However, a trial court should not exclude testimony unless there is a showing of intentional or tactical nondisclosure, of willful violation of a court order, or the conduct of the miscreant is otherwise

unconscionable.” *Barci v. Intalco Aluminum Corp.*, 11 Wash.App. 342, 351, 522 P.2d 1159, 1165 (Wash.App. 1974). For example, a trial court could exclude a witness if there was evidence that a party intentionally failed to disclose a witness, to gain a strategic advantage, and then called that witness to testify at trial.

Here, the trial court exclusion of Lisa Eby’s testimony as a discovery sanction was an abuse of discretion, as there was absolutely no evidence of intentional nondisclosure or other unconscionable conduct. *Lampard v. Roth*, 38 Wn. App. 198, 684 P.2d 1353 (1984); *Alpine Indus., Inc. v. Gohl*, 30 Wn. App. 750, 637 P.2d 998, 645 P.2d 737 (1981); *Barci v. Intalco Aluminum Corp.*, 11 Wn. App. 342, 522 P.2d 1159 (1974).

The choice of specific sanctions for violation of a discovery order is within the trial court's discretion, *Associated Mortgage Investors v. G. P. Kent Constr. Co.*, 15 Wn. App. 223, 229, 548 P.2d 558 (1976), but this discretion is not limitless. A trial judge should not exclude testimony absent a showing of intentional or tactical nondisclosure, willful violation of a court order, or other unconscionable conduct. *See Barci v. Intalco Aluminum Corp.*, 11 Wn. App. 342, 351, 522 P.2d 1159 (1974).

Here, during the trial, Plaintiff’s counsel learned that Lisa Eby had a discussion with Sunbanks’ manager Sandra Mcinnis regarding the hazard posed by the stump and branches. Appellant’s counsel stated:

Let me say that I met for the first time personally with Lisa Eby and her husband on Saturday [2/11/2012], and learned of that second bit, where they had the meeting [with Sandra McGinnis].

RP at 4.

Respondent Sunbanks objected to this testimony, asserting that this information was not disclosed in response to discovery requests. However, the Appellants only learned about Lisa Eby's discussion with Sandra Mcinnis during trial when Appellants' counsel informed Lisa Eby she could not testify about her conversation with the Sunbanks' employee groundskeeper. Upon discovering the evidence, the Appellants brought the evidence to the attention of the trial court and the Respondent. There was absolutely no evidence of an intentional nondisclosure or other unconscionable conduct on the part of Appellants.

Respondent has previously cited *Hampson v. Ramer* in support of the exclusion of Lisa Eby's testimony. 47 Wn. App. 806, 737 P.2d 298 (1987). *Hampson* involved a plaintiff with an injured arm and resulting carpal tunnel claim. *Id.* at 807. Parties agreed that the plaintiff would provide defense counsel with notice of any further treatment of plaintiff's injury prior to treatment so that defense counsel could obtain an independent medical examination (plaintiff's expert had already examined the plaintiff). *Id.* at 808. Despite this discovery agreement, the *Hampson*

plaintiff had his doctor perform surgery without notifying defendant's counsel. *Id.* at 808. The *Hampson* court found that plaintiff's "willful noncompliance with discovery" caused the irreparable prejudice to the defendant; as the defendant would never be able to examine the injured arm. *Id.* at 813-14. The *Hampson* court compared this irreparable prejudice with the destruction of evidence, as the defendant would never be able to obtain the discovery it sought. *Id.* at 814-15. Since this evidence was within the plaintiff's control (it was the plaintiff's own arm), the exclusion of the plaintiff's medical expert was necessary so that the plaintiff would not benefit from the alteration of evidence. *Id.* at 815.

Hampson is readily distinguishable from this case. First, unlike the *Hampson* plaintiff's arm, which was in the sole control of the plaintiff, Lisa Eby was a witness equally available to either party and was not under the control of either the Appellants or the Respondent. Second, there was no willful noncompliance on the part of the Appellants in disclosing Lisa Eby's testimony. When the new evidence was discovered, it was immediately relayed to the trial court and Respondent. There was never even an allegation of willful noncompliance or other misconduct. Third, the trial court had no idea whether the Respondent was prejudiced, stating, "I don't know what the prejudice to the defendants might be." RP 26. This certainly falls short of the "irreparable prejudice" identified in

Hampson. There was no destroyed evidence and Respondent could have deposed Lisa Eby during the trial to obtain the necessary discovery.

Indeed, the *Hampson* court discouraged the suppression of probative testimony in cases where there was no evidence of willful nondisclosure. The court stated, in that case, that “testimony should not be excluded absent intentional or willful nondisclosure or other unconscionable conduct.” *Id.* at 813. The *Hampson* court, in analyzing *Miller v. Peterson*, 42 Wn.App. 822, 714 P.2d 695 (1986), identified a narrow exception for expert testimony, stating:

However, weighing the factors set forth in *Barci* in deciding whether to exclude or permit testimony from a witness who was unobtainable and was undisclosed until just before trial or until after trial had begun, the *Miller* court found that the exclusion of certain expert witnesses' testimony in that case was not error even though the record did not disclose a violation of a court order or any other unconscionable conduct. The *Miller* court noted that the most important factor in its determination was the prejudice to the party opposing the testimony of the belatedly disclosed expert witnesses. (emphasis added) *Hampson* at 813.

Here, the *Hampson* court noted that *Miller* carved out a narrow exception when considering expert testimony. When considering *expert testimony* it is not error to exclude such evidence in absence of intentional or willful nondisclosure. Thus, Respondent’s reliance on the

Miller/Hampson prejudice standard is in error as witness Lisa Eby was not an expert witness.

Lisa Eby was a lay witness called to testify about her statements to Sunbanks manager Sandra McGinnis. Lisa Eby was not an expert witness for which Respondent would be entitled to call a rebuttal expert witness to refute claims and opinions. Lisa Eby was a fact witness that would be called to provide factual evidence so that the trier of fact could decide the case on the merits. Therefore, to exclude her testimony on the basis that her testimony was not previously disclosed to the Respondent, there must be a showing of intentional or willful nondisclosure or other unconscionable conduct. Here, there was no evidence of intentional or willful nondisclosure.

The trial court's exclusion of this testimony without evidence of intentional or willful nondisclosure or other unconscionable conduct was an abuse of discretion which must be reversed.

VI. CONCLUSION

Lisa Eby's testimony concerning her statements to the Sunbanks groundskeeper and the Sunbanks manager were critical to the presentation of Appellants' claims at trial. Appellants' premise liability claims hinged on Appellants evidencing actual notice to the Respondent Sunbanks. The

trial court's exclusion of this evidence prevented the Appellants from proving notice, a necessary element of their claim.

The exclusion of Lisa Eby's testimony regarding her statements to the Sunbanks groundskeeper was an abuse of discretion as the statements were not offered to prove the truth of the matter asserted, but were instead offered to prove that the Respondent had advance notice of the dangerous condition; a necessary element of Appellants' claims. Since Lisa Eby's statements were not offered for the truth of the matter asserted, the statements were not hearsay. Thus, the exclusion of Lisa Eby's critical testimony was an abuse of discretion.

The exclusion of Lisa Eby's testimony regarding her statements to the Sunbanks manager Sandra McGinnis was also an abuse of discretion, as there was no evidence of intentional or willful nondisclosure or other unconscionable conduct. Moreover, the trial court could not identify any prejudice to the Respondent.

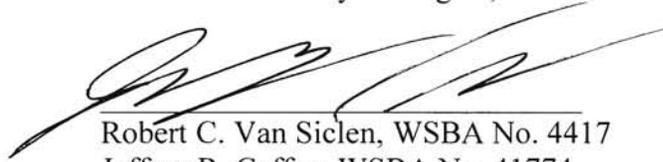
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This court should hold that both evidentiary rulings of the trial court were an abuse of discretion. The Appellants respectfully request that this Court (a) reverse the evidentiary decisions, (b) remand for a new trial, and (c) award costs for this appeal.

RESPECTFULLY submitted this 24th day of August, 2012.



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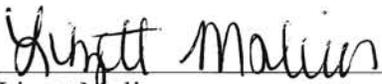
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CERTIFICATE OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on August 24, 2012, she caused the foregoing *Brief of Appellant* to be served on the following parties of record and/or interested parties by legal messenger and email transmission the same day:

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