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JUL 02 2015

No. 328139

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

CANDY BREEDEN and STEVE BREEDEN, husband and wife,

Appellants,

v.

MEAD SCHOOL DISTRICT #345 and MEAD HIGH SCHOOL,

Respondents.

APPELLANTS CANDY AND STEVE BREEDEN'S REPLY BRIEF

MICHAEL A. MAURER
WSBA #20230
KELLY E. KONKRIGHT
WSBA #33544
Attorneys for Appellants
Candy and Steve Breedem

LUKINS & ANNIS, P.S.
1600 Washington Trust Financial Center
717 W Sprague Ave
Spokane, WA 99201-0466
Telephone: (509) 455-9555
Facsimile: (509) 747-2323

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I. INTRODUCTION

As outlined in Appellants' opening brief, the hearsay statements at issue on appeal are classic examples of present sense impressions and excited utterances that are admissible pursuant to ER 803(a)(1) and (2). These unsolicited statements, which were made seconds after Mrs. Breeden fell and related the eyewitness's sensory perceptions, were inherently reliable and conveyed the eyewitness's personal knowledge of both the condition of the floor and Mrs. Breeden's fall.

Respondents Mead High School and Mead School District #354 (collectively "Mead" hereinafter) do not dispute that the statements were spontaneous or that they were made in reaction to Mrs. Breeden's accident. Instead, Mead argues that the trial court's decision to exclude the evidence was proper only because there was insufficient evidence of the unidentified declarant's personal knowledge and there were no indicia of reliability of the statements.

Mead's argument is premised on a faulty theory that hearsay statements by an unidentified witness are not admissible when only the plaintiff can testify as to the existence and statements of an unidentified witness. However, Mrs. Breeden has cited multiple slip and fall cases that have admitted statements by unidentified witnesses that were heard only by the plaintiff. Contrary to Mead's arguments, these cases cannot be meaningfully distinguished from the present situation. Mead's arguments ultimately concern the amount of weight that the trier of fact should give

the statements, not the admissibility. Furthermore, Mead's contention that there were no indicia of reliability ignores testimony from both parties that corroborates the witness's statements that (a) the floor had just been mopped before the accident, and (b) falls on the mopped floor occurred "all the time."

Here, where the statements were spontaneous, concerned the declarant's sensory perceptions (and therefore conveyed the declarant's personal knowledge of the accident), and the statements were corroborated by evidence presented by both parties, a reasonable juror could conclude that the unidentified declarant had observed Mrs. Breeden's accident and observed the school staff mopping the floor shortly before the accident.

Appellants respectfully submit that the trial court committed reversible error when it excluded the statements on the grounds that the declarant lacked sufficient personal knowledge, and ask this court to reverse the trial court and remand the case for a new trial.

II. REPLY ARGUMENT

A. Standard of review

A trial court's interpretation of the rules of evidence is a question of law, which this Court reviews *de novo*. *State v. Sanchez-Guillen*, 135 Wn. App. 636, 642, 145 P.3d 406 (2006); *see also State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Where, as here, the issue on appeal is whether there exists proper factual foundation for the admission of evidence, the appellate court must review the trial court's interpretation

of the evidentiary rule *de novo* as a question of law. *DeVincentis*, 150 Wn.2d at 11.

In the context of admissibility determinations concerning the excited utterance and present sense impression hearsay exceptions, a trial court errs when it excludes statements on the basis of lack of personal knowledge unless “**no reasonable juror could believe that the witness had the ability and opportunity to perceive the event he testifies about.**” *United States v. Hickey*, 917 F.2d 901, 904 (6th Cir. 1990) (emphasis added).

The trial court erred by ruling that the statements by the unidentified witness were inadmissible due to lack of personal knowledge.¹ Given the testimony presented at trial, the substance of the unidentified witness’s statements, and the circumstances surrounding those statements, a reasonable juror could believe that the unidentified witness had the ability and opportunity to perceive Ms. Breeden’s fall, and the mopping of the floor that occurred before the fall. Therefore, the trial court committed reversible error by excluding the statements by the unidentified witness.

¹ The trial court also erred by concluding that Mrs. Breeden’s fall was not a sufficiently startling event for purposes of the excited utterance exception, as set forth in detail in Mrs. Breeden’s opening brief. However, Mead apparently concedes that the fall was a sufficiently startling event, as it does not allege otherwise in its response brief. Therefore, Ms. Breeden does not set forth any additional argument on that issue in this Reply.

B. The Trial Court Committed Reversible Error by Excluding the Statements For Lack of Personal Knowledge

1. The Declarant's Statements Satisfy All the Requirements for Admissibility Under Both ER 803(a)(1) and (2).

As set forth in detail in Mrs. Breeden's opening brief, the statements by the unidentified witness are admissible pursuant to both ER 803(a)(1) and (2).

To be admissible under the present sense impression exception, a statement must be a "spontaneous or instinctive utterance of thought" that is evoked by the occurrence itself and unembellished by premeditation, reflection, or design. *State v. Martinez*, 105 Wn. App. 775, 20 P.3d 1062 (2001) (quoting *Beck v. Dye*, 200 Wn. 1, 9-10, 92 P.2d 1113 (1939), overruled on other grounds by *State v. Rangel-Reyes*, 119 Wn. App. 494, 81 P.3d 157 (2003)). "Present sense impression statements must grow out of the event reported and in some way characterize that event." *Martinez*, 105 Wn. App. at 783.

The policy behind the present sense impression exception rule is that there is very little chance of misrepresentation or conscious fabrication by a declarant where the statement about an event is made while the declarant was perceiving the event or condition, or immediately thereafter. *State v. Hieb*, 39 Wn. App. 273, 278, 693 P.2d 145 (1984), rev'd on other grounds, 107 Wn.2d 97, 727 P.2d 239 (1986). Spontaneity is the key to the rule. *Id.*; see also *Martinez*, 105 Wn. App. at 783.

Similarly, a statement “relating to a startling event or condition made while the declarant was under the stress of the excitement caused by the event or condition” is an “excited utterance” and is not excluded by the hearsay rule. ER 803(a)(2). A party seeking to introduce evidence under the excited utterance exception only has to satisfy three requirements: (1) that a startling event or condition occurred; (2) the declarant made the statement while under the stress or excitement of the startling event or condition; and (3) the statement related to the startling event or condition. *State v. Young*, 160 Wn.2d 799, 806, 161 P.3d 967 (2007). When the above requirements are met, the statement has the requisite indicia of reliability to be admitted into evidence. *State v. Davis*, 116 Wn. App. 81, 85, 64 P.3d 661 (2003).

Just as spontaneity is the key to admissibility of present sense impressions, it is likewise the key to admissibility of excited utterances. A statement spontaneously made under the excitement of the moment related to an accident or other startling event is admissible because such statements are likely not the result of fabrication, intervening actions, or the exercise of choice or judgment. *State v. Williams*, 137 Wn. App. 736, 154 P.3d 222 (2007); *see also State v. Flett*, 40 Wn. App. 277, 287, 699 P.2d 774 (1985) (“The principal elements of the exception are a sufficiently startling event and a showing that the declarant was still under the stress of excitement while making the statement”); *State v. Dixon*, 37 Wn. App. 867, 871-73, 684 P.2d 725 (1984).

Mead does not contradict Mrs. Breeden's position that the statements at issue satisfy the required elements for a present sense impression – *i.e.* that the statements were a spontaneous reaction made immediately after the unidentified witness observed Mrs. Breeden's accident. Nor does Mead contradict Mrs. Breeden's assertion that the statements also satisfy all three elements of an excited utterance: (1) Mrs. Breeden's fall was a startling event, (2) the declarant immediately made the statement while under the stress or excitement of seeing Mrs. Breeden fall, and (3) the statement related to the startling event.

Instead, Mead attacks the admissibility of the statements on the basis of personal knowledge, contending that there was no evidence of the unidentified declarant's personal knowledge of the accident or the condition of the floor. However, there was sufficient evidence of the declarant's personal knowledge for a reasonable juror to find that the declarant had the ability and opportunity to perceive Mrs. Breeden's accident and the mopping of the floor that preceded the accident.

2. **There is Sufficient Evidence for a Reasonable Juror to Believe that the Unidentified Declarant Witnessed Mrs. Breeden's Accident.**

i. **Direct Proof of Personal Knowledge is Not Required for Admissibility**

Direct proof of the declarant's personal knowledge is **not** required. The necessary firsthand knowledge may be inferred from the statement itself as well as the surrounding facts and circumstances. *See e.g., Booth*

v. State, 306 Md. 313, 508 A.2d 976 (1986) (“When the [hearsay] statement itself or other circumstantial evidence demonstrates the percipency of a declarant, whether identified or unidentified, this condition of competency is met.”); *Miller v. Crown Amusements, Inc.*, 821 F.Supp. 703 (S.D.Ga. 1993) (holding that a telephone call to 911, by an unidentified caller identifying the defendant as involved in the accident at issue in a personal injury action, was admissible as a present sense impression because the declarant’s firsthand knowledge was apparent from the statements themselves, particularly when taken in the context of the surrounding facts and circumstances); *State v. Phillips*, 194 W.Va. 569, 461 S.E.2d 75, 84-85 (1995) *overruled on other grounds by State v. Sutherland*, 231 W.Va. 410, 745 S.E.2d 448 (2013) (noting that: (1) a statement that is sufficiently descriptive may by itself demonstrate the declarant’s knowledge, (2) that a trial court may accept extrinsic evidence to satisfy the personal knowledge requirement, and (3) that the personal knowledge requirement “is not meant to be a very difficult standard and may be satisfied if it is more likely than not that the evidence proves the percipency of the declarant”).

In *Miller v. Crown Amusements, Inc.*, an unidentified witness called 911 and reported that she had seen the defendant sideswipe a person on the side of the road. *Miller*, 821 F.Supp. at 704-05. Even though the declarant was unidentified, the court found that there was sufficient evidence that the declarant had observed the accident. This was based on: (a) the caller’s comment that “[W]e noticed the [truck sideswipe a

person],” which indicated that the declarant had actual perception of the accident, (b) the timing of the call, which was consistent with the differences in distances and in driving times associated with the scene of the accident and the location the call was made from, and (c) the fact that the caller’s statements indicated she was traveling a route that would have taken her right by the scene of the accident. *Id.* Based on this evidence, the court concluded that there was sufficient evidence that the caller actually perceived the event.

Courts have consistently found sufficient personal knowledge in similar slip and fall cases, even when the declarant’s identity was unknown and there was no direct proof of the witness’s knowledge. *See e.g., Lindsay v. Mazzio’s Corp.*, 136 S.W.3d 915 (2004) (holding that in slip and fall cases where plaintiff fell in a restaurant, a statement from an unidentified diner asserting “[t]hat floor is wet there” was admissible as a present sense impression); *H.E.B. Food Stores v. Slaughter*, 484 S.W.2d 794 (Tex.Civ.App. 1972) (holding that a statement by an unidentified declarant that the plaintiff “fell on those grapes” was admissible spontaneous *res gestae* statement admissible in a slip and fall case); *Sanitary Grocery Co. v. Snead*, 67 App.D.C. 129, 90 F.2d 374 (1937) (holding that statement of an unidentified bystander in a slip and fall case was admissible as excited utterance). *See also David by Berkeley v. Pueblo Supermarket of St. Thomas*, 740 F.2d 230 (3d Cir. 1984).

In *Lindsay*, *H.E.B.*, *Sanitary Grocery Co.*, and *David by Berkeley*, there was no direct evidence of the witness’s personal knowledge. Rather,

in each of these cases the court inferred the witness's knowledge from the hearsay statement itself as well the fact that all of the statements were made spontaneously and immediately in reaction to the accidents. Given the substance of the statements, and the inherent reliability of the statements due to their spontaneous nature, the statements in each of these cases were admissible.

ii. **There are No Meaningful Distinctions Between the Present Situation and the Case Law Cited in Mrs. Breeden's Opening Brief.**

Ms. Breeden's opening brief identifies a number of slip and fall cases where statements by unidentified witnesses were admitted pursuant to ER 803(a)(1) and (2). Mead unsuccessfully attempts to distinguish these cases from the present situation by claiming that this case involves a "phantom" witness. Mead's argument is essentially a credibility argument: it claims the statements are not admissible because the witness was unidentified and no one can corroborate Mrs. Breeden's account of the witness. However, that is an issue of weight for the trier of fact – not a consideration of admissibility under ER 803(a)(1) and (2). *See* 7 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 803:1 (7th Ed.) (noting that fact that declarant is unidentified does not affect admissibility determination, only the assessment of weight to be assigned to statement by the trier of fact).

First, contrary to Mead's assertion, *Lindsay v. Mazzio's Corp.* did involve a statement by a "phantom" witness. See *Lindsay*, 136 S.W.3d at 915. The *Lindsay* case addressed the admissibility of **two** hearsay statements: the first was a statement by the plaintiff's daughter which was admitted as an excited utterance, and the second was **a statement by an unidentified diner at the restaurant where the plaintiff fell.** *Id.*

The salient facts concerning the hearsay statement at issue in *Lindsay* are directly on point with the present case. In *Lindsay*, the plaintiff slipped and fell in a restaurant. The only witnesses to the incident who provided testimony were the plaintiff and her daughter. The plaintiff testified that immediately after the accident, while she was still on the ground, an unknown woman customer stated "[t]hat floor is wet there." *Id.* at 918-19. The plaintiff was the only individual who provided any testimony concerning this unidentified witness - the plaintiff's daughter testified that she was too distraught to hear or see anything and that she could not remember anybody at a table nearby making any comments about the floor. *Id.* In other words, to borrow Mead's terminology, the hearsay statement at issue was made by a "phantom" witness.

The Missouri Court of Appeals held that the present sense impression exception applied to the statement by the unidentified witness, noting that "[C]ourts commonly accept an out-of-court statement which constitutes a declarant's present sense impression, 'a declaration uttered simultaneously, or almost simultaneously, with the occurrence of the act.'" *Lindsay*, 136 S.W.3d at 923 (citing *State v. Crump*, 986 S.W.2d 180, 188).

Since the unidentified observer's statement was made immediately after the plaintiff fell and described the state of the floor at the time of the accident (i.e. the cause of the accident), the statement was admissible as a present sense impression to prove the floor was wet.

Importantly, the *Lindsay* court's decision to admit the statement was completely unaffected by the fact that no one could corroborate the plaintiff's account of the presence and statement by the unidentified witness. That is because the fact that the plaintiff is the only witness to testify as to the statement by the unidentified witness should not factor into the admissibility analysis under ER 803(a)(1) or (2). Instead, that fact should be a consideration for the trier of fact when analyzing the plaintiff's credibility and the amount of weight to give this piece of evidence. *See* 7 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 803:1 (7th Ed.).

Similarly, in *H.E.B. v. Food Stores*, the plaintiff was the only identified witness to the slip and fall accident. *H.E.B.*, 484 S.W.2d 794. She testified that there were puddles of water on the floor where she fell, and that there were loose grapes on the floor as well. She also testified that there were several men unloading produce a few feet away where she fell, and that she heard one of the men say "[s]he fell on those grapes" immediately after she fell. *Id.* at 797. The court concluded the statement was a spontaneous res gestae statement that was admissible to show that the condition of the water and grapes intermingled on the floor constituted a serious hazard. *Id.*

Contrary to Mead's assertion, the unidentified witness was not unloading the grapes at issue. There was no evidence that the witness had contributed to the hazard on the floor (and thus had direct personal knowledge of it). Instead, he was simply unloading unidentified produce in the same general vicinity as the grape display. *Id.* Mead's attempt to distinguish this case on the basis of demonstrated personal knowledge is therefore not well-taken. The unidentified witness in *H.E.B.* was merely an individual who happened to witness the accident while he was working nearby. Since the statement was spontaneous and the statement itself indicated the witness's personal knowledge (he saw the plaintiff fall and observed the condition of the floor), there was sufficient evidence of the witness's personal knowledge.

Just like *Lindsay*, the *H.E.B.* court's analysis was completely unconcerned with the fact that the plaintiff was the only witness to testify as to the existence of the unidentified witness and his statement (i.e., the admissibility analysis was not affected by the fact that the witness was a "phantom" witness). Furthermore, the court's decision to admit the statement did not turn on the fact that the witness was an employee who was working when the accident occurred. Instead, the court's decision turned on the spontaneous nature of the statement and the content of the statement itself which reflected the witness's knowledge.

Likewise, in *Sanitary Grocery Co. v. Snead*, the statement at issue was made by an unidentified witness. *Sanitary*, 67 App.D.C. 129 (1937) There, the plaintiff slipped and fell on vegetable debris on a grocery store

floor. She testified that an unidentified clerk helped her off the ground and stated that he had noticed that the vegetable debris had been on the floor for several hours. *Id.* at 375. One other witness corroborated this statement. *Id.* at 376. The court held that the clerk's statement was admissible as an excited utterance because the evidence showed that the statements were a spontaneous reaction to the plaintiff's fall. *Id.* at 376-77.

Again, the court's decision did not turn on the fact that the witness was identified as a person who worked at the store. The court also did not depend on the fact that one additional witness corroborated the existence and statement of the witness. In fact, the court did not discuss these facts at all in its admissibility analysis. Instead, the court held that the statement was reliable (and therefore admissible) because it was made spontaneously in reaction to the fall. *Id.* at 377 (noting that the cases discussing admissibility of excited utterances "**recognize spontaneity as the test of admissibility.**") (emphasis added).

With respect to *David by Berkeley*, Mead is correct that there were additional witnesses to corroborate the hearsay statements at issue there, and that the declarant was identified. *David by Berkeley*, 740 F.2d 230 (1984). However, the court's admissibility determination did not turn on this extra corroboration or the identification of the witness. Instead, the court's analysis focused on the three elements required for an excited utterance: a startling occasion, whether the statement made before time to fabricate and under the excitement of the event, and whether the statement

related to circumstances of the occurrence. Finding that the statement was a spontaneous reflection of the witness's sensory perception of the accident (including the condition of the floor), and that it was made within seconds of the accident (and therefore inherently reliable), the court concluded the statement was properly admitted.

Furthermore, the *David by Berkeley* court's comment that the trial court was at the "outer bounds" of its discretion in admitting the hearsay evidence appears to be a comment on the trial court's decision to admit the hearsay statements **where the observer's identity was known and the plaintiff gave no reason for failing to admit the observer's direct testimony**. In fact, earlier in the opinion the court noted:

Though the plaintiffs introduced witnesses who testified as to what Susan Jacobs purportedly stated at the time of the incident, the plaintiffs did not call Susan Jacobs to testify nor was any reason given on the record explaining why she was not called. In fact, if one were writing a mystery story about the incident in question, one could entitle it "The Missing Witness – the Case of Admissible Hearsay" with the subheading, "What would Susan Jacobs *have* said had she testified in court?"

David by Berkeley, 740 F.2d 230 (1984). Thus, the court's comment's regarding the trial court's permissible discretion is not, as Mead implies, a comment on the propriety of admitting a hearsay statement in this type of slip and fall case generally. Rather, the court's comment is an expression of disapproval of the trial court's decision to admit hearsay statements

where the witness's identity was known and no reason was giving for not calling her as a witness.

Mead has presented no meaningful distinctions between the slip and fall cases discussed above. Contrary to Mead's assertion, the mere fact that an unidentified witness was wearing a uniform or was otherwise identified as an employee does not magically confer personal knowledge on that witness. Indeed, under Mead's theory, the statements it is contending are inadmissible here would be rendered admissible simply by addition of the fact that the unidentified woman was wearing a name tag or was otherwise identified as a teacher at the school. This argument is meritless, as evidenced by the fact that none of the admissibility determinations in the above cases turned on whether the witness was an employee.

Furthermore, Mead's argument that there cannot be sufficient personal knowledge where the witness is a "phantom" is also without any merit. The unidentified witnesses in *Lindsay* and *H.E.B.* were both "phantom" witnesses, and that fact did not affect the admissibility determination at all. This argument goes to the weight to be given the statements, rather than the admissibility of such statements, and that is a consideration for the trier of fact.

Here, just as in *Lindsay*, *H.E.B.*, *Sanitary Grocery Co.*, and *David by Berkeley*, there was sufficient evidence of personal knowledge. The statements indicate the young woman witnessed a school employee mopping the floor before Mrs. Breeden's fall. CP 26, 52. Mrs. Breeden

testified during her deposition that the young woman ran over from the cafeteria area (which is in plan view from the hallway) immediately after the fall and helped Mrs. Breeden off the floor. CP 26. This is sufficient to show that the declarant saw Mrs. Breeden fall.

Furthermore, the statements were made immediately after the woman saw Mrs. Breeden fall. CP 26, 52. The declarant did not have time to premeditate or fabricate her statements. They were spontaneous and unsolicited. The statements were clearly unembellished by premeditation, reflection, or design, and therefore reliable pursuant to ER 803(a)(1) and (2). The subject matter and spontaneous nature of the woman's statements, made within seconds of the accident, taken with Mrs. Breeden's testimony that the woman was nearby in the cafeteria when she fell and that she immediately ran over to assist, are sufficient to allow a reasonable juror to conclude that the declarant witnessed both the fall and employees mopping the floor prior to the fall.

The trial court committed reversible error by excluding the unidentified witness's statements for lack of personal knowledge.

iii. The Statements at Issue Contain Sufficient Indicia of Reliability.

As noted above, firsthand knowledge of the event the hearsay statements describe can be inferred from the surrounding facts and circumstances as well as the statement itself. *See e.g., State v. Booth*, 306 Md. 313, 508 A.2d at 981-82; *Miller v. Crown Amusements, Inc.*, 821

F.Supp. 703 (S.D.Ga. 1993); *State v. Phillips*, 194 W.Va. 569, 461 S.E.2d 75, 84-85 (1995).

In *Lindsay v Mazzio*'s, a case that is factually directly on point with the present situation, the hearsay statement by the unidentified "phantom" witness was that the floor where the plaintiff fell was wet. The witness's statement was supported by the following indicia of reliability provided in the form of affidavits by the defendant restaurant's former employees: (1) the place where the plaintiff fell was routinely wet and slick because of its close proximity to the kitchen area; (2) warning signs were available but not used because they blocked employee's path to the kitchen area; and (3) other people had slipped and fall in the area where the plaintiff fell. Given the nature and substance of the spontaneous statement, and the corroborating evidence, the *Lindsay* court held the statement was admissible as a present sense impression.

Just like *Lindsay*, other circumstantial evidence presented by both parties at trial provide sufficient indicia of reliability for the declarant's statements, and allow for the inference that the unidentified woman observed Mrs. Breeden's fall as well as the act that caused the fall (i.e., the mopping). Specifically, the evidence showed that the mall area was routinely mopped, warning signs were never used when the mall area was mopped, and other people had slipped and fallen in the mall area.

First, there is the accident report that Mrs. Breeden filled out within minutes of falling, which clearly relays what the witness told her

(“the floor had just been mopped”) and states that there was a student witness to the accident. CP 34.

Secondly, Mrs. Breeden’s recollection of the accident is consistent with the floor having recently been mopped. Mrs. Breeden testified that her clothes were soaking wet from her shoes to her shoulder, that the substance on the floor was water, and the overall appearance of the floor was consistent with the floor having just been mopped. RP 153-59. Furthermore, her testimony that there were no caution signs posted was consistent with the custodians’ admitted practice of neglecting to use wet floor signs when mopping the mall area during school hours, which happens approximately four times every month. RP 153-58, 304-07, 333.

Additionally, the testimony provided by custodians also allows for the inference that the floor had recently been mopped. Custodian Marv Fortune testified that the mall area requires mopping from time to time, that the floor was wet when they mopped the floors, and that mopping would leave residual water on the floor. RP 294, 296, 301. He also admitted that there had been times where water was present on the floor and nobody notified him or asked him to clean it up. RP 304-07. Custodian Ken Jelsing testified that he was aware that slip and falls occur multiple times each year in the mall area. RP 341.

This evidence corroborates the fact that the floor had recently been mopped and was still wet with water when Mrs. Breeden slipped and fell. It also corroborates the statement that falls “happen all the time,” since the evidence shows that they have to mop that area approximately four times

per month and that other slip and falls occur multiple times each year in the mall area.

Given this corroborating evidence, there is sufficient indicia of reliability of the unidentified declarant's statements. A reasonable juror could conclude, based on the nature and substance of the statements as well as the corroborating testimonial evidence, that the unidentified woman had the ability and opportunity to witness school staff mopping the floor and Mrs. Breeden's subsequent accident. Therefore, given this record, the trial court erred by excluding this evidence for lack of personal knowledge. This error was not harmless, as set forth in Mrs. Breeden's opening brief², and therefore Mrs. Breeden must be given a new trial.

III. CONCLUSION

For the foregoing reasons, Appellants Steve and Candy Breeden respectfully request that the Court grant their appeal and order remand for a new trial.

RESPECTFULLY SUBMITTED this 3rd day of July, 2015.

LUKINS & ANNIS, P.S.

By 
MICHAEL A. MAURER, WSBA #20230
KELLY E. KONKRIGHT, WSBA #33544
Attorneys for Appellants
Candy and Steve Breeden

² Mead does not contend the error was harmless, and therefore Mrs. Breeden relies on the discussion of this issue in her opening brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of July, 2015, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Brian A. Christensen
Jerry J. Moberg & Associates
P.O. Box 130
Ephrata, WA 98823-0130

Attorneys for Respondents

- U.S. Mail
- Federal Express
- Hand Delivered
- Overnight Mail
- Telecopy (FAX)
- Via email
bchristensen@jmlawps.com


MICHELE LINDQUIST
Paralegal