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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 328139

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 #354 and MEAD HIGH SCHOOL,

Respondents.

APPELLANTS CANDY AND STEVE BREEDEN'S APPEAL BRIEF

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I. INTRODUCTION

Appellant Candy Breeden slipped and fell on a wet hallway floor at Mead High School in May 2009, resulting in substantial injuries to her back and shoulder requiring surgery. There were no “wet floor” signs to warn Mrs. Breeden of the hazard. The only eyewitness to the fall was an unidentified young woman who immediately ran over to assist Mrs. Breeden after she fell. While she was helping Mrs. Breeden to stand, the young woman stated that “this happens all the time, they just mopped the floor.” These unsolicited statements, made within seconds of Mrs. Breeden’s fall, were consistent with Mrs. Breeden’s personal observations at the time of the fall that the hallway appeared to have been recently mopped: the tile floor appeared to be covered in water, a large section of the hall was wet (inconsistent with a spill), and Mrs. Breeden’s clothes were soaked where they made contact with the wet hallway floor.

The Breedens subsequently brought claims for negligence and loss of consortium against Respondents Mead High School and Mead School District #354. During the pre-trial motions, Respondents asked the trial court to exclude the out-of-court statements by the unidentified young woman on the grounds that these statements were inadmissible hearsay. The Breedens objected, contending that the statements could come in

under two different exceptions to the hearsay rule: the present sense impression exception and the excited utterance exception.

Despite the fact that the statements met all the requirements for admissibility under both the present sense impression exception as well as the excited utterance exception, and therefore contained all the independent indicia of reliability necessary for admission, the trial court granted the Respondents' motion and held that the out-of-court statements were inadmissible.

During the subsequent jury trial, the Breedens presented circumstantial evidence that the floor had been mopped the morning of the accident through Mrs. Breeden's testimony. The two day shift custodians from Mead High School admitted during their testimony that each month an average of three to four accidents requiring mopping occurred in the area where Mrs. Breeden fell, that they rarely put up wet floor signs when they mop, and that mopping may have occurred in that area at the time in question. Neither party presented any direct evidence regarding whether the floor had been mopped the morning of the accident. The jury found that the Respondents were not liable for Mrs. Breeden's injuries.

The trial court abused its discretion in holding that the unidentified declarant's statements, which were corroborated by circumstantial evidence, were not admissible as a present sense impression or as an

excited utterance. Furthermore, this error was not harmless because the statements went directly to a key issue in the case: whether the Respondents created the dangerous condition and whether the Respondents therefore had knowledge of the dangerous condition such that they were liable for the Breedens' subsequent damages. The excluded statements are not cumulative: the unidentified declarant was the only eyewitness to the accident – other than the Petitioner. Her statements about the cause of the accident were a necessary component of the case. Given the nature of the excluded statements and the evidence that was presented to the jury, this Court cannot conclude with reasonable probability that the outcome of the trial would have been the same had these statements been properly presented to the jury. Mr. and Mrs. Breeden respectfully submit that the trial court's decision to exclude the out-of-court statements should be reversed and the case remanded for a new trial.

II. ASSIGNMENTS OF ERROR

A. The trial court erred by granting Respondents' Motion in Limine and excluding the out-of-court statements made by the unidentified declarant because the statements were admissible pursuant to ER 803(a)(1) and ER 803(a)(2), and the trial court's error was not harmless.

III. STATEMENT OF THE CASE

Appellants Candy and Steve Breeden have been married for 35 years. They have three sons together. Prior to the events that are the subject of this appeal, Mrs. Breeden lived an active lifestyle. Report of Proceedings (RP) 143, 145. Although Mrs. Breeden worked during the first part of her marriage, she has been a homemaker since approximately 2002. RP 144.

In May of 2009, the Breeden's youngest son, Austin, transferred from Mt. Spokane High School to Mead High School ("MHS"). RP 147. On May 14, 2009, Mrs. Breeden accompanied Austin on his first day at Mead to check him into school and meet his teachers. After meeting Austin's teachers, Mrs. Breeden went back to the school office to make sure that Austin's car was parked in a correct parking spot under Mead's parking policy. RP 147-150.

The staff in the administrative office told Mrs. Breeden to go find the parking lot attendant outside. They instructed Mrs. Breeden to walk down the hallway outside the office, take a right, and exit the building through the double doors at the end of the hallway. This suggested pathway required Mrs. Breeden to walk through the cafeteria area (also referred to as the "mall"). RP 149-51.

Mrs. Breeden followed these instructions and headed down the hallway. As she entered the cafeteria, she slipped and fell on the tile floor. Mrs. Breeden struck her shoulder and back hard. Upon falling, she noticed that the floor was wet all over where she landed and that her clothes were soaking wet from her shoulders to her feet, particularly on her left side where she initially impacted with the floor. RP 153-54, 157-59.

Mrs. Breeden was surprised to find the floor wet because it was a warm, sunny day in May and there were no wet floor signs or caution tape to indicate the floor was wet. The substance on the floor appeared to be water. The water covered such a large section of the hallway that it did not appear to have been caused by a spill. In Mrs. Breeden's experience as a homemaker and the person primarily responsible for cleaning her family's home, the above observations and the slickness of the floor caused her to believe the area had just recently been mopped. RP 153-157.

Immediately upon Mrs. Breeden's fall, an unidentified young woman ran over from the cafeteria area and helped Mrs. Breeden off the ground. RP 157; Clerk's Papers (CP) 26. As she was assisting Mrs. Breeden, the woman stated that "this happens all the time," and "they just mopped." CP 26, 52. The woman made these statements within seconds

of Mrs. Breeden's fall. CP at 52. Mrs. Breeden did not know this young woman. CP 26-27.

The unidentified woman helped Mrs. Breeden walk to the end of the hallway and outside where Mrs. Breeden located the parking lot attendant. RP 157. The attendant asked what was wrong after noticing that Mrs. Breeden was crying and appeared to be injured. Upon hearing about the fall, the attendant instructed Mrs. Breeden to go back to the office and file an incident report. RP 159.

Mrs. Breeden returned to the office and filled out the incident report within 15 minutes of the fall. RP 159-60. In the report, she indicated that she was walking down the hall where the floor had just been mopped and she slipped and fell on her back and shoulder. She also indicated that there had been a student witness to the event. CP 34; RP 162. Mrs. Breeden's statement that the floor had just been mopped was based on her own observations as well as the statements by the unidentified woman.

Within 24 hours of returning home, Mrs. Breeden visited the emergency room for her shoulder and back. Mrs. Breeden tried multiple treatments to alleviate the pain in her left shoulder, but nothing helped. RP 167-168. Eventually, she underwent shoulder surgery in May 2013, which revealed that Mrs. Breeden had ripped a tendon in her shoulder and

suffered “bone slippage.” 180-181, 183. Although her shoulder pain has improved slightly since the surgery, she continues to experience back pain and anticipates that she will have to undergo back surgery in the near future. RP 184-86.

In July 2012, the Breedens filed suit against Respondents Mead High School and Mead School District #354 for claims of negligence and loss of consortium. CP 3. The Breedens’ lawsuit alleged that the Respondents had a duty to use reasonable care in maintaining the school premises’ safety for visitors, that they breached this duty by leaving the tile floor in the hallway wet after mopping and without placing warning signs, and the Breedens suffered damages as a direct result of the Respondents’ negligence. CP 4-5.

In 2013, Mrs. Breeden returned to Mead High School to take pictures of the area where she slipped and fell in 2009. RP 163. She visited the school at 3:15 p.m. during a weekday afternoon, and observed a janitor mopping the mall floor in the same general area where she fell. She also noticed that the floor was extremely wet and there were no wet floor signs or caution tape. Mrs. Breeden remained at the school for approximately 45 minutes taking pictures and, when she left, she noticed that the floor was still wet. RP 164-66.

The Breedens' lawsuit proceeded to jury trial on July 28, 2014. During the Motions in Limine, the Respondents asked the trial court to exclude any evidence concerning the out-of-court statements made by the unidentified witness who assisted Mrs. Breeden when she fell. RP 117. The Breedens objected to exclusion of the evidence on the grounds that the statements were admissible under two exceptions to the general hearsay prohibition: the present sense impression exception and the excited utterance exception. RP 118-124.

After considering both parties' arguments, the trial court held:

And I totally agree with Mr. Konkright's analysis of the presence sense analysis, and I agree with his rendition of the law, but I'm arriving at a different conclusion. These statements can come in even though we have no idea who a declarant might be, but I have to have more of a foundation than I think I have here. For example, I don't know who – I don't know when the statement about the mopping was made about the floor or whether it was one minute after the supposed mopping happened or 30 minutes ago. You know, maybe we're talking about the event, as Counsel said, the falling that was the startling event. I supposed that's more startling than watching somebody mop, but I'm backed up into a foundational question here.

Example: No doubt this was a startling event for Ms. Breeden. It would be to any of us. But I don't know, for example, whoever this declarant is, if the declarant witnessed the fall necessarily from down the hall or was right there, whether there was a scuffle and the person turned around and saw something, whether Ms. Breeden was laying on the floor and then the person comes to her aid, what the timeframe was, whether a person was just walking around the corner. That all goes to the issue of

whether it's a startling event. And if you're watching a car accident before your eyes and someone is seriously injured or killed or a gunshot, a startling event in those scenarios can be much more obvious.

And in terms of excited utterance, well, I think I would be taking a significant leap to say that the declarant was under the stress of the event. No disrespect to Ms. Breeden. She's certainly under the stress of a very difficult event for her, but I have no foundation to know whether the person that said this actually saw her fall necessarily or whether they were, like I said, looking in another direction, whether they were there three minutes later or five minutes later or ten minutes later. There's just too much in terms of unknowns for me to allow two statements like this, which I think would have significant impact with a declarant that is not available, as Mr. Konkright said, which is not a requirement of the rule, but there's no way to counter it under the circumstances.

So I don't think the rule contemplates that I have to admit this statement under the circumstances. So "they just mopped" or "it happens all the time" would not come in under my ruling, which doesn't mean, of course, that Ms. Breeden cannot describe the event as she saw it of course.

RP 125-27.

At trial, Mrs. Breeden testified about the accident and her observations that the condition of the floor as she perceived it was consistent with it having recently been mopped. She testified that the floor appeared to be wet with water, the wet area was too large to have been caused by a spill or puddle, her clothes were soaked where she made contact with the floor when she fell, and that her experience as a homemaker who was responsible for cleaning her family's house led her

to believe the floor had recently been mopped before she fell. She also testified that there were no warning signs or any other indicators that the floor was wet. RP 153-59.

The two day shift custodians at Mead High School also testified at trial. Marv Fortune, who has been a custodian at Mead High School for 37 years, testified that the "mall" area has tile floor that requires mopping from time to time and that, after mopping, there might be some residual wetness on the floor. RP 294, 296. Mr. Fortune, who did not have any recollection of the day of the accident, admitted that when they mop the floors, the floor is going to be wet. RP 301.

Mr. Fortune also testified that Mead High School has three or four wet floor warning signs that custodial staff are supposed to set up if the wet area is larger than two feet wide, but that he seldom uses the signs. RP 302, 314-15. He acknowledged that, on average, there are three to four incidents each month in the mall area requiring the day shift custodians to wet mop, but that he had no recollection of ever using the warning signs in the mall area. RP 304-07.

Ken Jelsing, the other day shift custodian, agreed with Mr. Fortune's estimate that they have to wet mop the mall area an average of three to four times per month, and he also stated that he usually does not put the warning signs out when he does so. RP 333. Mr. Jelsing admitted

that he had no recollection of ever actually using a warning sign and that, at the time of Mrs. Breeden's accident in 2009, he was not aware of what safety measures he was supposed to take with respect to preventing slip and falls. RP 335-336. Mr. Jelsing also indicated that he has never been reprimanded or disciplined in any way for failing to use the warning signs as instructed by the training manual. RP 330-331. Additionally, Mr. Jelsing testified that he was aware that slip and falls occur multiple times each year in the mall area, and that he does not necessarily hear about all of them. RP 341.

At the conclusion of trial, the jury found that the Respondents were not negligent and entered a verdict for the Respondents. CP 253.

The Breedens timely filed a Notice of Appeal in this Court on September 29, 2014. CP 264.

IV. 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). This Court reviews a trial court's application of the rules to particular facts for an abuse of discretion. *Id.* A court abuses its discretion if its decision is manifestly

unreasonable, or based on untenable grounds or untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

With respect to evidentiary rulings, a trial court abuses its discretion if it excludes statements that are clearly admissible under the rules of evidence. *Britton v. Washington Water Power Co.*, 59 Wn. 440, 110 P. 20 (1910). An evidentiary decision may be an abuse of discretion if it is based upon facts that are not supported by the evidence. *State v. Williamson*, 100 Wn. App. 248, 255, 996 P.2d 1097 (2000).

It is an abuse of discretion to exclude evidence admissible under either the present sense impression or excited utterance exceptions to the hearsay rule where, as here, there is sufficient information meeting the requirements of ER 803(a)(1) and/or ER 803(a)(2). *See e.g., State v. Powell*, 126 Wn.2d 244, 266, 893 P.2d 615 (1995); *see also State v. Sharp*, 80 Wn. App. 457, 461, 909 P.2d 1333 (1996) (recognizing that a court abuses its discretion if its evidentiary decision is contrary to law).

B. The trial court erred in granting Respondents' Motion in Limine to exclude the statements made by the unidentified young woman.

Hearsay is any out-of-court statement offered "as evidence to prove the truth of the matter asserted." ER 801(c). The purpose of the rule prohibiting the use of hearsay testimony, except in limited circumstance, is to increase the probability that evidence shall be

trustworthy and reliable. *Chmela v. Department of Motor Vehicles*, 88 Wash.2d 385, 392-93, 561 P.2d 1085 (1977). However, certain categories of statements contain independent indicia of reliability and are therefore excepted from the hearsay prohibition. *See Warner v. Regent Assisted Living*, 132 Wn. App. 126, 136, 130 P.3d 865 (2006) (noting that statements falling under the “firmly rooted” hearsay exceptions are considered inherently trustworthy). The Washington rules of evidence recognize 23 exceptions to the hearsay rule that apply regardless of whether the declarant is available to testify or not, including exceptions for statements of the declarant’s present sense impressions and excited utterances. ER 803(a)(1)-(23).

The trial court erred in granting Respondents’ motion to exclude the out-of-court statements made by the unidentified witness because her statements were admissible under both the present sense impression and the excited utterance exceptions to the hearsay rule.

1. **Statements are admissible under both ER 803(a)(1) and (2) even if the declarant’s name is unknown.**

Washington law does not require the declarant to be identifiable to admit a present sense impression statement. Rather, Washington law is in accord with those cases that state identification of the declarant is not necessary. *See* 5C KARL B. TEGLAND, WASHINGTON PRACTICE SERIES,

EVIDENCE LAW AND PRACTICE § 803.3 (5th ed. 2012) (instructing practitioners to see *Booth v. State*, 306 Md. 313, 508 A.2d 976 (1986) for application of the present sense exception to hearsay).¹ In *Booth v. State*, the Maryland Court of Appeals held that “[i]dentification of the declarant... is not a condition of admissibility. When the statement itself or other circumstantial evidence demonstrates the percipency of a declarant, whether identified or unidentified, this condition of competency is met.” *Booth*, 508 A.2d at 981-82; *see also State v. Jones*, 311 Md. 23, 31, 532 A.2d 169, 173 (1987) (concluding that the identity of the declarant need not be established and is not a prerequisite to introduction of the declarant’s statement); *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).

Similarly, the fact that a declarant’s identity is unknown does not affect the admissibility of the declarant’s statements under the excited utterance exception. *See e.g.*, 7 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 803:1(7th ed.) (noting that under the excited

¹ Although there are no published Washington cases discussing whether present sense impression statements by an unidentified declarant are admissible, there are multiple unpublished cases where Washington appellate courts have held that statements by an unidentified witness were properly admitted pursuant to ER 803(a)(1).

utterance exception, the fact that the declarant is unidentified does not affect the admissibility of his statement, only the assessment of weight to be assigned to his statement by the trier of fact). *See also 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); *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) *Britton v. Washington Water Power Co.*, 59 Wn. 440, 110 P. 20 (1910) (holding that the statement of an unidentified bystander was admissible under common law *res gestae* exception).

Under both ER 803(a)(1) and (2) and well-established case law, a declarant’s identity need not be established for his out-of-court statements to be admissible if the declarant was a firsthand witness to the event. *See* 5C WASH. PRACTICE SERIES, EVIDENCE LAW AND P. §§ 803.4, 803.6 (5th ed. 2012). 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., 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"). Indeed, "testimony should not be excluded for 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).

As discussed below, the statements by the unidentified declarant satisfied all the elements required for admissibility under both ER 803(a)(1) and (2), including a sufficient showing that the declarant had personal knowledge of the event.

2. **The statements are admissible as a present sense impression under ER 803(a)(1).**

A statement “describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter” is a “present sense impression” and is not excluded by the hearsay rule. ER 803(a)(1).

To be admissible as a present sense impression, 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 present sense impression exception rule is based on the policy that, under the circumstances defined by the exception, there is very little chance of misrepresentation or conscious fabrication by the declarant. *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. The rule also

requires that the statement be made while the declarant was perceiving the event or condition, or immediately thereafter. *Hieb*, 39 Wn. App. at 278.

Application of the present sense impression exception has been recognized in slip and fall cases where the declarant's statement concerns the condition of the floor when the accident occurred. *See e.g., Lindsay v. Mazzio's Corp.*, 136 S.W.3d 915, 923 (2004) (holding in a slip and fall case that a statement from an unidentified diner that "[t]hat floor is wet there" was admissible as a present sense impression to prove that the floor was wet where the plaintiff fell); *Duke v. American Olean Tile Co.*, 155 Mich.App. 555, 400 N.W.2d 677 (1986) (holding that the wife of a slip and fall plaintiff could testify as to a telephone conversation she had with her husband, during which her husband told her that the floor was wet and he slipped, that took place approximately three minutes after his accident).

The trial court declined to admit the testimony pursuant to ER 803(a)(1). Although the court correctly noted that present sense impressions may be admissible when the declarant is unknown, the court incorrectly held that more evidence regarding the foundation of the declarant's testimony was necessary. RP 125-26. The court also stated that it did not think that the event was a startling event.² RP 126. The

² It is not clear from the record whether the trial court was reading a requirement of a "startling event" into the elements of a present sense impression, or whether

trial court erred. The statements met all of the requirements for a present sense impression, including a proper foundation for the declarant's firsthand knowledge.

First, the statements were made immediately after the woman saw Mrs. Breeden fall, when she ran over to help Mrs. Breeden off of the ground. CP 26, 52. Thus, it was timely under the rule. The declarant did not have time to premeditate or fabricate her statements. Rather, the statements were unsolicited. They were clearly a spontaneous or instinctive utterance that was evoked by Mrs. Breeden's accident and unembellished by premeditation, reflection, or design.

Further, the statements also explained the event –Mrs. Breeden's fall. The declarant's statements explained why the floor was slippery – i.e., it had just been mopped. Thus, the statement meets the requirement that the statement describes or explains the startling event.

the court's comments regarding the lack of a startling event related to the analysis under the excited utterance exception. To the extent the trial court held that ER 803(a)(1) did not apply because there was no startling event, the trial court erred because ER 803(a)(1) does not require that the event being described or explained be startling. *See Martinez*, 105 Wn. App. at 783 (no requirement that event being described be startling under ER 803(a)(1)). The purpose of the ER 803(a)(1) exception is to cover the type of situation in which the declarant makes a statement contemporaneously or nearly contemporaneously with an event where there may be doubt as to whether the event was startling. 5C WASH. PRAC. SERIES, EVI. L. AND PRAC. § 803.3 (2012). Furthermore, the court's conclusion that Mrs. Breeden's fall was not a startling event is also in error, for the reasons stated in the discussion of ER 803(a)(2) below.

Moreover, there was a proper foundation to show that the woman was a firsthand witness to the event. Both the statements themselves and the other circumstantial evidence presented by both parties allow for the inference that the woman witnessed Mrs. Breeden's fall as well as the act that caused the fall (*i.e.*, the mopping).

The statements indicate that the young woman saw 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 immediately after the fall and helped Mrs. Breeden stand up. CP 26. Thus, it is apparent that the declarant saw Mrs. Breeden fall. How else would she know to come assist Mrs. Breeden?

Furthermore, Mrs. Breeden did not know this young woman, and there is no indication that the declarant had any motivation to lie about Mrs. Breeden's fall or the cause of her fall. CP 28. 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 in the mall area when Mrs. Breeden fell and that the woman immediately rushed over to help Mrs. Breeden, are sufficient to allow the reasonable inference that the declarant witnessed the fall and employees mopping the floor prior to the fall. Because a reasonable juror could conclude the

declarant had first-hand knowledge, it was error for the trial court to withhold this evidence from the jury. *Hickey*, 917 F.2d at 904.

Additionally, corroborating evidence demonstrates that Mrs. Breeden's testimony regarding the declarant's actions and statements is not merely a self-serving fabricated statement. Within minutes of falling, a school employee instructed Mrs. Breeden to report the injury to the school, which Mrs. Breeden did immediately. CP 159-60. The report Mrs. Breeden filled out within minutes of falling clearly states what she was told by the declarant – *i.e.*, “the floor had just been mopped” – and indicates that there was a student witness (the declarant) to the accident. CP 34.

Likewise, Mrs. Breeden's recollection of the accident is consistent with the floor having just been mopped. Mrs. Breeden's clothes were soaking wet from her shoes to her shoulder. In other words, the floor was wet all around her, which is characteristic of a floor having just been mopped. The substance on the floor was water, which is primarily what Respondents' custodians use to mop up spills. Finally, the slippage of the floor and the overall appearance of the floor were consistent with the floor having just been mopped. The fact that no wet floor warning signs were placed to warn the invitees was also consistent with the custodians' admitted practice of not using wet floor signs when mopping the mall area

during school hours, which happens approximately four times every month. RP 153-58, 304-07, 333.

The unidentified declarant's statements met the requirements of ER 803(a)(1). The declarant's personal knowledge could reasonably be inferred from the statements and the corroborating circumstantial evidence. The trial court abused its discretion by holding that the statements were not admissible pursuant to ER 803(a)(1).

3. **The statements are also admissible as an excited utterance pursuant to ER 803(a)(2).**

A statement "relating to a startling event or condition made while the declarant was under the stress of 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).

The key determination for the admission of evidence under the excited utterance exception is whether the statement was made while the declarant was under the influence of the event when the statement was made. *See e.g., 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). Statements made under the excitement of the moment related to an accident or other startling event are 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).

Courts have consistently recognized application of the excited utterance exception to statements made in response to slip and fall accidents where the statement concerned the condition of the floor at the time of the fall, even when the declarant was not identified. *See e.g., David by Berkeley v. Pueblo Supermarket of St. Thomas*, 740 F.2d 230 (3d. Cir. 1984) (holding that a bystander’s statement, made in response to plaintiff’s fall in a grocery store, that she had seen substance on the floor and told someone in the store to clean it up was admissible under the excited utterance exception); *Keene v. Arlan’s Dept. Store of Baltimore*,

Inc., 35 Md.App. 250, 256-57, 370 A.2d 124 (1977) (holding that where plaintiff slipped and fell on slippery substance on floor, cashier's statement after the fall that "I told them if this wasn't cleaned up, someone's going to fall" was properly admitted as an excited utterance); *H.E.B. Food Stores v. Slaughter*, 484 S.W.2d 794 (Tex.Civ.App. 1972) (holding that where plaintiff fell on wet grocery store floor where there were loose grapes on the floor, statement by unidentified employee that "she fell on those grapes" was admissible spontaneous res gestae statement); *Sanitary Grocery Co. v Snead*, 67 App. D.C. 129, 90 F.2d 374 (1937) (holding that unidentified store clerk's statement that items on floor that plaintiff slipped on "had been there for a couple of hours" was admissible as an excited utterance).

In *David by Berkeley*, a plaintiff sued a supermarket after she slipped on some cottage cheese on the floor. The plaintiff sought to admit evidence that, seconds after she slipped and fell, a bystander had stated that she had seen the cottage cheese on the floor prior to the accident and had told someone in the store to clean it up. The Third Circuit held that the bystander's unsolicited statement made within seconds after seeing the plaintiff fall was admissible as an excited utterance because: (a) the declarant saw the plaintiff slip and fall, an event that would reasonably qualify as a "startling occasion," (b) the statement was made before the

witness had time to fabricate, (c) the statement was unsolicited, and (d) it was undisputed that the statement directly concerned the “circumstances” surrounding the occurrence. 740 F.2d at 235.

Similarly, the plaintiff in *Keene* brought an action against a department store after she slipped and fell on an unidentified liquid on the floor near the checkout counters. 370 A.2d at 125-26. The plaintiff sought to introduce as evidence the fact that immediately following her fall, as she was regaining her feet, one of the store’s cashiers stated that “I told them if this wasn’t cleaned up, someone’s going to fall.” *Id.* at 126. The Maryland Court of Appeals held that the statement was properly admitted as an excited utterance because it satisfied the two requirements for admissibility under that exception: the plaintiff’s fall was an event that was sufficiently startling to bystanders to render the normal reflective thought processes of the observer inoperative, and the statement was a spontaneous reaction to the event. *Id.* at 128.

Likewise, in *H.E.B. Food Stores*, the plaintiff was walking in the produce section of a grocery store when she slipped and fell. As soon as she fell, the plaintiff noticed that the floor appeared to be smeared with dirty water and there were loose grapes on the floor. 484 S.W.2d at 795-96. The plaintiff, who was the only witness to testify regarding the accident, sought to introduce as evidence a statement **by an unidentified**

employee that “[s]he fell on those grapes.” The employee, who had been one of several employees unloading produce at the time the plaintiff fell, made the statement immediately after the plaintiff fell. The Texas Court of Appeals held that this statement, which was the employee’s immediate explanation of why the plaintiff fell, was an admissible spontaneous “res gestae type” statement – i.e. an excited utterance. *Id.* at 297.

Finally, in *Sanitary Grocery Co.*, the plaintiff brought a negligence action against a grocery store after she slipped and fell on produce that was on the floor. At trial, the plaintiff introduced evidence that immediately after she fell, **an unidentified store clerk** picked her up off of the ground, asked whether she was injured, and stated that the produce on the ground had been there for several hours. 90 F.2d at 375. On appeal, the defendant claimed the statement that the produce “had been on the ground for several hours” was improperly admitted as an excited utterance because that statement was narrative in character and concerned the state of the floor prior to the accident. The Court of Appeals for the District of Columbia rejected this argument. *Id.* at 376-77. The Court upheld the trial court’s admission of the statement as an excited utterance without requiring any showing of first-hand knowledge beyond the content of the statement. The Court noted that the statement regarding how long the produce had been on the floor was a spontaneous reaction to

the plaintiff's fall – which was a startling event to the unidentified witness.

Id.

Here, as in the above cases, the declarant witnessed a startling event (Mrs. Breeden falling) and, during the excitement of the event, immediately described the condition that caused the startling event. The statement Mrs. Breeden attempted to introduce satisfied all of the requirements of ER 803(a)(2). Despite the above line of cases, the trial court determined that the statements at issue here were not admissible as excited utterances. The trial court based this ruling on the notions that (1) it did not know enough about the declarant's position in relation to Mrs. Breeden when the fall occurred to determine whether a startling event had occurred, and (2) there was supposedly not enough information to determine whether the declarant was under the stress of the event when she made the statements. RP 126.

The trial court committed reversible error. The statements satisfied all three requirements for an excited utterance: a startling event occurred, the declarant was under stress of the event when she made the statements, and the statements related to the startling event.

i. A startling event occurred.

Mrs. Breeden's fall in the hallway constituted a startling event for purposes of ER 803(a)(2). One of the classic situations where the excited

utterance exception is most commonly invoked is where “the declarant has just witnessed an accident ... and spontaneously says something about the cause or circumstances of the accident.” 5C WASH. PRACTICE SERIES, EVID. L. AND PRAC., § 803.6 (5th ed. 2012). See also *David by Berkley*, 740 F.2d at 235; *Keene*, 35 Md.App. at 256-57; *H.E.B. Food Stores*, 484 S.W.2d at 796; *Sanitary Grocery Co.*, 90 F.2d at 376-77 (all holding that a plaintiff’s slip and fall constituted a sufficiently startling event for purposes of the excited utterance exception where the fall provoked an immediate reaction from the declarant who witnessed the fall).

Moreover, a declarant’s statement, with circumstantial evidence independent from the statement’s bare words, allows the inference that an event was starting under the excited utterance exception. *State v. Young*, 160 Wn.2d at 816-17.

The fact that a sudden fall on a slippery floor is a startling event is best exemplified by the analogous cases cited herein – *David by Berkeley*, *Keene*, *H.E.B. Food Stores*, and *Sanitary Grocery Co.* In each of those cases, the declarant witnessed the plaintiff slip and fall on a slick floor. In each case, the higher courts held that observing a person fall and suffer injury was a startling event for purposes of the excited utterance exception.

Here, the evidence indicates that the event was startling. The declarant's immediate reaction was to run over to assist Mrs. Breeden off of the floor and explain why she had fallen. If the declarant was not startled, she would not have rushed to assist Mrs. Breeden. CP 26-28, 52. This evidence that Mrs. Breeden's fall provoked such an immediate reaction from the declarant is sufficient to establish that the event was a startling one for purposes of ER 803(a)(2). *See David by Berkeley*, 740 F.2d at 235 (3d. Cir. 1984); *Keene*, 35 Md.App. at 256-57; *H.E.B. Food Stores*, 484 S.W.2d at 796; *Sanitary Grocery Co.*, 90 F.2d at 376-77. Under these facts, the trial court erred by holding the event was not sufficiently startling for purposes of ER 803(a)(2).

ii. **The evidence shows that the declarant saw Mrs. Breeden fall and made the statements while excited.**

The statements and the evidence relating to the manner in which the declarant's statements were made establish that the declarant saw Mrs. Breeden fall and was under the stress of the accident when she spoke.

Here, it can hardly be disputed that the declarant saw Mrs. Breeden fall. The declarant was immediately assisting Mrs. Breeden upon her fall. If the declarant had not observed the fall, how would she know to come assist Mrs. Breeden?

Likewise, there is sufficient evidence that the declarant made her statements in the excitement of the fall. The key to determining whether a statement was made during the excitement of the startling event is spontaneity and timing. *State v. Chapin*, 118 Wn.2d 681, 688, 826 P.2d 194 (1992).

Where, as here, the statement is made within seconds after the event, it was made while under excitement of the event. *See e.g., State v. Flett*, 40 Wn. App. 277, 287, 699 P.2d 774 (1985), *David by Berkeley*, 740 F.2d at 235 (3d. Cir. 1984); *Keene*, 35 Md.App. at 256-57; *H.E.B. Food Stores*, 484 S.W.2d at 796; *Sanitary Grocery Co.*, 90 F.2d at 376-77.

Just the like the admissible hearsay statements in *David by Berkeley*, *Keene*, *H.E.B. Food Stores*, and *Sanitary Grocery Co.*, which were all made within seconds of the plaintiff falling as an immediate reaction to the fall, here the unidentified declarant's unsolicited statements were made within seconds after Mrs. Breeden fell. CP 26, 52. The spontaneous nature and timing of the declarant's unsolicited statements demonstrate that she was still under the stress of the event when she spoke. The trial court erred by holding there was no foundation to find that the declarant made the statements while under the stress of the event.

iii. **The declarant's statements relate to Mrs. Breeden's fall.**

Finally, it is clear that the statements at issue relate to the accident. Statements describing an event that occurred before the exciting event, and which caused the exciting event, are admissible under ER 803(a)(2). See 5C WASH. PRACTICE, EVIDENCE L. AND PRAC. § 803.5 (citing to *David by Berkeley*, 740 F.2d 230); see also *Keene*, 35 Md.App. at 256-57 (statement that “I told them if this wasn’t cleaned up, someone’s going to fall” was admissible as excited utterance); *H.E.B. Food Stores*, 484 S.W.2d at 796 (statement that “[s]he fell on those grapes” was admissible hearsay statement); *Sanitary Grocery Co.*, 90 F.2d at 376-77 (statement that produce on floor on which plaintiff slipped and fell “had been there for hours” was admissible as excited utterance).

Here, like the spontaneous statements in *David by Berkeley*, *Keene*, *H.E.B. Food Stores*, and *Sanitary Grocery Co.*, the declarant’s statements constitute an excited utterance. There is no meaningful distinction between the statements excluded by the trial court, and those statements admitted in *David by Berkeley*, *Keene*, *H.E.B. Food Stores*, and *Sanitary Grocery Co.* In all of these slip and fall cases, the statements offered under the excited utterance hearsay exception were from declarants who witnessed a slip and fall, and made statements about the cause of the fall

within seconds after the fall. The only difference between this case and *David by Berkeley, Keene, H.E.B. Food Stores, and Sanitary Grocery Co.* is that the evidence was admitted in the latter cases, but erroneously denied in this case. The fall was a startling event to the declarant. The fact that the statements were made within seconds of the fall – indeed while the declarant was helping Mrs. Breeden – is sufficient to establish that the statements were made while the declarant was under the excitement of the event. The trial court erred in excluding these statements.

C. **The trial court's error was prejudicial and therefore requires reversal and remand for new trial.**

Nonconstitutional error is prejudicial if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Buourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997); *see also James S. Black & Co. v. P & R Co.*, 12 Wn. App. 533, 537, 530 P.2d 722 (1975) (error is prejudicial if it affects, or presumptively affects, the outcome of the trial).

Exclusion of evidence is only harmless where the excluded evidence is merely cumulative – that is, when the excluded evidence is essentially the same as other evidence which was admitted. *See e.g., Havens C&D Plastics, Inc.*, 124 Wn.2d 158, 169-70, 876 P.2d 435

(1994); *Aubin v. Barton*, 98 P.3d 126 (2004) (holding that trial court erred by improperly excluding expert testimony and that error was not harmless since the erroneously excluded evidence went directly to a central disputed issue of fact). Therefore, where a court erroneously excludes evidence that properly comes within a hearsay exception, and the excluded evidence is not merely cumulative, the court commits reversible error. *Houston Oxygen Co. v. Davis*, 161 S.W.2d 474, 476-77, 139 Tex. 1 (1942) (holding that where lower court erred by excluding admissible present sense impression, and the excluded statement was not purely cumulative because it was a statement in which the witness “was alluding to an occurrence within her own knowledge in language calculated to make her ‘meaning clearer to the jury’ than would a mere expression of opinion,” remand was necessary for a new trial).

There is no question that exclusion of the unidentified declarant’s statements affected the outcome of the Breedens’ case. The statements at issue are not merely cumulative of the other evidence presented at trial. Although Mrs. Breeden testified that the floor appeared to have just been mopped based on her perceptions of the floor after she fell, all of her evidence regarding whether the floor had been mopped was circumstantial. Similarly, the Respondents presented only circumstantial evidence with respect to the issue of whether or not the floor had been

mopped prior to the accident. There was no direct evidence addressing whether the floor had been mopped right before the accident because there were no witnesses to the state of the floor immediately prior to the accident other than the unidentified declarant.

The unidentified declarant's testimony goes directly to a major disputed issue in the case: whether the Respondents created the dangerous condition that Mrs. Breeden encountered and therefore had knowledge of the dangerous condition. Although the circumstantial evidence presented at trial could have allowed the jury to conclude that the floor had recently been mopped when Mrs. Breeden fell, the unidentified declarant's statements were the only direct evidence that the floor had been mopped.

Given the nature of the excluded statements, and the evidence that was presented at trial, this Court cannot conclude with reasonable probability that the trial court's error in excluding these statements did not affect the verdict. Indeed, the trial court itself recognized the importance of this evidence before ruling on the Motions in Limine, noting on the record that "[o]ne issue that's pretty important I think, and it's more than a bit important in a case such as this where the allegation is that Mrs. Breeden fell on a wet floor at Mead High School. And the statement that we're talking about or statements, something to the effect of this person

saying that they just mopped this or this happens all the time or a combination of those two things.” RP 125.

Here, where the Court cannot conclude with reasonable probability that the trial court’s error did not affect the trial outcome, the trial court’s error was prejudicial and the Breedens are entitled to a new trial.

V. 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 1st day of May, 2015.

LUKINS & ANNIS, P.S.

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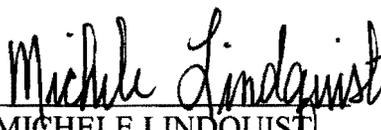
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of May, 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:

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