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JUN 03 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COA Cause No. 328139 III

**COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III**

CANDY AND STEVE BREEDEN, wife and husband

Appellants,

vs.

MEAD SCHOOL DISTRICT #354 and MEAD HIGH SCHOOL

Respondents,

BRIEF OF RESPONDENTS

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A. ASSIGNMENTS OF ERROR

Appellants claim the trial court erred in granting Respondent's motion in limine excluding out of court statements made by an unidentified declarant because the statements were admissible under ER 803 (a)(1)and (2).

B. STATEMENT OF THE CASE

In May of 2009, Appellant Candy Breeden's son transferred to Mead High School. RP 147. On May 14th, 2009 Ms. Breeden accompanied her son to the high school to check him in. RP 147-150. While there she went to speak to the parking attendant and in doing so went through the school's mall area. RP 149-51.

As Ms. Breeden walked down the hallway she slipped and fell hurting herself. She states she landed in water and her clothes were soaking wet. RP 153-54,157-59; CP 24. She described the area as a large area, bigger than just a spill. She concluded, based upon her experience in her home, that the area had been mopped. RP 153-157. There is no evidence she had any experience mopping in a setting such as a school with hundreds of persons passing daily, or that she had any experience or training in maintenance of such a setting. After she fell, a lady, described as between fifteen and twenty five years old, came to her and helped her

up. RP 157; CP 27. Ms. Breeden claims that the unknown lady told her “they just mopped” and “ this happens all the time.” CP 26; 52. There is no other information about the unknown lady; no other witnesses and nothing to indicate where the lady received her information and what she saw or knew.

Ms. Breeden went to the school again in 2013, after hours, and saw the maintenance crew running the “Zamboni” in the halls. RP 163; 164; 296; 332; 360. “The wet floors she saw had nothing to with mopping” and the zamboni’s do not run during school, such as when she fell – the pictures and testimony of her return visit have nothing to do with the state of the halls and mopping procedures during the school day. RP 332. When mopping is performed, which is not very often, the procedure is to make the area dry. RP 329-331; 333. Marv Fortune and Ken Jelsing, both thirty plus year veterans of custodial work for the district, testified that the point of mopping is to make the area dry. So when they leave a mopped area, it might be damp for a minute, but a person would not get soaked if they sat on the recently mopped floor. RP 292; 329-331.

C. ARGUMENT

1. **Standard of Review.** The trial court's factual determination of whether a statement falls within an exception to the hearsay rule will not be disturbed absent an abuse of discretion. *State v. Strauss*, 119 Wn.2d 401, 417, 832 P.2d 78 (1992). A court abuses its discretion if its decision is manifestly unreasonable, or based upon untenable grounds or untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

2. **The trial court made a correct determination and properly suppressed the alleged statements by the phantom witness.** Appellant sought to introduce statements at trial that were clearly hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). Hearsay is inadmissible as evidence, with a few well-established exceptions. ER 802. Appellant is arguing in the matter at bar that the hearsay exceptions of “excited utterance” and “present sense impression.” ER 803 (a)(1-2). 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 (Div. 3, 2001). 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. ER 803 (a)(2).

There are two statements allegedly made by a witness at issue here: 1) “They just mopped;” and “this happens all the time.” These statements were allegedly made by a female, aged 15-25, who was allegedly at the scene of the fall. There is no indication of how she would know such information, whether she saw the alleged mopping, whether she actually saw the appellant fall, when the alleged mopping took place or who “they” are. In the appellant’s brief, a number of cases are cited, however, none are factually similar in that there were no “phantom” witnesses involved. For instance, in *Lindsay v. Mazzio’s Corp.*, 136 S.W.3d 915 (2004), a case cited by appellant for the proposition that “a statement from an unidentified diner “that floor is wet there” was admissible as a “present sense impression” to prove the floor was wet where plaintiff fell. Actually, the “unidentified diner” was the plaintiff’s daughter who was standing next to her in the restaurant and witnessed her mother fall and writhe in pain and immediately made the statement. In *Sanitary Grocery Co. v. Snead*, 67 App.D.C. 129, 90 F.2d 374 (1937), another case quoted by Appellant while discussing “excited utterance”, an unidentified **store clerk** who the evidence showed was standing there, made an immediate statement about something having been on the floor for a couple hours.

Again, no question that the declarant would have had knowledge and there was evidence she existed – not a phantom. In *David by Berkeley v. Pueblo Supermarket of St. Thomas* 740 F.2d 230 (C.A. Virgin Islands, 1984), another case cited by appellant, the court points out that whether a statement falls within the excited utterance exception to the hearsay rule lies within the discretion of the trial judge. *Kornicki v. Calmar Steamship Corp.*, 460 F.2d 1134, 1138 (3d Cir. 1972). The burden of establishing the facts which qualify a statement as an excited utterance rests with the proponent of the evidence. *Id.* Interestingly, the Court in *Supermarket of St. Thomas* said, “Even though he reached the very outer bounds of his permissible discretion and even though as trial judges we may have ruled differently, we hold that the trial judge did not commit reversible error in admitting Susan Jacobs' statement under the excited utterance exception.” *Supermarket of St. Thomas* 740 F.2d 230 at.... In the case at bar, the trial judge was well within his discretion to exclude the phantom statement. In the *Supermarket of St. Thomas* case, there were multiple witnesses to the hearsay statement; multiple witnesses that the person existed, and the reviewing court suggested not allowing the statement would have been justified. There is certainly a great deal more indicia of reliability in the *Supermarket* case than in the case at bar.

Another case cited by Appellant is *H.E.B Food Stores v. Slaughter*, 484 S.W.2d 794 (Tex.Civ.App. 1972). In that case the plaintiff slipped on grapes and was injured. The offered statement was made by an unidentified store employee that had been moving grapes with others and knew some grapes had fallen. Not a phantom, but a person with knowledge of the event, based upon the evidence.

Appellant erroneously states that “there is no meaningful distinction” between the present case and the cases cited in his brief. (p. 31) There most certainly are differences, as pointed out. At some point a decision has to be made by the court as to whether the information is reliable. The court in the case at bar was within his discretion to suppress the statements at issue when there is no corroborating evidence. According to the district custodians, they rarely mop and when they do so they make the area dry. Ms. Breeden had been in the school for several minutes and did not say she had seen anybody mopping.

3. Both present sense impression and excited utterance exceptions require some indicia of reliability and there is absolutely zero indicia of reliability in this matter.

The case of *State v. Booth*, 306 Md. 313, 508 A.2d 976 (1986) is referred to in 5C Karl B. Tegland, Washington Practice Series, Evidence

in Law and Practice s. 803.3 (5th ed. 2012) as a guide in discussing the two hearsay exceptions at issue. That case states

Although the declarant need not have been a participant in the perceived event, it is clear that the declarant must speak from personal knowledge, *i.e.*, the declarant's own sensory perceptions. The more difficult question involves the quantity and quality of evidence required to demonstrate the existence of the requisite personal knowledge. We conclude that in some instances the content of the statement may itself be sufficient to demonstrate that it is more likely than not the product of personal perception, and in other instances extrinsic evidence may be required to satisfy this threshold requirement of admissibility. Identification of the declarant, while often helpful in establishing that he or she was a percipient witness, 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.*

State v. Booth, 306 MD. At 324-25. Although the identification of the declarant is not required, there has to be something that demonstrates competency. In this case, we have a fifteen to twenty-five year old female and nothing else. We do not know why she would know that information, or how she received the information. We have evidence that if the area had been mopped, the appellant would not have been wet as described. We have no evidence of any mopping. Ms. Breeden says she is familiar with mopping, but there is no evidence she knows anything about mopping procedures at large buildings or schools. The custodians stated she would

not have been wet as stated if they had mopped. The procedure is to make the area dry. Hence, the evidence corroborates the fact that the area was **not** mopped. In *State v. Jones*, 311 Md. 23, 532 A.2d. 169 (1987), the court said the person offering the statement must show that the declarant spoke from personal knowledge. *Jones*, 311 Md. at 30. The statement as to mopping is a very self-serving declaration, from an unknown person, with no evidence as to the declarant's knowledge.

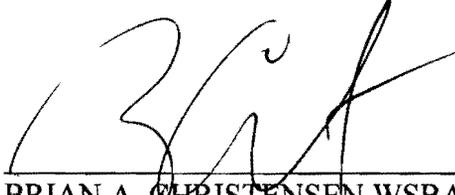
As for the alleged statement 'this happens all the time,' it is clearly not a contemporaneous statement and there is no indication of why or how the declarant would know such a fact. There is certainly no evidence to support the statement. For the same reasons discussed above, it should also be suppressed. Statements as to memory or opinion are not covered under the exceptions and are clearly hearsay. *Beck v. Dye*, 200 Wn. 1, 9–10, 92 P.2d 1113, 127 A.L.R. 1022 (1939); *State v. Martinez*, 105 Wn.App. 775, 20 P.3d. 1062 (Div. 3, 2001).

D. CONCLUSION

The trial court was within its discretion to suppress the statements at issue. The proffered statements were not reliable.

RESPECTFULLY SUBMITTED June 1, 2015.

JERRY MOBERG & ASSOCIATES, PS

A handwritten signature in black ink, appearing to read 'BAC', is written over a horizontal line.

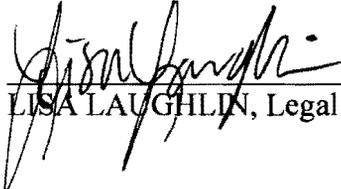
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CERTIFICATE OF SERVICE

I certify that on this date, I mailed a copy of this brief by first class mail, postage prepaid, and electronic mail to:

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