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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

Court of Appeal Cause No. 24739-2-III

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**IN THE SUPREME COURT OF THE STATE OF
WASHINGTON**

JOLIE SCHONDER, Respondent

v.

ECHO LUNDEBURG et al, [Petitioner or Appellant]

PETITION FOR REVIEW

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A. Identity of Petitioner

Echo Lundeberg and Robert Lundeberg asks this court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. Court of Appeals Decision

Decision of the Court of Appeals entered April 10, 2007.

A copy of the decision is in the Appendix at pages A-1 through A-4.

C. Issues Presented for Review

1. The Trial Court erred in precluding the testimony of Defendant and the witness (who was called by the Plaintiff) regarding the industry standard of providing

information to and getting signed acknowledgments from one about to undergo permanent cosmetic procedures.

2. The Trial Court erred in precluding the testimony of Defendant and the witness (who was called by the Plaintiff) regarding the fact that Defendant did in fact provide said information to Plaintiff and did in fact obtain Plaintiff's signature on said forms.

3. The Trial Court erred in precluding the testimony of Defendant and the witness (who was called by the Plaintiff) regarding the fact that said forms were kept at the witness' shop and disappeared about the same time, Plaintiff, who was an employee of said witness left that job.

4. The Trial Court erred in precluding the Defendant from offering her proposed exhibits (which were unsigned copies of the documents Defendant and the witness [who was called by the Plaintiff] would have testified were signed by the Plaintiff) in furtherance of Defendant's claim of Plaintiff's Assumption of the Risk.

5. The Trial Court erred in precluding the above evidence because it was too prejudicial to Plaintiff in that the withholding of said evidence from the jury was prejudicial to the Defendant.

6. The Trial Court erred in precluding all said evidence because the precluded evidence would have been helpful to the jury not confusing as the finder of fact and should have been allowed as such.

7. The Decision of the Court of Appeals is in conflict with other decisions where like evidence was allowed to go to the jury.

D. Statement of the Case

Deborah Thoen, the owner of a business in Spokane, Washington called Tonic Water, Inc., determined that she wanted to learn to do permanent make-up, a procedure akin to tattooing in order to increase the services available to her clientele at her place of business. Ms. Thoen was referred to Echo Lundeberg of Lewiston, Idaho who was experienced in the area of permanent make-up application.

After several conversations, Ms. Lundeberg agreed to teach Ms Thoen under several circumstances, the most important of which was that Ms. Thoen provide her own

subjects for her training. One such subject was the Plaintiff, Julie Schonder. Ms. Schonder was an employee of Debbie Thoen at that time.

Pursuant to the agreement between the parties, Defendant arrived in Spokane, Washington, to teach Ms. Thoen the art of permanent makeup. The Defendant had made sure Ms Thoen had the appropriate number of subjects for Ms Lundeberg to watch Ms. Thoen work on.....i.e. lips, eyebrows, etc. After going over the techniques with Ms. Thoen both in a classroom situation and in a practical situation, Defendant turned the actually application work to Ms. Thoen while the Defendant observed. Ms. Thoen performed

During the week that the Defendant was in Spokane to teach Ms. Thoen the art of permanent make-up, Ms. Thoen performed a lip procedure on the Plaintiff. The Plaintiff was unhappy with the results and the Defendant and Ms Thoen tried to rectify the situation. The Plaintiff thereafter sued both Ms Thoen and Defendant for damages based on negligence. The Defendant filed her answer to Plaintiff's Complaint and in defense of her actions specifically plead "Assumption of the Risk".

Through Discovery, Defendant let it be known that her defense was based on the fact that Plaintiff was thoroughly informed by way of written materials and verbal instruction prior to the procedure of all the risks attendant to permanent cosmetics. Defendant maintained that disclosure is part of every permanent cosmetics procedure and that Defendant and Ms Thoen, prior to the procedure, disclosed all the possible risks. Part of said disclosure was having the Plaintiff sign printed materials acknowledging that she was aware of the risks of permanent cosmetics. Defendant further alleged that this

documentation was placed in a file labeled with Plaintiff's name and kept at the business premises of Ms. Thoen. Defendant was unable to provide copies of this documentation in response to Plaintiff's Request for Documents because the Plaintiff's file was missing from Ms. Thoen's business premises. Defendant did though provide unsigned documents which were identical to the missing ones.

Further, it was Defendant's intent to testify as to the disclosure and the signing of the risk documentation at trial and to offer unsigned copies of same as evidence. It was also Defendant's intent to bring out this same evidence, through cross examination of Ms Thoen, listed as Plaintiff's witness, as well as that Plaintiff worked for Ms Thoen at the time of the procedure; had keys to the business premises; had access to the files where business records were kept; and finally that at the time the Plaintiff left the employ of Ms. Thoen her file disappeared as well.

Counsel for Plaintiff filed a Motion in Limine asking the court to preclude Defendant and any witnesses from testifying about the missing file as well as any testimony about the disclosure to Plaintiff about the risks and to preclude Defendant from entering into evidence unsigned copies of the disclosure documents that the Plaintiff was alleged to have signed. The Motion was heard as a preliminary matter at trial and the lower Court ruled that the jury would not be allowed to hear any of the testimony about disclosure of risk, the missing file or be allowed to see the unsigned documents (See **Excerpts of Verbatim Report of Proceedings, pages 16 - 24**).

The Defendant took exception to that ruling and so now seeks review of this Court of the lower Courts ruling and requests that judgment be set aside and that a new

trial be ordered allowing said testimony that was originally precluded.

E. Argument Why Review Should Be Accepted

At common law, assumption of the risk, like contributory negligence operated as a total bar to recovery **ITT Ravonier, Inc. v. Puget Sound Freight Lines, 722 P2d 1310, 44 Wn. App. 368 (Was. App., 1986) (citing Skarpness v. Port of Seattle, 326 P2d 747, 52 Wash. 2d 490 (1958))**. Throughout the years, the doctrine evolved to what it is today. The assumption of the risk doctrine is now divided into four classifications: (1) express, (2) implied primary, (3) implied reasonable, and (4) implied unreasonable **Scott v. Pacific West Mt. Resort, 834 P2d 6, 119 Wash. 2d 484 (1992) citing Shorter v. Drury, 695 P2d 116, 103 Wash. 2d 645, cert. denied, 474 US 827, 106 S.Ct. 86 (1985)**.

The Defendant in the case at bar alleges that Plaintiff was fully informed of the risks of permanent cosmetics and after being informed executed a release that was in effect an "express" assumption of the risk release. Even if the Court finds that there was not enough evidence to find an "express" assumption of the risk, Defendant asserts that there was more than enough information provided to Plaintiff such that the circumstances allowed for a finding of an "implied primary" assumption of the risk.

In order to rely on this defense, the Defendant must show that the Plaintiff: "(1) had full subjective understanding, (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter that risk **Erie v. White, 92 Wn. App. at 303 (quoting Kirk v. Wash. State Univ, 109 Wn.2d at 453; (citing Wagenblast v. Odessa Sch. Dist. No., 105-157-166J, 110 Wn.2d 845, 858, 758 P.2d 968 (1988))**). In other words, the evidence

must show that the plaintiff had knowledge of the risk, appreciated and understood its nature, and voluntarily chose to take it. *Id.* (citing *Shorter*, 103 Wn.2d at 656; *Martin v. Kidwiler*, 71 Wn.2d 47, 49, 426 P.2d 489 (1967); *Bailey v. Safeway Stores, Inc.*, 55 Wn.2d 728, 731, 349 P.2d 1077 (1960)). Knowledge and voluntariness are questions of fact for the jury, except when reasonable minds could not differ. *Id.* (citing *Alston v. Blythe*, 88 Wn. App. at 34)). If the Defendant is not even allowed to provide evidence to the jury of assumption of the risk then she can never show these things.

A plaintiff knowingly assumes a risk if, at the time of the decision, he or she actually and subjectively knew all the facts that a reasonable person in the defendant's position would know and disclose, or all facts that a reasonable person in the plaintiff's position would want to know and consider. *Home v. N. Kitsap Sch. Dist.*, 92 Wn. App. at 720. Thus the test is subjective, asking whether the plaintiff in fact understood the risk, as opposed to whether a reasonable person of ordinary prudence would understand the risk. *Id.* (citing *Shorter*, 103 Wn.2d at 656-57). "The plaintiff must be aware of more than just the generalized risk of {his or her} activities; there must be proof {he or she} knew of and appreciated the specific hazard which caused the injury."

Id. at 720-21 (alteration in original) (quoting *Shorter*, 103 Wn.2d at 657; citing *Klein v. R.D. Werner Co., Inc.*, 98 Wn.2d 316, 319, 654 P.2d 94 (1982); *Martin v. Kidwiler*, 71 Wn.2d at 49-50; *Restatement (Second) of Torts* sec. 496 D cmt. b). A plaintiff voluntarily assumes a risk if he or she elects to take it despite knowing of a reasonable alternate course of action. *Id.* at 721 (citing *Zook v. Baier*, 9 Wn. App. 708, 716, 514 P.2d 923 (1973); *Restatement (Second) of Torts* sec. 496 E). The plaintiff "must have

had a reasonable opportunity to act differently or proceed on an alternate course that would have avoided the danger." **Id.** (quoting **Zook, 9 Wn. App. at 716**).

In the case at bar, the Defendant could not introduce any of her evidence on assumption of the risk **EVEN THOUGH IT EXISTED** (because of the lower Court's ruling). Therefore, the jury, as finder of fact, could not consider assumption of the risk as a defense. A trial court may submit this defense to the jury if substantial evidence in the record supports it. **Klein, 98 Wn.2d at 318 (citing Langan v. Valicopters, Inc., 88 Wn.2d 855, 866, 567 P.2d 218 (1977)); Dorr v. Big Creek Wood Prods., Inc., , 84 Wn. App. at 430**. The lower Court should have allowed the evidence of assumption of the risk to be introduced and then decided if, as a matter of law, there was enough evidence to support submitting it to the jury.

The lower Court instead determined that allowing the evidence of assumption of the risk was too prejudicial to the Plaintiff. Defendant avers that the preclusion of any evidence of assumption of the risk was more prejudicial to Defendant then allowing it would be prejudicial to the Plaintiff.

The Court of Appeals, in affirming the granting of the Plaintiff's Motion in Limine correctly states that "(t)he trial court must admit relevant evidence that tends to make the existence of a material fact more or less probable" **Medcalf v. Dep't of Licensing, 83 Wn. App 8, 16, 920 P.2d 228 (aff'd, 133 Wn.2d 290, 944 P.2d 1014 (1997) ER 401, 402**. Further, (t)he trial court must exclude evidence, however, when it's probative value is outweighed by the potential that the evidence will unduly prejudice the other party or confuse the jury." **Id. At 16-17; ER 403**.

The evidence to be presented by the testimony of the Defendant **and** Deborah Thoen (The Plaintiff's **Witness** as well as her former employee) was that the risks had been explained, that the Plaintiff had signed the form and that the form was missing. The form was being used pursuant to the oral testimony of two (2) parties who saw the Plaintiff sign the form. And if the showing of the form and the testimony is prejudicial to the Plaintiff then keeping the testimony and the form from the jury is prejudicial to the Defendant. The jury is the Trier of Fact. It is the jury's responsibility to wade through conflicting testimony and to determine which party is more likely than not telling the truth. Further, Deborah Thoen was no longer a party to this case and her testimony could not have been considered biased at that point as she had nothing to lose.

The Court of Appeals determined that "(i)ntroduction of the form would have caused confusion to the jury." A-4 Certainly juries have been provided with evidence much more complicated than this and the Court has not found that a jury was confused.

Finally, the Court of Appeals stated that correctly that "(i)n Washington, negligent conduct cannot be the subject of a pre injury release." **Vodopest v. MacGregor**, 128 Wn.2d 840, 861, 913 P.2d 779 (1996) The intent of the Defendant to introduce this evidence is not to influence the determination of the jury in their finding as to whether or not there was negligence. The evidence of the pre injury release is to show assumption of the risk by the Plaintiff thereby barring or significantly reducing damages.

"Assumption of the risk may act to limit recovery but only to the extent the plaintiff's damages resulted from the specific risks known to the plaintiff and voluntarily encountered. To the extent a plaintiff's injuries resulted from other risks, created by the

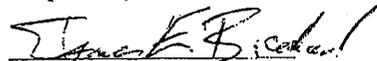
defendant, the defendant remains liable for that portion.” *Tincani v. Zoological Society* 66 Wn. App. 852, 837 P.2d 640 (1992), citing *Kirk v. WSU*, 109 Wn.2d 454-455, 746 P.2d 285 (1987).

F. Conclusion

WHEREAS, Defendant asks this court to review the Decision of the Court of Appeals and to overturn/vacate the jury decision and remand this matter back to the lower court for a new trial allowing the testimony of Ms. Thoen and Lundeberg in the area of Assumption and the Risk and the introduction of evidence by way of Assumption of the Risk documents.

May 10, 2007

Respectfully submitted,



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FILED

APR 10 2007

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOLIE SCHONDER,

Respondent,

v.

**DEBORAH THOEN and JOHN DOE
THOEN, husband and wife, TONIC
WATERS, INC., a Washington
corporation,**

Defendants,

**ECHO LUNDEBERG and JOHN DOE
LUNDEBERG, husband and wife, dba
ECHO LUNDEBERG PERMANENT
COSMETICS,**

Appellants.

No. 24739-2-III

Division Three

UNPUBLISHED OPINION

KATO, J.*—Echo Lundeberg agreed to train Deborah Thoen to perform a permanent cosmetic procedure. While in training, Ms. Thoen negligently performed such a procedure and injured Jolie Schonder. Claiming the court improperly excluded certain evidence, Ms. Lundeberg appeals. We affirm.

* Judge Kenneth H. Kato is serving as a judge pro tempore of the Court of Appeals pursuant to RCW 2.06.150.

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Ms. Thoen was trained by Ms. Lundeberg to perform a permanent cosmetic procedure. On November 11, 2001, as part of the training, Ms. Thoen performed a permanent color "lipstick" tattoo on Ms. Schonder, who agreed to be a test subject. Clerk's Papers at 4. After the procedure, Ms. Schonder claimed the permanent ink went out of her lip line and caused disfigurement, pain, and suffering. She filed suit for damages arising from negligence.

Ms. Lundeberg asserted the affirmative defense of assumption of risk. She claimed Ms. Schonder was apprised of the risks in the procedure and had signed a release/consent form acknowledging she was aware of those risks. But Ms. Lundeberg could not provide this document as Ms. Schonder's file containing it was apparently missing. Ms. Lundeberg thus sought to introduce as evidence an unsigned form along with testimony that Ms. Schonder had signed a similar form and may also have caused its disappearance. Ms. Schonder moved in limine to exclude the evidence.

The court found that admitting the unsigned form and related testimony would inject speculation into the case. In addition, admission of this evidence would prejudice Ms. Schonder because the failure to produce the original form was Ms. Lundeberg's oversight. The court stated that if the unsigned form itself was inadmissible, testimony regarding the document was likewise inadmissible. The motion in limine was granted.

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The jury returned a verdict in favor of Ms. Schonder. This appeal follows.

Whether or not to grant a motion in limine is within the trial court's discretion. *Garcia v. Providence Med. Ctr.*, 60 Wn. App. 635, 642, 806 P.2d 766 (citing *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 91, 549 P.2d 483 (1976)), review denied, 117 Wn.2d 1015 (1991). On review, the granting of a motion in limine will not be reversed absent an abuse of discretion. *Id.* "A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds." *Id.* (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

"The trial court must admit relevant evidence that tends to make the existence of a material fact more or less probable." *Medcalf v. Dep't of Licensing*, 83 Wn. App. 8, 16, 920 P.2d 228 (1996), *aff'd*, 133 Wn.2d 290, 944 P.2d 1014 (1997); ER 401, 402. "The trial court must exclude evidence, however, when its probative value is outweighed by the potential that the evidence will unduly prejudice the other party or confuse the jury." *Id.* at 16-17; ER 403.

An unsigned form does not make the existence of a signed one more or less probable. Moreover, evidence of the form is prejudicial. Ms. Lundeborg intended to show that Ms. Schonder, then Ms. Thoen's employee, caused the disappearance of the signed form and file because she had access to them and

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her file had disappeared when she left employment with Ms. Thoen. Introduction of an unsigned form would only have caused confusion for the jury.

Even if Ms. Schonder had signed the release/consent form, it could not be used as a defense in a negligence suit. In Washington, negligent conduct cannot be the subject of a preinjury release. *Vodopest v. MacGregor*, 128 Wn.2d 840, 861, 913 P.2d 779 (1996).

Affirmed.

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

Kato JPT

Kato, J. Pro Tem.

WE CONCUR:

Sweeney, C.J.
Sweeney, C.J.

Kulik, J.
Kulik, J.