CASE NO. 310582

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

PATRICIA COMER,

Respondent,

Vs.

SHARON COLISTRO,

Appellant.

APPEAL FROM SPOKANE COUNTY SUPERIOR COURT

CASE NO. 092034006

Mark J. King, IV, WSBA #29764

c/o Craig Swapp & Associates

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I. STATEMENT OF THE CASE

This was a premises liability case pertaining to a slip and fall incident that occurred on December 24, 2008, in Spokane County. Plaintiff is Patricia Comer. The property at issue where the incident occurred is a rental property owned by Defendant Sharon Colistro and Wayne Colistro, the latter of which was, unknown to Plaintiff, deceased when suit was filed. As such, suit was filed against Defendants Sharon Colistro and Wayne Colistro back on July 9, 2009 in the Spokane County Superior Court.

Defendant Sharon Colistro rents the property at issue out to tenants John Patton and Christina Birdsell. CP 101. On the day in question, Plaintiff Patricia Comer was a guest of Mr. Patton and Ms. Birdsell and slipped and fell near the front entryway due to the accumulation of ice as a result of the Defendant Colistro's alleged negligence and failure to properly maintain the roof and rain gutters. CP 148-154. Pursuant to Defendant's Colistro's lease with Mr. Patton and Ms. Birdsell, the rain gutters are noted to be a structural component of the rental property to be kept in good repair by Defendant Colistro. CP 377-378. As a result of the alleged negligence of Defendant Colistro, Plaintiff sustained a displaced left tibia and fibula fracture which required hospitalization, surgery, and physical therapy. CP Presentment 73. Her medical bills totaled

$38,869.95. CP Presentment 79. She continued to have residual symptoms through the time of trial, June 25-28, 2012. CP 163.

Suit was filed with the Court on July 9, 2009, on behalf of Plaintiff Patricia Comer, against Defendants Wayne and Sharon Colistro. Service of process of the summons and complaint were served upon Sharon Colistro personally, and as substituted service upon her husband, Wayne Colistro, on July 16, 2009, at her residence on 3:08 p.m. after the Spokane County Assessor's office records showed the property at issue was owned by Wayne and Sharon Colistro. Unknown to Plaintiff at the time of service of process, Wayne Colistro was deceased.

After Defendants failed to respond to the Complaint, and after attempts to contact the Defendants failed, Plaintiff moved for an Order of Default, which was granted on October 9, 2009. On July 6, 2011, Plaintiff decided to move forward with a Default Judgment. Defendant subsequently appeared and moved to set aside the Order of Default claiming she did not have notice of the suit or Default (insufficiency of service of process). The Court ended up setting aside the Order of Default and set the matter for trial. Given Plaintiff's belief that Defendant Colistro continued to evade service of process and failed to respond to telephone calls, correspondence and emails, Plaintiff's counsel personally re-served the Defendant with a copy of the summons and complaint on or around

September 1, 2011. *See* Appellant's Brief, Pg. 17. Up through this point, the Defendant decided to represent herself.

On February 9, 2012, the Defendant hired defense counsel to represent her. On February 29, 2012, Defendant filed with the Court her Answer to the Complaint, with Affirmative Defenses. In her Answer and Affirmative Defenses, Defendant did not assert insufficiency of service of process. New defense counsel was given a trial continuance, and on February 12, 2012, in the Court's Amended Civil Case Schedule Order it set the following a deadlines for the discovery cutoff on April 23, 2012 (and exchange of witness list, exhibit list and documentary exhibits for May 25, 2012). CP 10.

Going backward for a moment, on October 7, 2011, under CR 33, Plaintiff's counsel served Interrogatories upon the Defendant, which pursuant to CR 26, asked for any expert opinions, the basis therefore, etc. CP 9. Defendant responded indicating such was unknown at the time. CP 9. Defendant subsequently, on March 5, 2012, submitted a witness list listing experts Richard Fassett (pharmacist), Joellen Gill of Applied Cognitive Sciences (no information provided about her expertise) and S. Edward Bosley (meteorologist), and providing no information on their anticipated opinions, basis therefore, etc. CP 10. As such, Plaintiff's counsel sent defense counsel correspondence on April 4, 2012, indicating opinions for the listed witnesses had not been provided and noting the

discovery cutoff was coming up in approximately two and one-half weeks. CP 10. The defense did not respond to the letter and/or provide any information about the listed witnesses in response. CP 10.

The discovery cutoff passed on April 23, 2012, without Defendant providing any information on defendant's expert's opinions, background (resume/CV), basis for opinions, etc. On May 4, 2012, however, Plaintiff received from Defendant, Interrogatories directed to key lay witnesses (her own tenants) by the Defendant personally, despite having defense counsel representing her, dated and signed by the witnesses on April 23, 2012, about a month earlier. CP 11-12. The Defendant did not serve a copy of the Interrogatories on Plaintiff as required under CR 5(c) and actually sat down with the key witnesses, who were her tenants, and had them filled out as she sat with them. CP 11-12.

Next, on May 29, 2012, well beyond the discovery cutoff of April 23, 2012 and less than a month before trial, the Defendant served a number of documents, including, but not limited to, disclosure of a new expert, S.C. Maloney, who submitted a report with a date of February 11, 2012, three and one-half months earlier. CP 13-14. There was no CV or resume provided. The May 29, 2012 documents also included an affidavit from Willaim Fassett dated April 23, 2012 and a report from Joellen Gill, noted to be a preliminary report, also dated May 29, 2012. CP 14-15.

Given the numerous violations of the Court's scheduling order and other improprieties by the Defendant, including but not limited to: failure to follow court rules, failure to properly and timely disclose experts, their opinions, basis for opinions, etc., Plaintiff asked the Court to impose sanctions against Defendant pursuant to LAR 0.4.1(g)(4) and CR 37(b)(2), including striking her answer and/or liability witnesses.

On the day of trial, the Court heard Plaintiff's motion in limine and found that Defendant had engaged in conduct that did not compart with the court rules and orders of the court and held that Defendant would be limited to her choice of one of the three experts that had not been properly and timely disclosed, whom Plaintiff would be allowed to interview prior to testifying. CP 38-40. Defendant chose S.C. Maloney. A bench trial ensued from June 25, 2012, through June 28, 2012. The Court heard testimony from Plaintiff, her husband, witnesses John Patton, Kristina Birdsell, Defendant Sharon Colistro, Plaintiff's expert engineer, Ernest Corp, P.E. and defense expert Stephen Maloney, M.A.

After a bench trial before the Honorable Linda Tompkins June 25-28, 2012, in which the court heard from the various lay and expert witnesses, the Court subsequently ordered Findings of Fact and Conclusions of Law on July 19, 2012, finding the Defendant Sharon Colistro 70% comparatively negligent and Plaintiff Patricia Comer 30% comparatively negligent. CP Presentment 79. Total damages awarded

were $53,869.00, which were reduced by Plaintiff's comparative negligence.

II. SUMMARY OF ARGUMENT

With all due respect to the Appellant/Defendant Colistro, Respondent/Plaintiff is not able to logically follow most of the points of error she alleges of the trial court as they do not appear to be articulated in a manner which outline the legal issues. As such, Respondent attempts to address those points it appears are being argued by Appellant as best can be ascertained. It appears that many of Appellants points of error were not raised at the trial court level or are simple disagreement with the trial court's decision and witness testimony. In this regard, Respondent would point out to the Court of Appeals to RAP 2.5, which provides in part, that:

> Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

III. ARGUMENT

1. Abuse of Discretion (Recorded Conversation of Respondent/Plaintiff)

Appellant/Defendant Colistro argues that the Court erred as it should have allowed her to use a conversation/statement she personally recorded with the Respondent/Plaintiff at Respondent's front door on July 13, 2011, without Respondent's counsel present. The standard of review for exclusion of evidence is abuse of discretion. A trial court's decision regarding the admission or exclusion of evidence will not be reversed absent an abuse of discretion. *State v. Mee Hui Kim*, 134 Wash.App. 27, 41, 139 P.3d 354 (2006); *State v. Swan*, 114 Wash.2d 613, 658, 790 P.2d 610 (1990). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Littlefield,* 133 Wash.2d 39, 46, 940 P.2d 1362 (1997). A decision is based on untenable grounds if the factual findings are unsupported by the record.

Defendant Colistro was not represented by counsel at the time of the recorded conversation, July 13, 2011, and was acting Pro Se, however, the lawsuit in this case had been filed on July 9, 2009, and Respondent/Plaintiff was represented by her current counsel at the time of the statement. More importantly, Respondent/Plaintiff did not receive a copy of the recording until the Tuesday before trial, June 19, 2012, which was less than a week before trial, despite the fact that the conversation was

apparently recorded on July 13, 2011, nearly a year earlier. CP 16. Furthermore, the copy of the recording provided by Defendant to Respondent/Plaintiff was completely inaudible. CP 31. Defendant's counsel attempted to explain to the Court that the reason for the last minute disclosure was that:

> "It turns out she finally did figure out how to use the voice recorder just about ten days or two weeks". CP 28.

Generally, RPC 4.2 prohibits an attorney from communicating with an adverse party represented by counsel. L.A.R.0.4.1(f) and (g), respectively, allows the assigned judge to monitor compliance with the Civil Case Schedule Order and impose sanctions for non-compliance, including dismissal, imposition of terms, and such other sanctions as justice requires. More specifically, LAR 0.4.1(g)(4) states that other sanctions include, but are not limited to, exclusion of evidence.

The Civil Case Schedule Order is, in part, a discovery order carrying with it the same force and effect as any other Order issued by the Court. Pursuant to CR 37(b)(2), for non-compliance with a discovery order a Court has discretion to: find facts established against the offending party; prohibiting claims/defenses or facts into evidence; striking pleadings or parts thereof; treating as contempt of court; and exclude

witnesses from testifying for failure to comply with discovery orders. See *Viereck v. Fibreboard Corp.* 81 Wn.App. 579 (1996) (failure to disclose basis of opinion by expert); *Dempere v. Nelson*, 76 Wn.App. 403 (1994) (failure to disclose witness within time limits in case schedule order and pretrial order). The standard of review in this regard in abuse of discretion and a trial court "does not abuse its discretion by excluding testimony as a sanction when there is a showing of intentional disclosure or tactical nondisclosure, willful violation of a court order, or other unconscionable conduct. See *Viereck v. Fibreboard Corp.* 81 Wn.App. 579 (1996) citing *Allied Fin. Servs. v. Mangum* 72 Wn.App. 164, 168 (1993).

It is reversible error for the trial court not to exclude testimony when the other party would be prejudiced by the willful violation of a court order. See *Hampson v. Ramer*, 47 Wn.App. 806, 812 (1987). Disregard of a court order without reasonable excuse or justification is deemed willful. *Allied Financial Servs., Inc. v. Mangum*, 72 Wn. App. 164, 168, 864 P.2d 1, 871 P.2d 1075 (1993) (citing *Lampard v. Roth*, 38 Wn. App. 198, 202, 684 P.2d 1353 (1984); *Anderson*, 24 Wn. App. at 574).

While Appellant/Respondent is not an attorney, she was acting Pro Se at the time she recorded a statement of the Respondent/Plaintiff in front of Respondent's house on July 13, 2011. Acting as her own attorney, she should not have been able to do what an attorney would be prohibited from doing pursuant to RPC 4.2, that is, communicating with a person represented by counsel. The Court noted:

> 'I will trust that Ms. Murphy has admonished her client that all parties are to subject to the rules, and that ex parte communication cannot be accomplished through the effort of a party rather than counsel to that party." CP 37.

The Court cannot be said to have abused its authority in excluding the recorded conversation of Respondent/Plaintiff made by Appellant given the written discovery requests from Respondent/Plaintiff seeking the production of any statements or recordings made by Respondent/Plaintiff in July 2011,the fact that Appellant did not produce such until less than a week before trial, June 19, 2012, and which production to Respondent was completely inaudible and of a party represented by counsel.

2. Abuse of Discretion- Freedom of Speech (Appellant's Filing of Affidavit and Attachment of Trial Exhibits Documents Filed with the Court on June 19, 2012 in Support of her Motion for Summary Judgment)

It appears Appellant is arguing the Court should have taken into consideration her affidavit and materials she submitted to the Court on June 19, 2012, during the Court's consideration of her attempted (untimely) Motion for Summary Judgment, of June 25, 2012. See CP 36.

However, no such records from the trial Court have been provided to Respondent or the Court of Appeals in this regard. Again, the Appellants brief on this issue is not clear what Order of the Court is being appealed. As such, Respondent reserves the right to supplement this response, if necessary. However, Respondent would submit that without the record from the June 19, 2012 or June 25, 2012, proceedings, that such an Appeal is not properly before the Court.

For the possibility that Appellant may be arguing that all of the documents she provided to the Court on June 19, 2012, should have been admissible at trial, Respondent would point out that pursuant to the Civil Case Scheduling Order, the Discovery Cutoff was April 23, 2012, and the due date for Exchange of Witness Lists, Exhibit Lists and Exhibits was May 25, 2012. On June 19, 2012, less than a week before trial, Appellant submitted a box of documents she apparently sought to have admitted as Exhibits. Included in that box were videos, photographs, and numerous documents, many of which had not been previously disclosed. Such materials obviously should have been provided in compliance with the Civil Case Scheduling Order, which contained a Discovery Cutoff of April 23, 2012 and Exchange of Trial Exhibits on May 25, 2012. The Court was clearly within its discretion pursuant to LAR 0.4.1(f) and (g) and CR 37(b)(2), in excluding said materials as they violated the Civil Case

Scheduling Order and would be unfairly prejudicial to Plaintiff as the case was less than a week out from the scheduled trial date.

3) Abuse of Discretion-Service of Evidence (Witness Interrogatories/Affidavits)

Again, Respondent is not clear what specific error Appellant alleges, but it appears her argument is that she should have been allowed to use witness affidavits of certain individuals, including John Patton and Christina Birdsell. However, these individuals actually testified at the trial, so both sides had the opportunity to examine the witnesses. Regardless of whether the Court abused its discretion, any error would be harmless.

The Court did find there had been irregularities in the Appellant personally attempting to have her tenants, who were key witnesses in the case, sign Interrogatories and Affidavits, not going through proper procedures and then not producing these in a timely fashion. Appellant, while represented by counsel at the time, attempted to send Interrogatories to witnesses, which is not authorized by CR 33. More importantly, she did not serve said pleading on Respondent's counsel, as required by CR 5 and then had the key witnesses, her tenants, fill these out in front of her as an Affidavit. The Court described Appellant's actions as follows:

"These are extreme circumstances that have significantly impacted the testimony of at least one of the fact witnesses"

Appellant's counsel at the time tried to explain what had happened as follows:

> The interrogatories . . . when she brought them in I said to her why, you know these were dated in April. These should have been sent to Mr. King. She said I didn't because I thought they were no use to us . . . . It was only then when I saw and read them that I thought they were quite useful and they should be entered". CP 25.

The Court was again within its discretion to limit use of improperly obtained and untimely disclosure of witness materials; however, any error would be harmless as the witnesses were called and testified at trial.

4. Abuse of Discretion- Service of Evidence, Double Standard (Serving Trial Exhibits)

Appellant appears to be alleging trial court error in that she had previously provided 80% of the documents she sought to have admitted as trial exhibits that were provided to Respondent's counsel on June 19, 2012, less than a week before trial, and that there was no time frame set by the court required for said trial exhibits to be provided to opposing counsel. As noted, Appellant is incorrect as the Civil Case Scheduling Order set May 25, 2012, as the deadline for exchanging Trial Exhibits. Instead, Appellant waited until long after the deadline to exchange trial exhibits, including some (at least 20%) that she admits had never been disclosed previously. The Court correctly pointed out that:

"The scheduling order is, in fact, an order" CP 36.

"Not only was CR 37 violated in significant fashion, but the scheduling order was also disregarded".

The Court was clear and correct in not allowing the prejudicial and substantially untimely last minute attempted box of exhibits to be entered into evidence. As such, there was no abuse of discretion.

5. Lack of Judicial Authority for Trial

Appellant alleges the Court did not have authority over her as a Summons and Complaint were not filed following the Default Hearing. This was not brought up at the trial court level and is therefore not properly before the court on appeal.

Also, Appellant did not assert any lack of insufficiency of service of process, either as an affirmative defense or by motion before the trial court. CR 12(b) provides that every **defense** must be asserted in the responsive pleading, except that certain **defenses** may also be asserted by motion at the option of the pleader. Both "insufficiency of **service** of **process**" (CR 12(b)(5)) and "failure to state a claim upon which relief can be granted" CR 12(b)(6) are **defenses** that may be asserted either in a responsive pleading or in a motion. When a motion under CR 12 is made, all **defenses** then available to the movant must be joined in the motion. CR 12(g). The **defense** of insufficient **service** of **process** is **waived** if it is omitted from a motion described in CR 12(g) or if it is not made by motion under this rule nor included in a responsive pleading. CR 12(h).

Appellant did not assert insufficiency of service of process in her pleadings nor did she bring a motion before the trial court challenging the court's jurisdiction over her. As such, this matter is not properly brought before the Court of Appeals.

Additionally, Appellant is incorrect on her analysis of the procedural aspects of the law with regard to when service of process can be effectuated. The incident occurred on December 24, 2008. Suit was filed July 9, 2009, and, given (reported) evasion on the part of the Appellant in previous attempts to serve her with the summons and complaint on July 9, 2009, service of process was subsequently effectuated on her personally in open court on two (2) occasions, July 22, 2011, and September 1, 2011. Service of process on the Appellant perfected the filing of the lawsuit and the case did not have to be re-filed, as Appellant incorrectly believes. Appellant assumes that because the Order of Default was set aside, that a new case had to be filed, which is an incorrect assertion. To perfect commencement of the lawsuit, the Appellant still just needed to be served with a copy of the summons and complaint within the statute of limitations (three years), which she acknowledges occurred on September 1, 2011.

Moreover, Appellant is incorrect in that the summons must be served within ninety (90) days of filing the complaint. This applies only

when tolling the statute of limitations, which is not applicable under the facts in this matter.

For the above reasons, the issue of judicial authority is not properly before the Court of Appeals and even if it were, the suit was properly filed and served upon the Appellant prior to the expiration of the statute of limitations.

6. Abuse of Legal Standards-Entry Upon Land (Witness/Tenant's Ability to Allow on to Rental Property)

Appellant asserts that the court abused its discretion in not suppressing evidence obtained by Respondent and her expert, who had permission to be on the premises at issue by the tenant, John Patton. Appellant asserts as the landlord, she had to give consent upon request pursuant to CR 34. The Court addressed this issue and held a recall of Mr. Patton at the time of trial. Mr. Patton testified that he has exclusive possession of the applicable premises and can let anybody on his property that he sees fit. CP 196. He also testified that he allowed said inspection, but it was the last. CP 196. The Court held that Mr. Patton was a tenant in possession and control of the premises that CR 34 was not applicable. There is no evidence that the trial court abused its discretion, and even if incorrect, any error was harmless.

7. Abuse of Legal Standards-Limited Estate (Property Owner Dismissal as Not Asserting Exclusive Control)

Appellant again brings up an issue for the first time in the Court of Appeals that was not presented to the trial court, and therefore, is not properly before the Court of Appeals. No motion in this regard was brought before the trial court nor are there any references to the record where this issue was objected to and properly preserved for the appellate review.

8. Abuse of Discretion- Structural Components (Rain Gutters Considered Structural Components)

Respondent does not follow Appellant's argument as it does not appear to be logically sound. As such, Respondent can only surmise that Appellant is suggesting the trial court erroneously considered the rain gutters as structural components over which she had no control.

The Court heard evidence from Appellant herself that as landlord under her lease, she is responsible to maintain the structural components of the rental property in good repair. CP 377. The Appellant also testified that the rain gutters would be one of those structural components. CP 378. Clearly, the trial court had direct evidence from the Appellant that she was responsible for the rain gutters, which Respondent alleged contributed to the incident at issue. Respondent does not follow Appellant's alleged error other than she wishes to change her responses to the questions or

further argue to the point, which would have been appropriate at the trial court rather than the Court of Appeals.

9. Abuse of Legal Standards Discretion –Dr. Corp (Trial Court Allowing Plaintiff's Engineering Expert to Give Expert Opinions).

ER 702 provides that if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Respondent called Ernest Corp, Ph.D., an engineer to testify as to the technical aspects of the rain gutter's failures that Plaintiff alleged contributed to the incident at issue. Dr. Corp laid foundation that he has been a forensic engineer for thirty to thirty-five years as well as his extensive education, training, and experience, including cases involving rain gutters. CP 205-217. In fact, Appellant withdrew her objection to Dr. Corp's qualifications. CP 227. Appellant has not shown any areas of the trial where such issues were objected to and properly before the Court on appeal. Therefore, without specific instances of objections being overruled, it appears Appellant is again attempting to argue the lack of qualifications of the expert witness, which the trial court clearly felt Dr. Corp's opinions would be allowed, and for which Appellant shows no true abuse of discretion.

10/11. Assignment of Error - Miss-statement of material fact by J. Patton, witness, and Plaintiff Patricia Comer, abuse of discretion does not support verdict (Weight of Evidence)

It appears Appellant is arguing inconsistencies of witness testimony from John Patton and Plaintiff Patricia Comer do not support the verdict. However, as this was a bench trial, the trial court was the fact finder and entitled to give whatever weight it felt appropriate to each witness's testimony. While Appellant disagrees with the trial court in this regard, this does not make it an appealable issue and is clearly within the trial court's discretion, to which no abuse of discretion has been shown.

VI. CONCLUSION

Again, with all due respect to the Appellant/Defendant, she has not brought up any real errors at the trial court level that have been preserved by objection or otherwise and appears to simply disagree with the trial court's determination of facts and application of fact to law, which is the what the trial court does in a bench trial.

Respectfully Submitted this 19th day of March __, 2013

Mark J. King, IV, WSBA# 29764,
Attorney for Respondent Patricia Comer

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of March, 2013, I caused to be served the a true and correct copy of the Brief of Respondent to Defendant Sharon Colistro, by the method indicated below (if by mail, postage prepaid):

SHARON COLISTRO
East 8319 South Riverway
Millwood, WA 99212

____/____ PERSONAL SERVICE
____X____ U.S. MAIL
_____ HAND DELIVERED
_____ FACSIMILE/NO.: _____

Mark J. King, IV
WSBA No. 29764