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NO. 68748-4-1
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ROBERT C. LIFE and THERESA E. LIFE, husband and wife, and the
marital community,

Appellants

vs.

SUNBANKS LIMITED, dba SUNBANKS LAKE RESORT,

Respondent.

APPEAL FROM KING COUNTY SUPERIOR COURT
NO. 10-2-14445-5 SEA

REPLY BRIEF OF APPELLANT

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I. REPLY STATEMENT OF THE CASE

This is a case about evidentiary standards for proving notice on a premises liability claim. A plaintiff has no hope of prevailing on such a claim when the plaintiff is not permitted to present evidence of notice.

Plaintiffs/Appellants offered evidence of actual notice to Defendant/Respondent regarding a hazard on their premise liability claims. CP 276-79; 357-68; RP 3-4. The trial court erroneously excluded this evidence at trial.

Respondent continues to misstate and conflate the facts and evidentiary standards of this case. For example, Respondent states that Lisa Eby “could not say for certain that he [the employee of Respondent] was employed by Respondent.” See Br. of Respondent at 3. However, Respondent’s statement could not be further from the truth. In her declaration, Lisa Eby declares:

I recognize this groundskeeper as being an employee of Sunbanks Resort. In previous years he had been one of the managers of the resort and he was always around as a maintenance/groundskeeper sort of person. I would recognize him again if I was to see him, and I can generally describe him as being rather tall (over 6 feet), a person that had seemed to be controversial in prior years, and a person who impressed me as trying unsuccessfully to be very flirty with women. I do not know his name but **I am positive that he was a regular employee of the Sunbanks Resort** and that he had previously been a manager and also did maintenance type of work around the campgrounds. (emphasis added) CP 130-131.

Lisa Eby's statement that she was "positive that he was a regular employee of Sunbanks Resort" is a far cry from "could not say for certain that he was employed by Respondent." Br. of Respondent at 3. Perhaps Respondent's prior and continued misstatement regarding this fact was cause for the trial court's erroneous ruling on this evidentiary issue.¹

Additionally, the Respondent has misstated the evidentiary standards being evaluated in this appeal. Without citation to any authority, Respondent makes the quantum leap that because the groundskeeper was not a speaking agent, notice could not be provided to the groundskeeper of the hazardous condition. Speaking agency is irrelevant when considering whether notice to an agent is imputed to the principal. *Hedrick v. Washington Nat. Ins. Co.*, 186 Wash. 263, 57 P2d 1038; *Guaranty Trust Co. v. Yakima First Nat. Bank*, 179 Wash. 615, 38 P2d 384; *Brower Co. v. Garrison*, 2 Wn .App. 424, 468 P.2d 469; *State v. Keypoint Oyster Co.*, 64 Wn.2d 375, 391 P.2d 979; *Sons of Norway v. Boomer*, 10 Wn. App. 618, 519 P.2d 28 (corporation charged with notice of facts acquired by agents). This same misstated speaking agency standard is repeated constantly throughout Respondent's briefing.

¹ Respondent continues this misstatement later in its brief on page 5, stating, "no evidence that this person was employed by Respondent." Lisa Eby's testimony that she knew the groundskeeper as Respondent's employee is evidence.

In addition, Respondent misses the issue regarding evidence of notice to Respondent's manager. To date, Respondent has failed to even allege that Appellants engaged in intentional nondisclosure or other unconscionable conduct to sustain the exclusion of Lisa Eby's testimony regarding her conversation with Respondent's manager Sandra Mcinnis. The Appellants only learned about Lisa Eby's discussion with Sandra Mcinnis during trial when Appellants' counsel informed Lisa Eby she could not testify about her conversation with the Sunbanks' employee groundskeeper. Upon discovering the evidence, the Appellants brought the evidence to the attention of the trial court and the Respondent.

Finally, Respondent's assertion that the trial court's error was harmless is untenable. The central issue of this case, and key element of Appellants' claims, was whether Respondent had notice of the dangerous condition. The trial court's exclusion of Lisa Eby's testimony, regarding both of her conversations, eliminated all evidence of notice to the Respondent. The trial court effectively gutted Appellants' case by excluding Lisa Eby's testimony regarding both points of notice.

II. ARGUMENT IN REPLY

5.1 Standard of Review.

The Court reviews the correct interpretation of an evidentiary rule *de novo* as a question of law. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74

P.3d 119 (2003); *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). Once the rule is correctly interpreted, the Court reviews the trial court's decision to exclude evidence for abuse of discretion. *DeVincentis*, 150 Wn.2d at 17; *State v. Lord*, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007). An abuse of discretion occurs when the trial court's decision is based on untenable grounds or untenable reasons. *State v. Athan*, 160 Wn.2d 354, 376, 158 P.3d 27 (2007).

Respondent's assertion that this is not about interpretations of evidence rules, but rather application of the facts to clear rules is incorrect. First, the trial court held the Appellants to the "speaking agent" standard when proving agency for the purposes of notice. That was an erroneous interpretation of the evidence rules. Second, the court failed to apply the correct standard to its exclusion of Lisa Eby's testimony regarding Sunbanks manager Sandra Mcinnis. Exclusion requires a showing of intentional or tactical nondisclosure or other unconscionable conduct. *Barci v. Intalco Aluminum Corp.*, 11 Wash.App. 342, 351, 522 P.2d 1159, 1165 (Wash.App. 1974). However, the trial court failed to engage in such an analysis and instead based the exclusion on prejudice. Prejudice is not the standard for exclusion of newly discovered evidence.

Therefore, due to the trial court's misinterpretation of the evidentiary rules, the Court of Appeals must engage in a *de novo* review.

However, even if the Court of Appeals were to find that the evidentiary rules were properly applied by the trial court, there exists an abuse of discretion by the court below.

5.2 Notice Does Not Require Speaking Agency.

Where a principal acts through an agent, a third person dealing with the agent is entitled to rely upon the agent's knowledge and notice and it binds the principal, who should incur the risks of the agent's infidelity or lack of diligence rather than innocent third parties. *Kiniski v. Archway Motel, Inc.*, 21 Wash.App. 555, 563, 586 P.2d 502, 508 (Wash.App.,1978). Here, it is sufficient that the person receiving notice simply be an agent; speaking agency is not required.

The Respondent begins its analysis of the issue of notice through the admission by a party opponent standard citing ER 801(d)(2)(iv), *Griffiths v. Big Bear Stores*, 55 Wn.2d 243, 347 P.2d 532 (1959) and Tegland's analysis of ER 801(d). Respondent then makes the argument, without citation to any legal authority, that the ER 801(d) speaking agent analysis is applied with equal force when considering whether an agent can accept notice on behalf of a principal. Br. of Respondent at 7. Washington case law makes no mention of such a requirement and simply requires an individual be an agent to accept notice so long as the agent receives notice while acting in the course and scope of his or her

employment. *Hedrick v. Washington Nat. Ins. Co.*, 186 Wash. 263, 57 P2d 1038; *Guaranty Trust Co. v. Yakima First Nat. Bank*, 179 Wash. 615, 38 P2d 384; *Brower Co. v. Garrison*, 2 Wn .App. 424, 468 P.2d 469; *State v. Keypoint Oyster Co.*, 64 Wn.2d 375, 391 P.2d 979; *Sons of Norway v. Boomer*, 10 Wn. App. 618, 519 P.2d 28 (corporation charged with notice of facts acquired by agents).

If the Court were to accept Respondent's leap in logic, defendants across the State of Washington would be encouraged to never give its employees speaking agent authority in an effort to avoid premise liability. Such a ruling would defeat the public policy based upon the imputation of knowledge rule by shifting the risks and burdens from corporations and business owners to consumers and other invitees.

For example, if there was a spill in the grocery store and a store employee (from whom the corporation expressly revoked speaking agent authority) was notified by a customer, the risk of the agent's failure to take action is borne by the customers of the grocery store. This is a complete reversal of public policy based on the premise that a corporation can act only through its agents, and when its agents act within the scope of their actual or apparent authority, their actions are the actions of the corporation itself. *Mauch v. Kissling*, 56 Wn. App. 312, 316, 783 P.2d 601 (1989);

American Seamount Corp. v. Science and Engineering Associates, Inc., 61 Wn.App. 793, 796–97, 812 P.2d 505 (1991).

The trial court's assertion that notice requires a party to prove a corporate agent's speaking authority is in error. Such a ruling is contrary to Washington case law and Washington public policy. Therefore, the Court should find error in the trial court's analysis of this evidentiary issue.

5.3 The Sunbanks Groundskeeper was an Agent of Respondent.

The existence of an agency relationship is a question of fact for the jury. *O'Brien v. Hafer*, 122 Wn. App. 279, 284, 93 P.3d 930 (2004), *review denied*, 153 Wn.2d 1022 (2005). An agency relationship may be implied from the conduct of the parties and by the circumstances of the particular case. *Turnbull v. Shelton*, 47 Wn.2d 70, 72, 286 P.2d 676 (1955), overruled on other grounds, *Crown Controls, Inc., v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988). Here, Lisa Eby was prepared to extensively testify about the agency relationship (employer-employee relationship) between the groundskeeper and Sunbanks.

Lisa Eby (1) recognized the person as a Sunbanks employee; (2) knew this person to also operate as a Sunbanks manager in prior years; (3) knew this person to operate as a groundskeeper/maintenance person; and (4) was positive about her identification of this individual as a Sunbanks

employee. Therefore, the agency relationship may be implied from the conduct of these observations. *Turnbull v. Shelton*, 47 Wn.2d 70, 72, 286 P.2d 676 (1955), overruled on other grounds, *Crown Controls, Inc., v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988). However, the trial court impermissibly removed the factual issue of agency from the jury's consideration altogether by excluding Lisa Eby's testimony. This was a result of the trial court's erroneous adherence to the speaking agent standard.

The Respondent's citation to *Condon Bros. Inc. v. Simpson Timber Co.* is unpersuasive given the facts of this case. 92 Wn.App. 275, 966 P.2d 355 (1998). In *Condon Bros.*, Condon claimed that an employee's statement was not hearsay as it was an admission by a party opponent under ER 801(d). *Condon Bros.* at 289-90. The *Condon Bros.* court did not address the issue of whether the alleged employee was an agent of the principal. Instead, *Condon Bros.* court analyzed whether the agent was a speaking agent whose statements would bind the principal. *Id.* Here, the Appellants do not appeal, nor even address, whether the groundskeeper's statements were excluded in error. It is the statements by Lisa Eby providing notice to the Respondent that are of issue. Therefore, *Condon Bros.* is not applicable to the issues presented and Respondent's reliance on *Condon Bros.* is misplaced.

Additionally, Respondent misrepresents the ruling of the trial court when citing the trial court's comments (on the Verbatim Report of Proceeding at 32) to support the allegation that the trial court had a level of concern as to the credibility and reliability of Lisa Eby's testimony and the ability of Respondent's to challenge its veracity. Br. of Respondent at 9. The trial court's commented cited by Respondent were made during the trial court's ruling on its *exclusion of the groundskeeper's statements to Lisa Eby*.

Respondent misleads the Court by conflating two separate evidentiary rulings in an effort to bolster support for its position on the exclusion of Lisa Eby's testimony of notice to the Sunbanks groundskeeper. Respondent continues to view this evidentiary issue under an ER 801(d) analysis as if Respondent believes Appellants are seeking review of the exclusion of the groundskeeper's statements. To be clear, Appellants do not appeal the exclusion of the groundskeeper's statements to Lisa Eby. It is the trial court's exclusion of Lisa Eby's testimony regarding notice to the groundskeeper that is at issue.

The trial court impermissibly removed the factual issue of agency from the jury's consideration by adhering to an erroneous "speaking agent" standard when analyzing the issue of notice to the Respondent.

5.4 Respondent Fails to Address the Testimony Exclusion Standard.

A trial court should not exclude testimony unless there is a showing of intentional or tactical nondisclosure, of willful violation of a court order, or the conduct of the miscreant is otherwise unconscionable. *Barci v. Intalco Aluminum Corp.*, 11 Wash.App. 342, 351, 522 P.2d 1159, 1165 (Wash.App. 1974). To date, the Respondent has not alleged any intentional or tactical nondisclosure or other unconscionable conduct that would permit exclusion of testimony. Moreover, the trial court failed to even engage in such an analysis and misapplied evidentiary rules by excluding Lisa Eby's testimony regarding her conversations with Sunbanks manager Sandra Mcinnis on the basis of prejudice.

As anticipated, Respondent cited to *Hampson v. Ramer* to support its claim that Lisa Eby's testimony was properly excluded. 47 Wn.App. 806, 814-15, 737 P.2d 298 (1987). However, Respondent fails to address the problems with Respondent's reliance on *Hampson* cited by the Appellants in their opening brief. Again, *Hampson* is readily distinguishable from this case.

First, the *Hampson* plaintiff's arm was in the sole control of the *Hampson* plaintiff. Here, Lisa Eby was a witness equally available to either party and was not under the control of either the Appellants or the Respondent. If any party were deemed to be "in control" of witness Lisa

Eby it would be the Respondent as Lisa Eby was a longtime volunteer at Respondent's music festival.

Second, the *Hampson* plaintiff violated an agreement to refrain from surgery until the *Hampson* defendant had an opportunity to conduct a CR 35 examination; unconscionable conduct by knowledgeable spoliation of evidence. Here, there was no willful noncompliance or other unconscionable conduct on the part of the Appellants. When the new evidence was discovered it was immediately relayed to the trial court and Respondent. There was not and has not been any allegation of willful noncompliance or other misconduct.

Third, the *Hampson* defendant suffered "irreparable prejudice" as a result of the spoliation of evidence. Here, the trial court had no idea whether the Respondent was even prejudiced, stating, "I don't know what the prejudice to the defendants might be." RP 26. This certainly falls short of the "irreparable prejudice" identified in *Hampson*. Putting aside that prejudice is not part of the exclusion analysis, any prejudice as a result of this newly discovered evidence could have been cured through a deposition of Lisa Eby, a deposition Respondents did not take despite opportunity to do so.

Fourth, the *Hampson* plaintiff did not discover new evidence, but instead actively destroyed evidence. Here, Appellants did not destroy

evidence as was the case in *Hampson*. Respondent could have deposed Lisa Eby during the trial to obtain the information regarding any other conversations or interactions Lisa Eby had with Respondent's agent. However, Respondent did not even need to go that far. Respondent could have simply contacted Lisa Eby, as she was an equally available witness, and asked if she had provided notice to any other Sunbanks employees.

Indeed, the *Hampson* court sought to discourage gamesmanship and encourage disclosure to the fullest practicable extent. However, the *Hampson* court expressly discouraged the exclusion of probative testimony in cases where there was no evidence of willful nondisclosure. The court stated, in such cases, that "testimony should not be excluded absent intentional or willful nondisclosure or other unconscionable conduct." *Id.* at 813.

The trial court's decision to exclusion Lisa Eby's testimony regarding manager Sandra Mcinnis erroneously applied evidentiary rules and should be reviewed *do novo*. The trial court's exclusion of this testimony without evidence of intentional or willful nondisclosure or other unconscionable conduct was an abuse of discretion which must be reversed.

5.5 The Trial Court's Error was Not Harmless.

The trial court's error cannot be deemed harmless. Error is reversible if within reasonable probabilities, had the error not occurred, the result might have been materially more favorable to the one complaining of it. *State v. Wanrow*, 88 Wash. 2d 221, 559 P.2d 548 (1977) ("A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.").

Stated another way, a ruling is harmless if the evidence in question is merely cumulative. *Boeing Co. v. State*, 89 Wash. 2d 443, 572 P.2d 8 (1978) (erroneous admission of merely cumulative evidence did not constitute reversible error); *Brown v. Spokane County Fire Protection Dist. No. 1*, 100 Wash. 2d 188, 668 P.2d 571 (1983) (error in admitting hearsay was harmless; "We find that the evidence, being merely cumulative in nature, was harmless error.").

Here, Lisa Eby was the key witness of this case that witnessed the most contested portion of the Appellants' premise liability claims: whether Respondent had actual notice of the dangerous condition. The exclusion of all evidence of actual notice was necessarily harmful to the Appellants' claims because it gutted Appellants' claims of necessary evidence.

Had the trial court admitted Lisa Eby's testimony regarding her conversation with the Sunbanks groundskeeper, but excluded the conversation with Sandra Mcinnis (or vise-versa), the Respondent could legitimately assert that the trial court's error was harmless as the exclusion of evidence of notice would be cumulative in that circumstance. Theoretically speaking, the jury would have heard at least some evidence of notice (notice to either the Sunbanks groundskeeper or Sunbanks manager Sandra Mcinnis) and the exclusion of evidence of notice could be considered cumulative, and therefore, harmless. However, the trial court's exclusion of all evidence of notice is necessarily harmful as Appellants were not given an opportunity to present evidence on a necessary element of their claims.

Additionally, Appellants were required to show actual notice, rather than constructive notice, as there was no evidence of constructive notice. Any assertion that Appellants were able to present evidence of constructive notice necessarily fails. There was no evidence outside of Ms. Eby's testimony to support any claim that the Respondent created the hazard or should have known about the hazard prior to the injury. While it was known that Respondent had removed a large bush from the property in the months prior to the injury, there was no evidence that the stump and branches were situated in a manner that would be considered a tripping

hazard prior to Lisa Eby's discovery. The condition of the branches prior to Lisa Eby's discovery is unknown. Thus, Appellants' only evidence of notice in this case was actual notice provided to respondent by Lisa Eby.

Therefore, the trial court's exclusion of all evidence of actual notice was harmful to Appellants' claims.

III. CONCLUSION

Lisa Eby's testimony concerning her statements to the Sunbanks groundskeeper and the Sunbanks manager were critical to the presentation of Appellants' claims at trial. Appellants' premise liability claims hinged on Appellants evidencing actual notice to the Respondent Sunbanks. The trial court's exclusion of this evidence effectively dissolved the Appellants' premise liability claims.

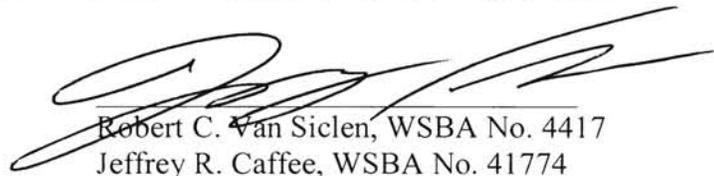
Lisa Eby's testimony regarding her statements to the Sunbanks groundskeeper was offered to prove that the Respondent had advance notice of the dangerous condition, a necessary element of Appellants' claims. These statements by Lisa Eby were relevant because they were made. The truth of the matter asserted, whether the branches were a tripping hazard, is irrelevant.

Regarding Lisa Eby's testimony in respect to her statements to Sunbanks manager Sandra McGinnis, there was no evidence or even an allegation of Appellant's intentional or willful nondisclosure or other

unconscionable conduct. The trial court failed to apply the proper evidentiary standards in analyzing this evidence. As discussed above, prejudice is not a basis for exclusion of Lisa Eby's testimony absent intentional nondisclosure or other unconscionable conduct.

This Court should hold that both evidentiary rulings of the trial court were an abuse of discretion. The Appellants respectfully request that this Court (a) reverse the evidentiary decisions, (b) remand for a new trial, and (c) award costs for this appeal.

RESPECTFULLY submitted this 29th day of October, 2012.



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CERTIFICATE OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on October 29th, 2012, she caused the foregoing *Reply Brief of Appellant* to be served on the following parties of record and/or interested parties by legal messenger and email transmission the same day:

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