

U.S. 748-4

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NO. 68748-4-1

COURT OF APPEALS, DIVISION I
OF THE STATE WASHINGTON

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

Appellants,

vs.

SUNBANKS LIMITED, d/b/a SUNBANKS LAKE RESORT,

Respondent.

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COURT OF APPEALS
DIVISION I
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BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. STATEMENT OF THE CASE	1
III. ARGUMENT	4
A. Standard of Review	4
B. The hearsay statements of Ms. Eby were properly excluded.	5
1. The hearsay statements cannot provide "notice" in the absence of a showing of agency and authority to bind Respondent	6
2. Failure to identify the alleged agent is fatal to claim of notice and casts significant doubt on the reliability of the alleged statements	8
3. Apparent agency must be demonstrated by evidence that the principal has indicated authority exists in a purported agent.	9
C. The undisclosed alleged conversation was properly excluded by the Court under the rules of civil procedure and rules of evidence	10
D. There is substantial evidence to sustain the jury's verdict	13
E. Respondent is entitled to its fees and expenses on Appeal	15
IV. CONCLUSION.....	15

TABLE OF AUTHORITIES

	Page
Cases	
<i>Compare Gourley v. Gourley</i> , 158 Wn.2d 460; 145 P.3d 1185 (2006).....	4
<i>Condon Bros, Inc., v. Simpson Timber Co.</i> , 92 Wn. App. 275; 966 P.2d 355 (1998).....	8
<i>Estep v. Hamilton</i> , 148 Wn. App. 246, 201 P.3d 331 (2008).....	9
<i>Ford v. Red Lion Inns</i> , 67 Wn. App. 766; 840 P.2d 198 (1992).....	13, 14
<i>Hampson v. Ramer</i> , 47 Wn. App. 806; 737 P.2d 298 (1987).....	12
<i>Griffiths v. Big Bear Stores</i> , 55 Wn.2d 243; 347 P.2d 532 (1952).....	6
<i>Mackay v. Mackay</i> , 55 Wn.2d 344; 347 P.2d 1062 (1959).....	4
<i>Mauch v. Kissling</i> , 56 Wn. App. 312, 783 P.2d 601 (1989).....	9
<i>Ness v. Bender</i> , 18 Wn.2d 243; 138 P.2d 864 (1943).....	12
<i>Passovoy v. Nordstrom, Inc.</i> , 52 Wn. App. 166; 52 Wn. App. 166 (1988)	7
<i>State v. Atsbeha</i> , 142 Wn.2d 904, 16 P.3d 626 (2001).....	4
<i>State v. Young</i> , 160 Wn.2d 799, 161 P.3d 967 (2007).....	4
<i>Tincani v. Inland Empire Zoological Soc'y</i> , 124 Wn.2d 121; 875 P.2d 621 (1994).....	13
<i>Wickre v. Allen</i> , 58 Wn.2d 770; 364 P.2d 911 (1961).....	13

Statutes and Rules

ER 801(d)(2)(iv) 6
KCLR 26(k)(B)(3) 11
KCLR 26(k)(B)(4) 11
RAP 18.1 4, 15
Restatement (Second) of Torts §343 (b)..... 13
Restatement (2nd) of Torts §343(A) cmt. e (1965) 13
WA CR 37(b)(2) 11

Other Authorities

Karl B. Tegland *Courtroom Handbook on Washington Evidence*,
p. 417 (2011-2012 edition) 6-7

I. INTRODUCTION

The jury's verdict in favor of Respondent should be affirmed. The pre-trial evidentiary rulings by the trial court should similarly be upheld. Appellants cannot demonstrate any abuse of discretion in ruling upon evidentiary matters, or other legal error, justifying reversal of the verdict. The trial court, having heard the arguments of counsel and having reviewed the proposed evidence submitted by the parties, was in the best position to evaluate the credibility of the evidence. Having done so, its rulings should remain unchanged and the jury's verdict affirmed.

II. STATEMENT OF THE CASE

Mr. Robert C. Life attended a concert at a campground owned and operated by Respondent. CP 2. On May 18, 2007, Mr. Life fell while taking a shortcut through a dark campground without the aid of a flashlight. CP 2-3, 66, 71, 75. Mr. Life alleged to have suffered an injury to his shoulder as a result. CP 4. Importantly, Mr. Life does not recall what caused him to fall nor can he recall the fall itself.

At trial plaintiff sought to introduce evidence regarding a possible cause of his fall, a tree root along a raised embankment of the road he was attempting to climb. CP 499. One of the witnesses called to provide testimony about this root mass was Ms. Lisa Eby. CP 127-132.

Ms. Eby had previously provided testimony, via declaration, about her knowledge of Mr. Life's fall and the condition of the property. CP 127-132. In that declaration, she indicated that her only discussion was with an unknown, and still unidentified "groundskeeper." CP 130-131 Ms. Eby claimed to have discussed the presence of the tree root with this unknown groundskeeper and that it should be removed because it was dangerous. CP 130. Appellants attempted to argue that the unknown groundskeeper was a former employee, Mr. George Hitzler (deceased). CP 130-131; 209, 276-279; 497-498; 928-931. However, Ms. Eby was unable to identify the unknown groundskeeper. CP 130-131.

Respondent moved to exclude these statements as part of its motions in limine on three grounds. CP 305-308. First, the statements were hearsay as they were out-of-court statements being offered for the truth of the matter asserted (*i.e.*, that the tree root constituted a hazard). CP 305-308. Second, Respondent argued that the responsive statements of the unknown "groundskeeper" alleged to have been made in response to Ms. Eby also constituted hearsay and should be excluded. CP 305-308.

Finally, to the extent Appellants sought to offer the statements as actual notice to Respondent of an alleged hazardous condition, Ms. Eby's inability to identify the "groundskeeper" to whom she spoke was fatal. She could not say for certain that he was employed by Respondent. CP

130-131, 305-308. More importantly, Ms. Eby could not testify that the unknown groundskeeper was an authorized agent—designated by Respondent—who could receive notice of conditions of the property and make affirmative representations that they would be addressed. CP 130-131, 305-308.

After considering the briefing of the parties and arguments on motions in limine, the trial court properly excluded Ms. Eby's hearsay statements. CP 305-308, CP 876-878, CP 928-931; RP 17.

After this testimony was excluded, Appellants—for the first time in the case—disclosed that Ms. Eby also planned to testify that she had another conversation, prior to Mr. Life's fall, with the Respondent's manager, Ms. Sandra McGinnis. RP 17-18.

This disclosure was made at trial. RP 17-18. Respondent objected and moved to exclude on multiple grounds, including failure to properly disclose the testimony in response to discovery, in mandated witness disclosures and in prior sworn declarations of Ms. Eby. CP 305-308, RP 17-18. Given the untimely disclosure, the failure to disclose this proposed testimony earlier in discovery—and the fact that plaintiff had previously submitted a declaration of Ms. Eby that did not include this newly disclosed testimony—the trial court excluded the testimony after considering the totality of the circumstances. RP 20-42.

There are no errors in the trial court's evidentiary rulings. Therefore, Respondent seeks A) dismissal of Appellants' appeal; B) that the verdict of the Jury be preserved and confirmed, and C) an award of Respondent's fees and expenses for this appeal pursuant to RAP 18.1.

III. ARGUMENT

A. Standard of Review

Admissibility of evidence generally is within the sound discretion of the trial court.¹ This Court reviews decisions made by the trial court regarding the admission of potential hearsay evidence for abuse of discretion.²

Unlike the review of a trial court's *interpretation* of a court rule, the *application* of the plain language of those rules to specific evidence or testimony is given significant deference.³

¹ *State v. Atsbeha*, 142 Wn.2d 904, 913; 16 P.3d 626 (2001).

² *State v. Young*, 160 Wn.2d 799, 805; 161 P.3d 967 (2007).

³ *Compare Gourley v. Gourley*, 158 Wn.2d 460, 466; 145 P.3d 1185 (2006) (stating interpretation of rules is akin to interpretation of statutes and thus reviewed *de novo*) *with* (holding "[t]he usual rule is that admissibility of evidence is within the sound discretion of the trial court and the court's decision will not be reversed absent abuse of that discretion. ... An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court.") (internal quotation omitted); *see also Mackay v. Mackay*, 55 Wn.2d 344, 348; 347 P.2d 1062 (1959) (defining "judicial discretion" as "a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the judge to a just result") (quoting *In State ex. rel. Clark v. Hogan*, 49 Wn. 2d 457, 462; 303 P.2d 290 (1956)).

Here, Appellants allege two assignments of error. First, the trial court's exclusion of the statements by Ms. Eby to an unknown "groundskeeper" regarding the alleged danger posed by the tree roots. Appellants offered no evidence of the identity of this unknown person, no evidence that this person was employed by Respondent, and no evidence that this "groundskeeper" was authorized to receive notice and/or speak on Respondent's behalf regarding the condition of the property.

Second, the trial court's exclusion of last minute testimony that had not been previously disclosed and was not previously mentioned in a sworn declaration submitted in opposition to Respondent's motion for summary judgment. Given the failure to disclose this evidence, its lack of credibility in light of prior sworn testimony, and the inherent prejudice visited on Respondent in being unable to address this critical testimony disclosed at trial, the trial court appropriately exercised its discretion and excluded the testimony.

These two evidentiary rulings were not interpretations of evidence rules, but rather application of the facts of the case to the clear rules and, therefore, the "abuse of discretion" standard applies.

B. The hearsay statements of Ms. Eby were properly excluded.

Appellants advance the same arguments that were briefed during trial and on their motion for a new trial. No additional evidence or legal

arguments are advanced on appeal. The trial court properly excluded the statements under the rules of evidence. Appellants point to no case law or evidence on appeal that demonstrate reversible error or otherwise justify overturning the verdict of the Jury in this matter.

1. The hearsay statements cannot provide "notice" in the absence of a showing of agency and authority to bind Respondent

In order for a statement to have the legal effect of notice to a party, it needs to be made to the party or to a person deemed to have authority to act on behalf of the party (*i.e.*, receive notice of an allegedly dangerous condition) and speak on the party's behalf (*i.e.*, acknowledge an alleged risk to patrons). ER 801(d)(2)(iv).

As the Supreme Court held in *Griffiths v. Big Bear Stores*,⁴ "[i]t is clearly the general rule in this jurisdiction that declarations and admissions against interest by an agent may not be shown except when they are within the scope of the agency...." (citations omitted).

Tegland confirms that this principle continues to be the law in Washington.⁵ "A statement by an agent is admissible against the principal ***only*** if the agent was acting within the scope of his or her authority in

⁴ 55 Wn.2d 243, 247; 347 P.2d 532 (1952).

⁵ See Karl B. Tegland *Courtroom Handbook on Washington Evidence*, p. 417 (2011-2012 edition).

making the statement."⁶ The burden is on the party seeking to admit the agent's statement or admission to show the required agency and authority.⁷ "An admission is not admissible unless the proponent makes a foundation showing of agency and authority to make the statement in question."⁸

Here, as at trial, Appellants fail to make these required showings. Appellants cannot establish the required agency between this unknown person and Respondent. There is no evidence the unidentified person had authority to bind Respondent as a speaking agent. The trial court specifically found these failures were fatal to the offer of Ms. Eby's out-of-court statements as "notice" of the allegedly dangerous condition on the property. RP 28, 31, 33.

⁶ *Id.* at 417 (citing *Kadiak Fisheries Co. v. Murphy Diesel Co.*, 70 Wn.2d 153; 422 P.2d 496 (1967) (emphasis added)).

⁷ *Id.* (citing *Condon Bros, Inc., v. Simpson Timber Co.*, 92 Wn. App. 275; 966 P.2d 355 (1998)).

⁸ *Id.* at 418 (emphasis added). See also *Passovoy v. Nordstrom, Inc.*, 52 Wn. App. 166, 171-172; 52 Wn. App. 166 (1988):

Unless the fact of the agency may be inferred from *other* evidence, the mere declarations of an alleged agent, made out of court, may not be used to establish the fact of his agency, *Stouffer-Bowman, Inc. v. Webber*, 18 Wn.2d 416, 425, 139 P.2d 717 (1943), or the nature and extent of his authority. *Woodworth v. School Dist. 2, Stevens Cy.*, 92 Wash. 456, 461, 159 P.2d 757 (1916). ***An independent proof of the existence of the agency and its scope must be shown.*** 4 J. Weinstein & M. Berger, Evidence § 801(d)(2)(C)[01] (1987) (emphasis added).

2. ***Failure to identify the alleged agent is fatal to claim of notice and casts significant doubt on the reliability of the alleged statements***

In *Condon Bros. Inc. v. Simpson Timber Co.*, the Court of Appeals held that the inability of a witness to positively identify the person to whom they were speaking is fatal when attempting to establish authority of the unknown person to bind the principal.⁹ In *Condon Bros.*, the proponent of the hearsay statements of the alleged speaking agent could not recall a name or otherwise positively identify the alleged speaking agent.¹⁰ The description provided was insufficient for the trial court to determine the specific person claimed to have been the speaking agent.¹¹

Here, the exact same facts exist. Ms. Eby could not identify the alleged speaking agent of Respondent. She gave a general description that in no way matched to the only authorized agent of Respondent, Ms. McGinnis.

Moreover, the fact that Ms. Eby's inability to positively identify the unknown groundskeeper added another level of concern as to the credibility and reliability of the testimony and the ability of Respondent to challenge its veracity. As the trial court ruled:

⁹ *Condon Bros, Inc., v. Simpson Timber Co.*, 92 Wn. App. 275, 289-90; 966 P.2d 355 (1998).

¹⁰ *Id.* at 289-90.

¹¹ *Id.*

[A]t the heart of exclusion of hearsay is the fact that you can't cross-examine the person that's making the statement. How can you possibly cross examine or discover the person that purportedly was making the statement, that groundskeeper, if you don't even know who it is? ...[Y]ou don't have the personal identity, you don't have anybody to depose, [and] you don't have anybody to test on cross-examination. RP 32.

Further, unlike a situation where a third party recounts the statement of another; here, Ms. Eby was recalling her own out of court statement; and was the sole witness as to the contents of those statements. RP 34. Under these circumstances—and after weighing the evidence and the arguments of the parties at trial—the court properly excluded the statements of Ms. Eby. RP 34-35.

3. ***Apparent agency must be demonstrated by evidence that the principal has indicated authority exists in a purported agent.***

Apparent agency can only be established through acts of the purported principal, not acts of the agent.¹² Specifically, an agent's apparent authority to bind a principal requires objective manifestations of the principal to a third party.¹³

Here, Appellants point to no objective manifestations by Respondent that would permit the assumption that the unidentified groundskeeper had apparent authority to act as a speaking agent for Respondent. There is no evidence of an act by Respondent which would

¹² *Mauch v. Kissling*, 56 Wn. App. 312, 783 P.2d 601 (1989).

¹³ *Estep v. Hamilton*, 148 Wn. App. 246, 201 P.3d 331 (2008).

form the basis for their argument that Ms. Eby was permissibly led to believe she was interfacing with an authorized speaking agent of Respondent. In fact, the trial court specifically stated this point of law in response to Appellants' attempt to introduce Ms. Eby's testimony as the evidence of apparent agency:

[Y]ou cannot prove agency through the acts of the person you're contending was an agent; it has to come from some act by the employer [principal]. RP 31.

The trial court required Appellants to demonstrate apparent agency with some evidence beyond the very hearsay statement of the person purported to be the speaking agent. Absent this showing, the proposed testimony was correctly excluded.

C. The undisclosed alleged conversation was properly excluded by the Court under the rules of civil procedure and rules of evidence

After the trial court ruled that Ms. Eby could not testify regarding her hearsay statements to an unidentified groundskeeper, Appellants' counsel—for the first time—disclosed an alleged meeting between Ms. Eby and Ms. McGinnis prior to Mr. Life's accident. Appellants sought to have this newly disclosed testimony presented to the Jury. Respondent objected on numerous grounds and the trial court requested additional briefing, which was provided, before ruling on the issue. CP 305-308; CP 928-931.

Contrary to Appellants' argument, they were under an obligation disclose facts known by fact witnesses. This was not only required in response to written discovery served by Respondent, but is also an affirmative obligation under King County Local Rule regarding pre-trial witness disclosures. LR 26(k)(B)(3).

This alleged conversation between Ms. Eby and Ms. McGinnis was not identified in Plaintiff's primary witness disclosure or supplemental witness disclosures. LR 26(k)(B)(3) requires a "brief description of the witness relevant knowledge." Moreover, LR 26(k)(B)(4) clearly states that failure to provide the required description of a witnesses' knowledge can result in exclusion of that witness at trial. *See also* WA CR 37(b)(2).

Finally, Appellants did not oppose Respondent's motion in limine requiring the exclusion of undisclosed witness testimony. *Compare* Sunbanks' Motion in Limine C *with* Plaintiffs' Response to Defendant's Motion in Limine at p.4 (conceding to exclusion of undisclosed testimony, save for Appellants' experts).

More significantly, however, is that this purported conversation with Ms. McGinnis was not disclosed in Ms. Eby's amended declaration submitted in response to Respondent's motion for summary judgment (signed January 3, 2012). Respondent sought dismissal arguing, among other things, a lack of notice of a hazardous condition on the property.

Ms. Eby's declaration provides great detail, including her conversation with the unidentified groundskeeper, but does not mention this alleged conversation. CP 130-131.¹⁴

As is made clear in *Hampson v. Ramer*,¹⁵ exclusion of undisclosed testimony enforces the goal of modern discovery rules to avoid ambush and surprise at trial. "The imposition of a *de minimis* sanction would undermine the purpose of discovery, [...] which is to make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."¹⁶ Moreover, a trial court is in the best position to judge the testimony in light of all factors, including assessment of witness credibility.¹⁷

Given the timing and totality of circumstances, the trial court appropriately exercised its discretion to exclude this evidence. RP 37.

¹⁴ Ms. Eby amended her original declaration in support of Appellants' opposition to Respondent's motion for summary judgment to ensure accuracy. The alleged conversation with Ms. McGinnis was not part of either version of her declaration. *Compare* CP 127-131 (Amended Declaration) *with* CP 506-511 (original declaration) (lacking mention of any conversation with Ms. McGinnis).

¹⁵ 47 Wn. App. 806, 814-15; 737 P.2d 298 (1987).

¹⁶ *Id.* at 814-15 (internal quotation omitted).

¹⁷ *Ness v. Bender*, 18 Wn.2d 243, 249; 138 P.2d 864 (1943).

D. There is substantial evidence to sustain the jury's verdict

A jury's verdict should not be reversed even where evidence was wrongfully excluded if there is sufficient evidence to support the verdict.¹⁸

Here, there is ample evidence to sustain the jury's finding that Respondent was not negligent. The Appellants had the burden of proof in regards to establishing a duty, a breach of duty, proximate cause and resulting harm.¹⁹ Further, in a premises liability action, the plaintiff must also demonstrate that a landowner (a) is aware, or should be aware of the alleged condition, and that it involves an unreasonable risk of harm; (b) should expect that that invitee will not discover or realize the danger, or fail to protect themselves against it; and (c) fails to exercise reasonable care to protect them against the danger.²⁰

Sub-part (b) of section 343 of the Restatement (2d) of Torts is often referred to as the "open and apparent" element.²¹ A landowner will not be held to have breached a duty if the jury finds that the allegedly

¹⁸ *Wickre v. Allen*, 58 Wn.2d 770, 778-79; 364 P.2d 911 (1961). *See also id.* at 778-79 ("Wrong directions which do not put the traveler out of his way, furnish no reason for repeating the journey.") (*Cherry v. Davis*, 59 Ga. 454, 456 (1877)).

¹⁹ *Ford v. Red Lion Inns*, 67 Wn. App. 766, 769; 840 P.2d 198 (1992).

²⁰ Restatement (Second) of Torts §343.

²¹ *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 135; 875 P.2d 621 (1994); *see also id.* at 135 ("The open and apparent dangers from a natural condition put a licensee on notice: proceed at your own risk."). Restatement (2nd) of Torts §343(A) cmt. e (1965) ("If a person knows the actual conditions and the dangers involved, the person is free to make an intelligent choice as to whether the advantages gained is sufficient to incur the risk.")

dangerous condition was open and apparent and a plaintiff had the opportunity to discover it and avoid the risk posed.²²

Even if Appellants were to have presented Ms. Eby's testimony regarding the unknown groundskeeper or her alleged conversation with Ms. McGinnis, there remains sufficient evidence to support the Jury's verdict.

Notice is but one element of a four-part test associated with the duty owed by a landowner to an invitee. Duty is one of the four elements of negligence. The jury here found Respondent was not negligent. CP 351. Plaintiff cannot demonstrate that this evidence would have made an impact on the Jury's verdict in light of all of the various elements considered before a finding of lack of negligence could be reached.

Both parties presented their evidence to the jury regarding the alleged dangerous condition. Respondent argued that it was an open and apparent condition and that Mr. Life knowingly encountered the hazard when he chose to walk across a dark campground, without a flashlight, while wearing flip-flops. The jury's verdict can be supported on these facts, despite the exclusion of the select portion of Ms. Eby's testimony.

²² *Ford v. Red Lion Inns*, 67 Wn. App. 766, 769; 840 P.2d 198 (1992).

E. Respondent is entitled to its fees and expenses on Appeal

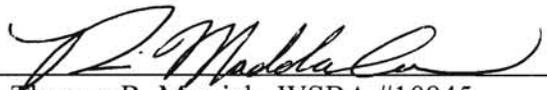
Appellants have brought this appeal after a verdict in the trial court and denial of their motion for a new trial. Appellants have presented no new evidence or arguments on appeal. Pursuant to RAP 18.1, Respondent requests an award of all its fees and expenses associated with this appeal in an amount to be determined by supplemental proceedings.

IV. CONCLUSION

The Jury was able to evaluate all the facts presented and apply the law of negligence. The Jury found that Respondent was not negligent. The trial court appropriately exercised its discretion in ruling on evidentiary matters. Appellants present no evidence of abuse of discretion, or other error, as is their burden. Therefore, the verdict should be upheld and this Appeal dismissed.

DATED this 8th day of October, 2012.

MERRICK, HOFSTEDT & LINDSEY, P.S.

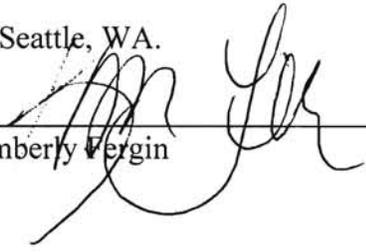
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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2012, true and correct copies of the foregoing were served on the following as indicated below:

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Dated October 9, 2012 at Seattle, WA.



Kimberly Vergin

L:\147\220\PLEADINGS\APPEAL\Respondent's Brief [Final]