ATTACHMENT

UNPUBLISHED OPINIONS CITED IN APPELLANT BAJA CONCRETE USA CORP.'S SUPPLEMENTAL BRIEF

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Ngo v. Hearst Corp.

Court of Appeals of Washington, Division One

September 27, 1999, Filed

No. 42456-4-I

Reporter
1999 Wash. App. LEXIS 1734 *

ANH-TU SY NGO, Appellant, v. HEARST CORPORATION, d/b/a THE SEATTLE POST INTELLIGENCER; THE SEATTLE TIMES COMPANY, INC.; ALLEN DEVEALL SINCLAIR and JANE DOE SINCLAIR, and their marital community composed thereof; CHRISTOPHER DION WILLIAMS and JANE DOE WILLIAMS, and their marital community composed thereof; JAMES PENNINGTON and JANE DOE PENNINGTON, and their marital community composed thereof; BOB CALLAGHAN and JANE DOE CALLAGHAN, and their marital community composed thereof; KHOUNG NGUYEN and JANE DOE NGUYEN, and their marital community composed thereof. Respondents.

Notice: [*1] RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported in Table Case Format at: *97 Wn. App. 1046.*

Prior History: Appeal from Superior Court of King County. Docket No: 96-2-20107-3. Date filed: 03/26/1998. Judge signing: Hon. Jeffrey M. Ramsdell.

Disposition: Affirmed.

Core Terms

newspaper, independent contractor, route, carrier, delivery, deliver, warn

Case Summary

Procedural Posture
Plaintiff appealed the judgment of the Superior Court of King County (Washington), which dismissed plaintiff's negligence claim against defendants after plaintiff was attacked while delivering defendants' newspapers.

Overview
Plaintiff was shot and robbed while he was on his newspaper delivery route. Plaintiff filed suit, alleging that defendants, the newspaper companies for which he worked, breached their duty by failing to provide adequate security measures to protect carriers in a high-crime area. The trial court dismissed plaintiff's negligence claim. The court affirmed. The court held that the trial court correctly ruled that plaintiff was an independent contractor as a matter of law. The court found that defendants did not have control over the manner in which plaintiff completed his job, because plaintiff had primary responsibility for maintaining adequate facilities, supplies, and equipment, and because plaintiff was not subject to daily supervision. The court held that even if plaintiff was an employee, defendants' duty to maintain safe working conditions did not extend to the condition of premises not within their control. The court held that the criminal conduct was unforeseeable as a matter of law because plaintiff failed to show any relationship between the assault on him and other crimes in the immediate area.

Outcome
The court affirmed the trial court, holding that defendants did not owe plaintiff any duty.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

Torts > ... > Affirmative Duty to Act > Types of Special Relationships > General Overview

Torts > ... > Elements > Duty > General Overview

HN1[] **Standards of Review, De Novo Review**

Whether a defendant owes a legal duty of care to a plaintiff is a question of law, which an appellate court reviews de novo. In the absence of a special relationship, no duty exists to protect others from the criminal acts of third persons. The relationship between employer and employee has been recognized as a special relationship that gives rise to such a duty.

Torts > Vicarious Liability > Independent Contractors

HN2[] **Vicarious Liability, Independent Contractors**

If the facts are undisputed and but a single conclusion may be drawn therefrom, it becomes a question of law as to whether one is an employee or an independent contractor.

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Governments > Fiduciaries

Torts > Vicarious Liability > Independent Contractors

Business & Corporate Law > Agency Relationships > General Overview

Business & Corporate Law > ... > Agents Distinguished > Independent Contractors, Masters & Servants > General Overview

Business & Corporate Law > ... > Agents Distinguished > Independent Contractors, Masters & Servants > Independent Contractors

Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Care, Good Faith & Reasonable Skill > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Care, Good Faith & Reasonable Skill > Duty of Care & Reasonable Skill

Business & Corporate Law > ... > Duties & Liabilities > Care, Good Faith & Reasonable Skill > Duty of Good Faith

Labor & Employment Law > Employment Relationships > Fiduciary Responsibilities

Labor & Employment Law > Employment Relationships > Independent Contractors

HN3[] **Contract Interpretation, Fiduciary Responsibilities**

A person employed to perform services for another may be an employee even if the agreement expressly states that he or she is an independent contractor. Washington State has adopted the factors set out in the Restatement (Second) of Agency for determining whether a person is an employee. The essential factor is whether the master has control over the mode and manner in which the actor completes his or her task. Those who render service, but retain control over the manner in which they perform the service, are not employees. They may be agents, agreeing only to use care and skill to accomplish a result and subject to the fiduciary duties of loyalty and obedience to the wishes of the principal.

Torts > Vicarious Liability > Independent Contractors

HN4[] **Vicarious Liability, Independent Contractors**

Restrictions over the time, place, and manner of delivery generally do not create a master-servant relationship in the newspaper industry because they reflect only the publisher's insistence that the carrier supply what the publisher has promised to the customer: a dry newspaper, delivered in a timely and convenient fashion on a relatively consistent schedule.

Torts > Vicarious Liability > Independent Contractors

HN5[] **Vicarious Liability, Independent Contractors**

While a party employing an independent contractor is generally not liable for the independent contractor's injuries, a duty may arise if the principal agrees to assume responsibility for maintaining and supervising the safety of the work to be done.

Business & Corporate Law > ... > Duties & Liabilities > Unlawful Acts of Agents > Criminal Activities

Torts > ... > Affirmative Duty to Act > Types of Special Relationships > Dangerous People

Business & Corporate Law > ... > Duties & Liabilities > Unlawful Acts of Agents > General Overview

Torts > ... > Elements > Duty > General Overview

Torts > ... > Affirmative Duty to Act > Types of Special Relationships > General Overview

Torts > Vicarious Liability > Independent Contractors

HN6[] **Unlawful Acts of Agents, Criminal Activities**

The master's duty as to working conditions does not extend to the condition of premises not in his control, or to the conduct of third persons with whom the servants are to be brought into contact during the course of the work, except that he has a duty to disclose dangerous conditions of which he should know. Where there is no evidence that the defendant knew of the dangerous propensities of the individual responsible for the crime and there is no history of such crimes on the premises, the criminal conduct is unforeseeable as a matter of law. If the criminal conduct is unforeseeable as a matter of law, the employer owes the employee no duty.

Counsel: For Appellant: Charles K. Wiggins, Attorney At Law, Bainbridge Is, WA. Neil Leavitt, Bellevue, WA. Kenneth W. Masters, Wiggins Law Ofc., Bainbridge Is, WA.

For Respondents: William R. Hickman, Reed McClure, Seattle, WA.

Judges: BECKER, J.

Opinion by: BECKER

Opinion

BECKER, J. -- Two men shot and robbed appellant Ngo while he was delivering the morning newspaper in the Central District of Seattle. Ngo filed suit, claiming that the newspaper companies breached their duty by failing to provide adequate security measures to protect the carriers in a high-crime area. We affirm the trial court's summary judgment dismissal of Ngo's claim. The companies owed no such duty to Ngo, who was an independent contractor. And even if his status was that of an employee, no duty arose because the criminal conduct of Ngo's assailant was not a legally foreseeable risk. On August 1, 1993, Anh-Tu Sy Ngo obtained a newspaper **[*2]** route located in the Central District of Seattle. He signed a home delivery dealer agreement with two newspaper companies, The Seattle Times Company, Inc., and The Seattle Post Intelligencer (collectively P-I). Two men shot and robbed Ngo while he was on his delivery route on Saturday, August 28, 1993, at about 6 a.m. Ngo brought this action alleging that the P-I's negligence was the proximate cause of his injuries. The trial court granted the P-I's motion for summary judgment dismissal. Ngo appeals.

INDUSTRIAL INSURANCE ACT

As a threshold matter, Ngo's negligence action is not barred by the Industrial Insurance Act, *RCW 51.32.010*. While the Act is ordinarily the exclusive remedy against employers for an employee's employment related injuries, excluded from its reach are "Services performed by a newspaper carrier selling or distributing newspapers on the street or from house to house." *RCW 51.12.020(10)*. When the Act does not provide coverage, negligence actions are not barred. *McCarthy v. Department of Social and Health Services, 110 Wash. 2d 812, 816-18, 759 P.2d 351 (1988)*. Whether the P-I owed Ngo a duty is an issue properly before the court.

INDEPENDENT CONTRACTOR

[*3] *HN1*[] Whether a defendant owes a legal duty of care to a plaintiff is a question of law, which this court reviews de novo. *Reynolds v. Hicks, 134 Wash. 2d 491, 496, 951 P.2d 761 (1998)*. In the absence of a special relationship, no duty exists to protect others from the criminal acts of third persons. *Craig v. Washington Trust Bank, 94 Wash. App. 820, 976 P.2d 126 (1999)*, citing *Folsom v. Burger King, 135 Wash. 2d 658, 958 P.2d 301 (1998)*. The relationship between employer and employee has been recognized as a special relationship

that gives rise to such a duty. Nivens v. 7-11 Hoagy's Corner, 133 Wash. 2d 192, 201, 943 P.2d 286 (1997), citing Bartlett v. Hantover, 9 Wash. App. 614, 621, 513 P.2d 844 (1973). Ngo claims that he was the P-I's employee, and therefore, the P-I had a duty to warn him about the dangers of his route. The P-I contends Ngo was an independent contractor, and thus fully responsible for his own safety. HN2[↑] "If the facts are undisputed and but a single conclusion may be drawn therefrom, it becomes a question of law as to whether one is an employee or an independent contractor." Hollingbery v. Dunn, 68 Wash. 2d 75, 80, 411 P.2d 431 (1966), **[*4]** citing Restatement (Second), Agency sec. 220, cmt. c (1958). That Ngo was referred to in the dealer agreement as an independent contractor is not dispositive. HN3[↑] A person employed to perform services for another may be an "employee" even if the agreement expressly states that he or she is an independent contractor. Rho Company v. Department of Revenue, 113 Wash. 2d 561, 570-71, 782 P.2d 986 (1989). Washington has adopted the factors set out in the Restatement (Second) of Agency for determining whether a person is an employee. Hollingberry v. Dunn, 68 Wash. 2d at 80-81; Restatement (Second) of Agency, Section 220(2) (1958). The essential factor is whether the master has control over the mode and manner in which the actor completes his or her task. Those who render service, but retain control over the manner in which they perform the service, are not employees. Washington Recorder Pub. Co. v. Ernst, 199 Wash. 176, 189, 91 P.2d 718 (1939). "They may be agents, agreeing only to use care and skill to accomplish a result and subject to the fiduciary duties of loyalty and obedience to the wishes of the principal". Washington Recorder Pub. Co. v. Ernst, 199 Wash. at 189. **[*5]** Ngo purchased the papers for delivery and sold them to the customers at a profit. Under the agreement, either party could terminate the contract with 30 days notice, or with 2 days notice if the terms of the agreement were breached. The P-I gave Ngo a route list of subscribers and agreed not to assign the route to any other carrier. Ngo assumed "primary responsibility" for maintaining adequate facilities, supplies, and equipment to carry out the purpose of the contract. He agreed to purchase the newspapers at a wholesale rate and was required to secure his own substitute newspaper carrier. The P-I delivered the papers to Ngo. He chose the means of delivery. He was not subject to daily supervision, other than his subscribers' complaints. Nothing precluded him from having someone else deliver the paper for him as long as the purpose of the agreement (to provide "reliable, prompt delivery and sale" of the paper) was fulfilled. The P-I did establish the route and gave him a deadline for completing it. The P-I provided the collection book, and instructed the carrier on how to fill out and deliver the billing envelopes. The P-I also maintained the records on customer accounts **[*6]** and received customer complaints. These facts show only the P-I's will as to the results of the services. They do not establish the P-I's right to control the mode or manner of Ngo's performance of the services. Ngo relies on decisions in other states that have allowed a jury to decide whether or not a newspaper carrier is an employee. See, e.g., Brose v. Union Tribune Pub. Co., 183 Cal. App. 3d 1079, 228 Cal. Rptr. 620 (1986); Santiago v. Phoenix Newspapers, Inc., 164 Ariz. 505, 794 P.2d 138 (1990). These cases do not persuade us that there is a material issue of fact in the present case. As the Minnesota Court of Appeals has stated, HN4[↑] restrictions over the time, place, and manner of delivery generally do not create a master-servant relationship in the newspaper industry "because they reflect only the publisher's insistence that the carrier supply what the publisher has promised to the customer: a dry newspaper, delivered in a timely and convenient fashion on a relatively consistent schedule." Neve v. Austin Daily Herald, 552 N.W.2d 45, 48 (Minn. App. 1996). Because Ngo did not raise a material issue of fact tending to prove he was an **[*7]** employee, the trial court correctly ruled that he was an independent contractor as a matter of law.

DUTY

HN5[↑] While a party employing an independent contractor is generally not liable for the independent contractor's injuries, Ngo claims that a duty to exercise care toward the independent contractor arose from the contract. A duty may arise if the principal agrees to assume responsibility for maintaining and supervising the safety of the work to be done. See Kelley v. Howard S. Wright Const. Co., 90 Wash. 2d 323, 333-34, 582 P.2d 500 (1978). Here, Ngo refers to the P-I's Carrier Handbook that includes suggestions on how to deliver papers safely. But he fails to point to any provision of his contract wherein the P-I agreed to maintain and supervise the safety of his work to be done. Ngo also cites to Keck v. American Employment Agency, Inc., 279 Ark. 294, 652 S.W.2d 2 (1983). The plaintiff in Keck alleged that the employment agency was negligent in referring her to an employer who raped her. The Arkansas Supreme Court allowed the case to go to a jury, based on the agency's violation of a statute requiring agencies to investigate the background of potential **[*8]** employers. Keck v. American Employment Agency, Inc., 279 Ark. at 298. Ngo

contends that the P-I violated the Washington Industrial Safety and Health Act (WISHA) and regulations promulgated under RCW 49.22.020, the "Late night retail establishments" Crime Prevention statute. The P-I was not obligated to comply with either of these provisions in its relationship with Ngo. WISHA sets forth duties for an "employer" to his "employee", but it does not protect Ngo because he was an independent contractor, not an employee. See RCW 49.17.060. Also, there is no showing that the P-I failed to provide a workplace free from recognized hazards. See Craig v. Washington Trust Bank, 94 Wash. App. at 825-26. And delivery of newspapers is not the type of retail sales regulated by RCW 49.22. Because Ngo has not shown that the P-I has violated any pertinent statute, Keck is not analogous and does not support Ngo's claim that a duty to warn arose from his contract with the P-I. Even assuming that Ngo was an employee of the P-I, the question remains whether the P-I owed him a duty to take precautions for his safety on the route. According to Ngo, the specific steps the **[*9]** P-I should have taken included warning him about the potential dangers; ensuring that he, who spoke and read very little English, understood the potential dangers; training him to avoid danger; providing an extra person to accompany him on the route; and providing him with an emergency means of communications such as a radio or a cellular telephone. Where an employee-employer relationship exists, the employer has a duty to provide a safe place to work, and to make reasonable provisions against foreseeable dangers of criminal misconduct to which the employment exposes the employee. Bartlett v. Hantover, 9 Wash. App. 614, 620-21, 513 P.2d 844 (1973), rev'd on other grounds, 84 Wash. 2d 426, 433, 526 P.2d 1217 (1974); see also Hutchins v. 1001 Fourth Ave. Assocs., 116 Wash. 2d 217, 802 P.2d 1360 (1991) (recognizing employer-employee as "special relationship" giving rise to duty to warn and protect under Bartlett). But with respect to the risk of harm caused by third persons or occurring upon premises not in the employer's control, the employer's duty is more circumscribed. *HN6*[↑] "The master's duty as to working conditions does not extend to **[*10]** the condition of premises not in his control, or to the conduct of third persons with whom the servants are to be brought into contact during the course of the work, except that he has a duty to disclose dangerous conditions of which he should know." Restatement (Second) of Agency, Section 504 (1958). Where there is no evidence that the defendant knew of the dangerous propensities of the individual responsible for the crime and there is no history of such crimes on the premises, the criminal conduct is unforeseeable as a matter of law. Raider v. Greyhound Lines, Inc., 94 Wash. App. 816, 819, 975 P.2d 518, review denied, Wash. 2d (1999), citing *Wilbert v. Metropolitan Park Representative, 90 Wash. App. 304, 309, 950 P.2d 522 (1998)*. If the criminal conduct is unforeseeable as a matter of law, the employer owes the employee no duty. See Schneider v. Strifert, 77 Wash. App. 58, 888 P.2d 1244 (1995). Merely establishing the relatively high incidence of crime in a particular urban area is insufficient to establish an employer's duty to protect employees from becoming victims of crime when they are sent into that area. Imposing such a duty **[*11]** would be in conflict with the general principle that a business should be able to assume that others will follow the law. See Hutchins v. 1001 Fourth Ave. Assocs., 116 Wash. 2d 217, 237. 802 P.2d 1360 (1991). Also, the relativity of crime rates makes them unsuitable as a limiting principle. The potential for violent crime is not limited to high crime areas. If a duty to provide protection exists by way of the foreseeability of harm by criminal action, it must exist in relatively low crime areas too. See Craig v. Washington Trust Bank, 94 Wash. App. at 827 ("Indeed, Ms. Craig could have been similarly accosted nearly any place or time if somebody chose to break the law."). The reluctance of courts to regard high crime rates as establishing the foreseeability of harm is demonstrated in Raider. In that case, a passenger who had recently disembarked from a Greyhound bus took out a gun and shot two people inside the bus station. The crime was racially motivated. The court held on summary judgment that Greyhound was not liable for the shooting of an invitee where there was no evidence that Greyhound knew or had reason to know that the passenger was likely **[*12]** to assault the victims or that similar racially motivated conduct had occurred on the premises. The court found no evidence that would allow a jury to decide for the plaintiff even though Greyhound knew its bus terminal was a dangerous high crime area. The court reasoned that there was no indication that the passenger's attack bore any relationship or similarity to other crimes taking place at the station in the past. Like the plaintiff in Raider, Ngo has failed to show any relationship between the assault on him and other crimes in the immediate area. His evidence consists of the P-I's own news articles about drive-by shootings, public demand for more police protection in the Central District, rising murder and assault rates in Seattle and the increase in illegal drug transactions in the Central District and the South End. Another P-I article criticized a pizza supplier for deciding that the Central District was too dangerous to allow employees to deliver pizzas there. Ngo also presented an affidavit from a detective stating that the P-I should have been aware of the high

crime rate in the Central District, and therefore should have provided better security. The articles **[*13]** and statistics submitted by Ngo do not show any attacks on newspaper carriers in the past in the area of his route or any other area, and they do not establish a pattern of shootings and robberies in the Central District or along Ngo's route. In fact, one of the articles says that 85 percent of murder victims are related to or acquainted with the murderer, and that the most likely location for a murder is the victim's home. The statistics provided by the detective are no more focused than the articles, and his declaration as an expert witness is too conclusory to be helpful. See *Wilbert v. Metropolitan Park Representative, 90 Wash. App. at 309-310.* Ngo also argues, citing to *Russo v. Grace Institute, 546 N.Y.S.2d 509, 145 Misc. 2d 242 (1989)*, that the P-I owed him a duty because the P-I created the opportunity for the criminal conduct and failed to take precautions. In Russo, the building owner had liability because a scaffold he left at the plaintiff's apartment was used by the robbers when they broke in. Here, the P-I did not do anything comparable to create the opportunity for the assailants to attack Ngo. Following Raider and Craig, we conclude **[*14]** that the trial court correctly dismissed the plaintiff's negligence claim because the facts do not give rise to a duty. Ngo raises a new argument on appeal that the contract was unconscionable. Because he did not raise this argument below, we do not consider it. *RAP 2.5(a)*. In summary, we conclude Ngo was an independent contractor. But even if he was an employee, on this record the duty of care owed to him by the P-I did not include a duty to warn him about or protect him from assaults by third parties on his delivery route.

Affirmed.

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Kachess Community Ass'n v. Hix

Court of Appeals of Washington, Division Three, Panel Ten

March 25, 1997, Filed

No. 14679-1-III

Reporter
1997 Wash. App. LEXIS 386 *

KACHESS COMMUNITY ASSOCIATION, a non-profit corporation, Appellant, v. STEVEN HIX and JEANNIE HIX, husband and wife, Respondents.

Notice: [*1] RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Prior History: Appeal from Superior Court of Kittitas County. Docket No: 93-2-00088-2. Date filed: 01/30/95. Judge signing: Hon. Michael E. Cooper.

Disposition: Affirmed.

Core Terms

color, notice, roof, actual authority, apparent authority, estoppel, plans, manifestation, ratification, disapproval, building plans, contends, attorney's fees, insurance company, build

Case Summary

Procedural Posture

Appellant community association (association) sought review of an order from the Superior Court of Kittitas County (Washington), which ruled that no ***agency*** relationship existed between the builder and appellee property owners. The lower court found in favor of the property owners in the association's action against the property owners to force the property owners to change the color of their roof.

Overview

The property owners bought property in a development that was subject to certain rules enforced by the community association's committee. The property owners gave the plans for their home to the builder who submitted them to the association. The association sent notice to the builder that the color of the roof was unacceptable. The roof was constructed anyway. The association brought an action for an injunction to prohibit the property owners from keeping the color of the roof. The lower court found that no ***agency*** existed between the builder and the property owners. The court affirmed and reasoned that no express actual authority existed because the property owners did not give the builder the authority to act on their behalf. Further, the property owners refused to sign the paperwork for the builder to act on their behalf. The court concluded that there was no apparent authority because the actions of the builder, attending the meeting and introducing himself as the project manager, was not authorized by the property owners. There was no ratification because the builder never discussed the problem with the property owners and therefore they did not have full knowledge.

Outcome

The court affirmed the lower court which found that no ***agency*** relationship existed between the builder and the property owners in the community association's action against the property owners to change the color of their roof.

LexisNexis® Headnotes

Business & Corporate Law > ... > Establishment > Elements > Manifestation by Principal

Business & Corporate Law > ***Agency*** Relationships > General Overview

Business & Corporate Law > ***Agency*** Relationships > Establishment > General Overview

Business & Corporate Law > ***Agency*** Relationships > Establishment > Consent

Business & Corporate Law > ... > Establishment > Elements > General Overview

Business & Corporate Law > ... > Establishment > Elements > Right to Control by Principal

Business & Corporate Law > ... > Establishment > Proof of ***Agency*** > Questions of Fact & Law

HN1[] **Elements, Manifestation by Principal**

An ***agency*** exists when an agent manifests a willingness to act under the control of a principal, and the principal expresses consent to such action. Determining if an ***agency*** relationship exists is a question of fact when the facts are in dispute.

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN2[] **Standards of Review, Substantial Evidence**

A trial court's findings of fact will not be disturbed on appeal if they are supported by substantial evidence. When the record contains evidence sufficient to persuade a fair-minded, rational person of the truth of a statement, then substantial evidence is deemed to exist. The evidence and reasonable inferences are viewed in the light most favorable to the prevailing party. Although a reviewing court may find that the record contains some evidence which contradicts the findings, nevertheless it must uphold the findings if the record contains substantial evidence to support the finding.

Business & Corporate Law > ... > Authority to Act > Actual Authority > General Overview

Business & Corporate Law > ***Agency*** Relationships > General Overview

Business & Corporate Law > ***Agency*** Relationships > Authority to Act > General Overview

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

Business & Corporate Law > ... > Authority to Act > Apparent Authority > Reliance

Business & Corporate Law > ... > Establishment > Elements > Manifestation by Principal

HN3[] **Authority to Act, Actual Authority**

An agent may have either actual or apparent authority to bind his principal. Actual authority relies upon objective manifestations made by the principal directly to the agent. It is the impressions of the parties themselves, not third party impressions, which determine the existence of actual authority.

Business & Corporate Law > ... > Duties & Liabilities > Causes of Action & Remedies > Burdens of Proof

Business & Corporate Law > ***Agency*** Relationships > General Overview

Business & Corporate Law > ***Agency*** Relationships > Authority to Act > General Overview

Business & Corporate Law > ... > Authority to Act > Actual Authority > General Overview

Business & Corporate Law > ... > Actual Authority > Implied Authority > General Overview

Business & Corporate Law > ... > Actual Authority > Implied Authority > Knowledge of the Principal

Business & Corporate Law > ... > Actual Authority > Implied Authority > Proof

Business & Corporate Law > ... > Duties & Liabilities > Knowledge & Notice > General Overview

HN4[] **Causes of Action & Remedies, Burdens of Proof**

Actual authority can be express or implied. Implied actual authority is proven through circumstantial evidence that indicates the principal actually intended the agent to have such authority. Implied actual

authority is often found where the agent has consistently exercised a power which was not expressly given by the principal, but the principal knowing of this action has sanctioned it by making no objection.

Business & Corporate Law > ... > Authority to Act > Actual Authority > ***Express Authority***

Business & Corporate Law > ***Agency*** Relationships > Authority to Act > General Overview

Business & Corporate Law > ... > Authority to Act > Actual Authority > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Causes of Action & Remedies > Unauthorized Acts

HN5[] **Actual Authority, *Express Authority***

Express authority is authority that a principal directly conveys to an agent in express terms.

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

Business & Corporate Law > ***Agency*** Relationships > General Overview

Business & Corporate Law > ***Agency*** Relationships > Authority to Act > General Overview

Business & Corporate Law > ... > Authority to Act > Actual Authority > General Overview

HN6[] **Authority to Act, Apparent Authority**

Apparent authority requires objective manifestations be made to a third party. These manifestations are made by the principal, or an agent acting under the actual authority of the principal. Manifestations to third parties support finding apparent authority when (1) they cause the person claiming authority existed to subjectively believe the agent had authority, and (2) the third parties' belief is objectively reasonable.

Business & Corporate Law > ... > Duties & Liabilities > Authorized Acts of Agents > Burden of Inquiry

Business & Corporate Law > ***Agency*** Relationships > General Overview

Business & Corporate Law > ***Agency*** Relationships > Ratification > General Overview

Business & Corporate Law > ***Agency*** Relationships > Ratification > Express & Implied Ratification

Business & Corporate Law > ***Agency*** Relationships > Ratification > Silence

HN7[] **Authorized Acts of Agents, Burden of Inquiry**

Although an individual may not have authority to act as an agent, a purported principal may ratify the actor's actions if, after having full knowledge of the action, the principal accepts the benefits of the act, or assumes an obligation without inquiry. Ratification may be inferred from a principal's silence if the circumstances are such that a person would be expected to speak if they did not consent.

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

HN8[] **Estoppel, Equitable Estoppel**

In order to establish estoppel, a party must prove: (1) an admission, statement, or act which is inconsistent with a subsequently asserted claim; (2) third party reliance on the admission, statement, or act; and (3) injury to the relying party. Estoppel prevents a party from asserting an explanation or a defense. Equitable estoppel requires proof by clear, cogent and convincing evidence. Equitable estoppel may only be used as a defense.

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

HN9[] **Estoppel, Equitable Estoppel**

Silence is not sufficient to support an estoppel claim.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN10[↓] **Basis of Recovery, Statutory Awards**

Wash. Rev. Code § 4.84.330 provides that where a contract provides for an award of attorney fees incurred to enforce the contract, the prevailing party is entitled to attorney fees even if that party is not the specified party in the contract.

Counsel: For Appellant: F. S. Lathrop, Lathrop Winbauer Harrel & Slothower, P.O. Box 1088, Ellensburg, WA 98926. Susan K. Harrel, Lathrop & Winbauer, PO Box 1088, Ellensburg, WA 98926.

For Respondents: Gary R. Luloff, 402 E Yakima Ave Ste 820, Yakima, WA 98901. F. D. Andersen Jr., PO Box 9551, Spokane, WA 99209-9551.

Judges: Authored by Philip J. Thompson. Concurring: Frank L. Kurtz, Stephen M. Brown.

Opinion by: Philip J. Thompson

Opinion

THOMPSON, A.C.J. Kachess Community Association brought suit against Steven and Jeannie Hix to force them to change the color of their roof. The Hixes contended Kachess Community Association (KCA) failed to follow their own rules, and never directly notified them that the roof color was not approved. KCA argued they properly notified individuals who were constructing the house, and who were agents for the Hixes. The court concluded no ***agency*** existed and entered judgment for the Hixes. **[*2]** KCA appeals contending the court erred in finding no ***agency*** relationship existed. In addition, they argue the court erred in finding they did not comply with their own rules. Arguing an estoppel theory, they also contend the Hixes should not prevail because they had actual notice that the roof color had not been approved. Finally, both parties request attorney fees on appeal. We affirm.

In 1982, Mr. Hix purchased a lot in the Lake Kachess development. The property was subject to certain covenants, conditions, and restrictions (CCR's). The KCA enforces the CCR's through an Architectural Control Committee (ACC). The ACC approves or disapproves building plans, including exterior color. When Mr. Hix purchased the lot he received a copy of the CCR's.

In 1992, Mr. Hix decided to build on his lot. He had seen the Bavarian-type houses at Village at the Summit on Snoqualmie Pass and liked the style. He decided to build the same style house on his Lake Kachess property.

While viewing his lot, Mr. Hix ran into Mr. Garka who was then the ACC chairman. He told Mr. Garka about his plans to build. Mr. Garka reminded him about the CCR's. Mr. Hix gave Mr. Garka his home address so that Mr. Garka **[*3]** could mail him the necessary information for submitting building plans.

The Hixes met with Steve Nicolich, the owner of Village at the Summit (VAS) who agreed to build their home. The Hixes contracted with ANA Associates (ANA) to do the foundation, and VAS was to build the rest of the home. VAS then contracted with ANA to construct part of the house in addition to the foundation. At this time, the Hixes selected the exterior colors.

Mr. Hix received a packet of information regarding the submission of their building plans. Mr. Hix had until April 5 to submit his plans to the ACC. He said he knew there was a meeting afterwards and the decision would be made. He did not know the exact date of the meeting, and did not know someone needed to attend. Mr. Hix sent the information to ANA or Steve Jewett and asked them to compile the necessary information and hand deliver it to Mr. Garka.

Mr. Jewett was the project manager for VAS. He coordinated the construction of the home. Mr. Jewett also stated he felt he was responsible for obtaining any necessary permits including the ACC approval. Mr. Hix did have contact with Mr. Jewett, but Mr. Jewett did not work for him.

Terry Elliott of ANA **[*4]** assembled the necessary information and mailed it to the ACC on March 24. On April 1, Steve Hoeck, the project manager for ANA, learned from Mr. Garka that Mr. Hix's association fees were not current and that they needed to be paid. Mr. Garka also told him he did not like the trim colors submitted. Mr. Hoeck passed this information along to ANA.

On April 5, Mr. Jewett attended the ACC meeting. In addition to Mr. Jewett, Mr. Garka, John Gullion and Joe Leon were present representing the ACC. Each individual had a different recollection of what transpired at the meeting. Mr. Jewett stated the meeting was

informal. He left with the idea that the colors were an issue, but thought the trim colors were creating the problem. Mr. Garka contends there was a formal vote to reject the colors. Mr. Gullion stated the ACC concluded the roof was not an appropriate color. Mr. Leon also indicated the ACC disapproved of the roof color. The court found that everyone at the meeting had an impression that the roof color was unacceptable.

On April 22, 1992, Mr. Garka sent Mr. Jewett a letter at ANA's address indicating the colors had yet to be approved. Mr. Elliott of ANA stated the letter was in his **[*5]** files, but does not remember receiving it. He did not pass the letter to Mr. Jewett. In May 1992, Mr. Garka was replaced as chairman of the ACC by David Raymond. On May 20, Mr. Raymond sent a letter to Mr. Jewett at ANA's address again indicating the colors had not been approved. On July 15, a letter was again sent to Mr. Jewett at ANA indicating the color scheme of the Hix home was not approved.

Mr. Raymond and Mr. Jewett met to discuss the colors of the Hix residence on July 23. Mr. Jewett then contacted ANA to find out if the roof construction had begun. ANA told him the roofing materials had been delivered, but they did not know if the roof had been installed. Mr. Jewett arranged to meet with the Hixes who told him to stop everything until the problem had been sorted out. Since this was a weekend and work did not usually occur on weekends, Mr. Jewett thought he could stop the project on Monday. Apparently the roof subcontractor had learned the color would not be approved and finished the roof. The roof on the Hix home is parchment or white.

KCA brought this action against the Hixes for an injunction enforcing the CCR's and prohibiting the Hixes from maintaining their roof in **[*6]** its present color. In ruling on this matter, the court was required to determine if ANA or Mr. Jewett was the Hixes' agent. The court determined that no ***agency*** relationship existed. KCA appeals the court's decision.

HN1[↑] An ***agency*** exists when an agent manifests a willingness to act under the control of a principal, and the principal expresses consent to such action. *Costco Wholesale Corp. v. World Wide Licensing Corp., 78 Wash. App. 637, 645, 898 P.2d 347 (1995)*. Determining if an ***agency*** relationship exists is a question of fact when the facts are in dispute. *Bill McCurley Chevrolet Inc. v. Rutz, 61 Wash. App. 53, 57, 808 P.2d 1157*, review denied, *117 Wash. 2d 1015, 816 P.2d 1223 (1991)*. *HN2*[↑] A trial court's findings of fact will not be disturbed on appeal if they are supported by substantial evidence. *Bering v. Share, 106 Wash. 2d 212, 220, 721 P.2d 918 (1986)*. When the record contains evidence sufficient to persuade a fair-minded, rational person of the truth of a statement, then substantial evidence is deemed to exist. Id. The evidence and reasonable inferences are viewed in the light most favorable to the prevailing party. *Smith v. Hansen, Hansen & Johnson, Inc., 63 Wash. App. 355, 363, 818 P.2d 1127 [*7] (1991)*, review denied, *118 Wash. 2d 1023, 827 P.2d 1392 (1992)*. Although a reviewing court may find that the record contains some evidence which contradicts the findings, nevertheless it must uphold the findings if the record contains substantial evidence to support the finding. *State v. Black, 100 Wash. 2d 793, 802, 676 P.2d 963 (1984)*. KCA argues the facts support an ***agency*** relationship based upon (1) actual authority, (2) apparent authority, and (3) ratification.

Actual Authority

HN3[↑] An agent may have either actual or apparent authority to bind his principal. *King v. Riveland, 125 Wash. 2d 500, 507, 886 P.2d 160 (1994)*. Actual authority relies upon objective manifestations made by the principal directly to the agent. *Smith, 63 Wash. App. at 363*. It is the impressions of the parties themselves, not third party impressions, which determine the existence of actual authority. *Absher Constr. Co. v. Kent Sch. Dist. No. 415, 77 Wash. App. 137, 144, 890 P.2d 1071 (1995)*.

HN4[↑] Actual authority can be express or implied. *Id. at 143-44*. Implied actual authority is proven through circumstantial evidence that indicates the principal actually intended the agent to have such authority. *King, 125 Wash. 2d at [*8] 507*. Implied actual authority is often found where the agent has consistently exercised a power which was not expressly given by the principal, but the principal knowing of this action has sanctioned it by making no objection. *Id. at 507*.

HN5[↑] ***Express authority*** is authority that a principal directly conveys to an agent in express terms. Black's Law Dictionary 581 (6th ed. 1990). There is no question that express actual authority did not exist. Mr. Hix testified he did not give Mr. Jewett or ANA the authority to act on his behalf. Mr. Jewett also stated Mr. Hix did not ask him to attend the ACC meeting or accept notice of the ACC's decision. Mr. Jewett also said Mr. Hix refused to sign the paperwork required for Mr. Jewett to act as his agent. Nor is there evidence in the record to

indicate that Mr. Hix authorized ANA to act as the Hixes' agent.

KCA argues that because Mr. Hix gave ANA and/or Mr. Jewett the responsibility to submit the plans, he also gave them the authority to accept notice of the ACC decision. It is undisputed that Mr. Hix asked either ANA or Mr. Jewett to submit the building plans. Mr. Hix testified he gave this task to them because they had all the necessary documents. **[*9]** Mr. Hix still thought the ACC would contact him with their approval or disapproval. ANA did not instruct the ACC to notify them regarding the approval. Mr. Jewett testified he thought he was responsible for getting the ACC approval, but he also stated Mr. Hix did not directly request the notice be sent to Mr. Jewett.

In determining if a type of actual authority existed, we look to the interaction between the alleged principal and the alleged agent. No objective manifestation of authority was made by Mr. Hix to Mr. Jewett or ANA. Nor did Mr. Jewett and ANA think they were agents for Mr. Hix. Submitting the building plans alone was not sufficient to establish an ***agency***. The court did not err in finding that no theory of actual authority was proven.

Apparent Authority

HN6[↑] Apparent authority requires objective manifestations be made to a third party. *Smith, 63 Wash. App. at 363*. These manifestations are made by the principal, or an agent acting under the actual authority of the principal. *Id. at 364*. Manifestations to third parties support finding apparent authority when (1) they cause the person claiming authority existed to subjectively believe the agent had authority, and (2) **[*10]** the third parties' belief is objectively reasonable. *King, 125 Wash. 2d at 507*.

The only action of Mr. Hix that could be deemed an objective manifestation was the request that the building plans be sent by someone other than himself. This alone is not sufficient proof that Mr. Jewett or ANA had apparent authority to receive notice. Mr. Jewett did attend the April 5 meeting of the ACC, and introduced himself to the ACC and the project manager. Although this could be considered a manifestation of authority, it was not expressly authorized by Mr. Hix.

KCA contends the Hixes created apparent authority when they failed to inform the ACC that ANA and Mr. Jewett were not authorized to receive notice. KCA relies on *State v. Parada, 75 Wash. App. 224, 230-31, 877 P.2d 231 (1994)*, to support this position. In Parada, an insurance company, through a bail bond company, executed an appearance bond on behalf of Mr. Parada. *Id. at 226*. The bond, accompanied by a power of attorney, directed all court notices to be sent through the bail bond company. *Id. at 226-27*. Notice of a bail forfeiture was sent to the bond company which forwarded the notice to the insurance company. *Id. at 227*. The insurance **[*11]** company moved to exonerate the bond claiming it did not receive notice. Id. The appellate court found the insurance company had created apparent authority for the bond company to accept notice by failing to give notice of those limitations. *Id. at 231-32*.

In this case, unlike Parada, no power of attorney existed, nor did any express ***agency*** or actual authority. Secondly, the insurance company instructed notice be sent to the bond company but did not limit what type of notice. Mr. Hix never informed the ACC to notify ANA or Mr. Jewett of the approval or disapproval of the plans. These situations are distinguishable.

We conclude substantial evidence supports the court's finding that no theory of apparent authority was proven.

Ratification

The Hixes argue that KCA did not allege or argue ratification at the trial court; thus, they are precluded from arguing it on appeal. KCA did argue ratification at the trial court. In its memorandum decision, the court refers to the facts which give rise to the ratification theory, and explains why the theory fails. This court may properly consider this issue.

HN7[↑] Although an individual may not have authority to act as an agent, a purported **[*12]** principal may ratify the actor's actions if, after having full knowledge of the action, the principal accepts the benefits of the act, or assumes an obligation without inquiry. *McCurley Chevrolet, 61 Wash. App. at 57*. Ratification may be inferred from a principal's silence if the circumstances are such that a person would be expected to speak if they did not consent. *Smith, 63 Wash. App. at 369*.

KCA contends that the Hixes ratified the ***agency*** relationship between themselves and ANA and Mr. Jewett by paying delinquent homeowners dues after notification was sent from the ACC through ANA and Mr. Jewett. If the Hixes did not want notification of construction-related information to pass through these individuals, they had a duty to tell the ACC, which they

failed to do. The message regarding dues got to Mr. Hix. He also was told of a problem with the trim colors. Finally, he knew that under the CCR's the ACC had to provide a written response to his building plans. However, Mr. Jewett never discussed the April 5 meeting with Mr. Hix. Thus, any knowledge Mr. Jewett had about the roof color problem was not communicated to Mr. Hix. Mr. Hix may not have had full knowledge, and full knowledge **[*13]** is a specific requirement under a ratification theory.

As to the delinquent dues, it is undisputed that Mr. Hix learned about his delinquent dues from someone other than the ACC. [1] He testified he assumed the color problem was a rumor. Substantial evidence supports the trial court's finding that the facts do not support KCA's arguments regarding ratification.

KCA also contends the court erred by not finding Mr. Hix had actual notice of the color disapproval. The ACC and its actions are governed by the CCR's. Article IX of the CCR's provides:

The architectural control committee will meet during the first week of each month and approve or disapprove plans which have been submitted prior to the last day of the preceding month, by a majority vote and in writing prior to the fifteenth of that month. . . . In the event said architectural **[*14]** control committee, or the Board of Directors, fails to approve or disapprove such plans, etc., within sixty (60) days after said plans and specifications have been submitted to it, approval will not be required and this article will be deemed to have been fully complied with.

(Emphasis added.) The CCR's are intended to govern the relationship between the KCA and the individual property owner. Thus, notice as prescribed under the CCR's should be given to a landowner or their agent.

The plans were submitted to the ACC on March 24. The CCR's require written notice by the 15th of the month. The first letter sent regarding the color problem was dated April 22. Thus, the first requirement under the CCR's was not met. Further, the April 22 letter was addressed to Mr. Jewett at the ANA office, which was not his address. Knowledge of an agent is imputed to a principal. *Parada, 75 Wash. App. at 230-31*. However, Mr. Jewett was not Mr. Hix's agent, and even if he was, he did not receive the letter. ANA was not Mr. Hix's agent. KCA had the proper addresses for all the individuals involved and yet their correspondence to these people went to the wrong addresses due to their own negligence. **[*15]** Mr. Hix did not have knowledge of the roof problem until July 29, well after the 60 days. Since he did not receive the required notice, he was justified in assuming the plans for his home, including the colors, had been approved.

Finally KCA argues that since Mr. Hix admitted he was aware of the color problem, he should be estopped from contending he did not receive notice. *HN8*[↑] In order to establish estoppel, a party must prove: (1) an admission, statement, or act which is inconsistent with a subsequently asserted claim; (2) third party reliance on the admission, statement, or act; and (3) injury to the relying party. *Greene v. Pateros Sch. Dist., 59 Wash. App. 522, 535, 799 P.2d 276 (1990)*. Estoppel prevents a party from asserting an explanation or a defense. *McGreevy v. Oregon Mut. Ins. Co., 74 Wash. App. 858, 870, 876 P.2d 463 (1994)*, aff'd, *128 Wash. 2d 26, 904 P.2d 731 (1995)*. Equitable estoppel requires proof by clear, cogent and convincing evidence. Id. Equitable estoppel may only be used as a defense. *Chemical Bank v. Washington Pub. Power Supply Sys., 102 Wash. 2d 874, 902, 691 P.2d 524 (1984)*.

The Hixes contend KCA cannot use equitable estoppel because they are the plaintiff. **[*16]** However, KCA is using an estoppel theory to defend against the Hixes' denial they received notice their color was disapproved.

KCA contends Mr. Hix admitted he knew of the problem with the colors, but then claims he is not bound because he did not receive written notice. Mr. Hix did not admit he knew of the roof color problem, but only the trim color problem. Although no challenge was made to the court's finding that everyone at the April 5 meeting knew of a roof color problem, the knowledge is not imputed to Mr. Hix as he was not at the meeting, and no agents of his were at the meeting. Further, his admission about the colors was not made until trial. Generally, *HN9*[↑] silence is not sufficient to support an estoppel claim. *Waldrip v. Olympia Oyster Co., 40 Wash. 2d 469, 476, 244 P.2d 273 (1952)*. Up until trial, Mr. Hix was silent about any knowledge he had. KCA did not establish how it relied on Mr. Hix's admission. During the period of time when color was at issue, Mr. Hix did not act in a manner which suggested he knew of the color problem. Since he was aware of the CCR's and he received no notice, it is perfectly logical he could have assumed his

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[1] Mr. Hix was not entirely sure how he learned of the delinquency. He believed Mr. Nicolich from VAS informed him, who had learned of the information through Steve Hoeck of ANA.

plans, including the colors, had been **[*17]** approved. Prior to trial, Mr. Hix did not act in such a way or make a statement or admission upon which KCA could have relied. Thus, their estoppel theory fails.

Both KCA and the Hixes request their attorney fees on appeal. The CCR's state that a defendant shall pay the reasonable attorney fees and costs incurred by the association for bringing a suit to enforce the CCR's. KCA did not prevail and are not entitled to fees. *RCW 4.84.330*.

Mr. Hix requests attorney fees for both trial and appeal. ***HN10***[↑] *RCW 4.84.330* provides that where a contract provides for an award of attorney fees incurred to enforce the contract, the prevailing party is entitled to attorney fees even if that party is not the specified party in the contract. The award of fees to the Hixes at trial is affirmed. They are also entitled to fees on appeal. *RCW 4.84.330*.

We affirm and award the Hixes attorney fees incurred on appeal.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will **[*18]** be filed for public record pursuant to *RCW 2.06.040*.

Thompson, A.C.J.

WE CONCUR:

Kurtz, J.

Brown, J.

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Lybyer v. Grays Harbor Pud

Court of Appeals of Washington, Division Two

February 8, 2002, Filed

No. 26399-8-II

Reporter
2002 Wash. App. LEXIS 242 *

ROBERT D. LYBYER and BERNICE L. LYBYER, husband and wife, Appellants, v. GRAYS HARBOR PUD, a Washington public utility company; ASPLUNDH TREE EXPERT COMPANY - MOWING DIVISION, a Washington corporation; JOHN DOE and JANE DOE, unknown defendants, and JOHN DOE CORPORATION, a Washington corporation, Respondents.

Notice: [*1] RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Prior History: Appeal from Superior Court of Grays Harbor County. Docket No: 98-2-01534-5. Date filed: 07/10/2000. Judge signing: Hon. F. M. McCauley.

Reported in Table Case Format at: 2002 Wash. App. LEXIS 982.

Disposition: Affirmed.

Core Terms

apparent authority, instruction of a jury, ***agency*** relationship, matter of law, trial court, photograph, actual authority, manifestations, videotape's, prejudicial, proposed modification, jury instructions, admit, video

Case Summary

Procedural Posture
Appellants homeowners sued respondent county public utility (county) for timber trespass. A jury in the Superior Court of Grays Harbor County (Washington) entered a verdict in favor of the county. The homeowners appealed.

Overview
The county contracted with a company to cut and remove trees near its power lines to help prevent power outages. As a result, the company removed about 40 alder trees from the homeowners' property. The homeowners planted the trees as a barrier to the highway. At trial, the issue in dispute was whether the company had authority to remove the trees. The county asserted that the homeowners gave their son actual authority to remove the trees while they were on vacation. The homeowners asserted that they did not give their son any authority, actual or apparent. The county provided evidence and a jury instruction that the son had actual authority to remove the trees, and the homeowners argued the son had no authority. Thus, the appellate court held that trial court's refusal to give an instruction on "apparent authority" was proper. The appellate court also rejected the homeowners claim that the trial court improperly rejected their instruction on duty, as the homeowners did not object to the court's ruling at the time of trial. The court found that substantial evidence existed to support the jury's verdict, and that the trial court did not err in admitting certain evidence.

Outcome
The jury's verdict was affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Jury Instructions

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

HN1[] **Standards of Review, De Novo Review**

An appellate court reviews alleged errors of law in jury instructions de novo.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

HN2[] **Jury Trials, Jury Instructions**

Jury instructions are sufficient if they: (1) are supported by substantial evidence; (2) permit each party to argue its theory of the case; (3) are not misleading; and (4) when read as a whole, properly inform the trier of fact of the applicable law.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

HN3[] **Jury Trials, Jury Instructions**

An erroneous instruction does not require reversal unless prejudice is shown.

Civil Procedure > Appeals > Standards of Review > General Overview

HN4[] **Appeals, Standards of Review**

An error is not prejudicial unless it presumptively affects the outcome of the trial.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

HN5[] **Jury Trials, Jury Instructions**

Whether to give a particular jury instruction, however, is within the trial court's discretion. A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds.

Business & Corporate Law > ... > Establishment > Elements > Factors Inconsistent With ***Agency***

Business & Corporate Law > ***Agency*** Relationships > General Overview

Business & Corporate Law > ***Agency*** Relationships > Establishment > General Overview

Business & Corporate Law > ***Agency*** Relationships > Establishment > Consent

Business & Corporate Law > ... > Establishment > Elements > General Overview

Business & Corporate Law > ... > Establishment > Elements > Manifestation by Principal

Business & Corporate Law > ... > Establishment > Elements > Right to Control by Principal

HN6[] **Elements, Factors Inconsistent With *Agency***

An ***agency*** relationship arises from manifestations that one party consents that another shall act on his behalf and subject to his control, and corresponding manifestations of consent by another party to act on behalf of and subject to the control of the other. It may exist either expressly or by implication. It does not exist unless the facts establish mutual consent and control by the principal of the agent.

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

Business & Corporate Law > ***Agency*** Relationships > Authority to Act

Business & Corporate Law > ***Agency*** Relationships > Authority to Act > General Overview

Business & Corporate Law > ... > Authority to Act > Actual Authority > General Overview

Business & Corporate Law > ... > Actual Authority > Implied Authority > General Overview

HN7[] **Authority to Act, Apparent Authority**

An agent's authority to bind their principal may be either actual or apparent. Actual authority can be either express or implied.

Business & Corporate Law > ... > Authority to Act > Actual Authority > General Overview

Business & Corporate Law > ***Agency*** Relationships > General Overview

Business & Corporate Law > ***Agency*** Relationships > Authority to Act > General Overview

HN8[] **Authority to Act, Actual Authority**

Actual authority is created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent take action on the principal's behalf.

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

Business & Corporate Law > ***Agency*** Relationships > General Overview

Business & Corporate Law > ***Agency*** Relationships > Authority to Act > General Overview

Business & Corporate Law > ... > Authority to Act > Actual Authority > General Overview

Business & Corporate Law > ... > Actual Authority > Implied Authority > General Overview

Business & Corporate Law > ... > Actual Authority > Implied Authority > Knowledge of the Principal

HN9[] **Authority to Act, Apparent Authority**

Implied actual authority exists when the principal actually intended the agent to have such authority. It arises when the agent consistently exercises a power not expressly given by the principal, but the principal, knowing of the action, sanctions it by making no objection.

Business & Corporate Law > ... > Authority to Act > Actual Authority > ***Express Authority***

Business & Corporate Law > ***Agency*** Relationships > General Overview

Business & Corporate Law > ***Agency*** Relationships > Authority to Act > General Overview

Business & Corporate Law > ... > Authority to Act > Actual Authority > General Overview

HN10[] **Actual Authority, *Express Authority***

Express authority is authority that a principal directly conveys to an agent in express terms.

Business & Corporate Law > ... > Authority to Act > Apparent Authority > Conduct of Parties

Business & Corporate Law > ***Agency*** Relationships > General Overview

Business & Corporate Law > ***Agency*** Relationships > Authority to Act > General Overview

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

HN11[] **Apparent Authority, Conduct of Parties**

Apparent authority requires objective manifestations to be made to a third party. Apparent authority may be inferred only from the acts of the principal, not from the acts of the agent. Manifestations to third parties support a finding of apparent authority when they cause the person claiming authority existed to actually or subjectively believe that the agent had authority and the third party's belief is objectively reasonable.

Business & Corporate Law > ... > Authority to Act > Apparent Authority > Conduct of Parties

Business & Corporate Law > ***Agency*** Relationships > General Overview

Business & Corporate Law > ***Agency*** Relationships > Authority to Act > General Overview

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

HN12[] **Apparent Authority, Conduct of Parties**

Apparent authority cannot be inferred from the acts of the agent alone. Rather, the principal's conduct must lead a reasonable person to believe that the agent had authority to act.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Planned Unit Developments

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

HN13[] **Zoning, Planned Unit Developments**

If a party is not satisfied with a jury instruction, it must propose a correct instruction; if it does not do so, it cannot complain about the court's failure to give the instruction.

Civil Procedure > ... > Jury Trials > Jury Instructions > Objections

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Failure to Object

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Jury Instructions

HN14[] **Jury Instructions, Objections**

If a party is dissatisfied with an instruction, it is that party's duty to propose an appropriate instruction, and if the court fails to give the instruction, to take exception to that failure. The failure to object, before the jury is instructed, to enable the trial court to avoid error, violates *Wash. Super. Ct. Civ. R. 51(f)*.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN15[] **Reviewability of Lower Court Decisions, Preservation for Review**

An appellate court need not consider arguments for which a party has cited no authority.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN16[] **Standards of Review, De Novo Review**

An appellate court reviews a motion for judgment as a matter of law de novo, applying the same legal standard as the trial court.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN17[] **Trials, Judgment as Matter of Law**

Judgment as a matter of law is proper only when the court can find, as a matter of law, that there is neither evidence nor reasonable inference therefrom sufficient to sustain the verdict.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN18[] **Trials, Judgment as Matter of Law**

A motion for a judgment as a matter of law admits the truth of the opponent's evidence and all inferences reasonably drawn therefrom, and it requires the evidence to be interpreted most strongly against the moving party and in the light most favorable to the opponent.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Evidence > Weight & Sufficiency

HN19[] **Trials, Judgment as Matter of Law**

An appellate court's review of a denial of a motion for judgment as a matter of law is confined to whether the evidence presented was sufficient to sustain the jury's verdict. The record must contain a sufficient quantity of evidence to persuade a rational, fair-minded person of the truth of the premises in question.

Civil Procedure > ... > Standards of

Review > Substantial Evidence > General Overview

HN20[] **Standards of Review, Substantial Evidence**

An appellate court can overturn a jury's verdict only if substantial evidence does not support it. An appellate court may not substitute its judgment for that of the jury as long as there is evidence that, if believed, would support the verdict. No element of discretion is involved.

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN21[] **Standards of Review, Substantial Evidence**

Reviewing courts must defer to the trier of fact when there is conflicting testimony, credibility determinations, and weighing of the evidence.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Criminal Law & Procedure > ... > Reviewability > Waiver > Admission of Evidence

HN22[] **Reviewability of Lower Court Decisions, Preservation for Review**

Claimed errors without argument or citations to authority are deemed waived.

Evidence > Relevance > Relevant Evidence

HN23[] **Relevance, Relevant Evidence**

The decision to admit or to exclude evidence lies largely within the trial court's discretion; an appellate court will not reverse the trial court absent an abuse of discretion. An abuse of discretion exists only where no reasonable person would take the trial court's view.

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

HN24[] **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**

Nearly all evidence is prejudicial in the sense that it is usually offered with the purpose of inducing the trier of fact to reach one conclusion and not another. Evidence is only unfairly prejudicial under *Wash. Evid. R. 403* if it is evidence dragged in for the sake of its prejudicial effect or is likely to trigger an emotional response rather than a rational decision among the jurors. The burden of showing prejudice is on the party seeking to exclude the evidence.

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

HN25[] **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**

See *Wash. Evid. R. 403*.

Evidence > Types of Evidence > Demonstrative Evidence > Foundational Requirements

Criminal Law & Procedure > Trials > Examination of Witnesses > Transmitted & Videotaped Testimony

Evidence > Authentication > General Overview

Evidence > ... > Demonstrative Evidence > Photographs > Visual Formats

HN26[] **Demonstrative Evidence, Foundational Requirements**

A videotape is authenticated by testimony establishing that the video is a fair and accurate depiction of what is portrayed.

Counsel: For Appellant(s): Jean A. Cotton, Cotton Law Ofcs., Elma, WA. Therese M. Wheaton, Cotton Law Ofcs., Elma, WA. Jean A. Cotton.

Counsel for Respondent(s): Lance C. Dahl, Preston Gates & Ellis Llp, Seattle, WA.

Judges: Authored by Carroll C. Bridgewater. Karen G. Seinfeld, David H. Armstrong, Concur.

Opinion by: Carroll C. Bridgewater

Opinion

BRIDGEWATER, J. -- Robert and Bernice Lybyer (Lybyers) sued Grays Harbor County Public Utility (PUD) for timber trespass and appeal from a jury verdict in favor of the PUD. We affirm.

In 1998, the PUD contracted with Asplundh to cut and remove trees near its power lines to help prevent power outages. As a result, Asplundh removed about 40 alder trees from the Lybyers' property. The Lybyers planted the trees as a barrier to the highway.

At trial, the issue in dispute was whether Asplundh had authority to remove the trees. The PUD asserted that the Lybyers gave their son, Anthony, **[*2]** actual authority to remove the trees while they were on vacation. The Lybyers, on the other hand asserted that they did not give Anthony any authority, actual or apparent. The jury found for the PUD.

I. Proposed Jury Instructions

HN1[↑] We review alleged errors of law in jury instructions de novo. *Boeing Co. v. Key, 101 Wn. App. 629, 632, 5 P.3d 16 (2000)*, *review denied, 142 Wn.2d 1017 (2001)*. *HN2*[↑] Jury instructions are sufficient if they (1) are supported by substantial evidence; (2) permit each party to argue its theory of the case; (3) are not misleading; and (4) when read as a whole, properly inform the trier of fact of the applicable law. *Boeing, 101 Wn. App. at 633*; *State v. Hutchinson, 135 Wn.2d 863, 885, 959 P.2d 1061 (1998)*, *cert. denied, 525 U.S. 1157, 143 L. Ed. 2d 69, 119 S. Ct. 1065 (1999)*. *HN3*[↑] An erroneous instruction does not require reversal unless prejudice is shown. *Boeing, 101 Wn. App. at 633* (citing *Thomas v. French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983)*). *HN4*[↑] An error is not prejudicial unless it presumptively affects the outcome of the trial. *Boeing, 101 Wn. App. at 633*. **[*3]**

HN5[↑] Whether to give a particular jury instruction, however, is within the trial court's discretion. *Boeing, 101 Wn. App. at 632*. A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)*. The Lybyers contend that two instructions should have been given, an apparent authority instruction and a duty instruction.

A. Apparent authority

The Lybyers contend that the trial court abused its discretion in rejecting its proposed apparent authority jury instruction and that the trial court's instruction was legally insufficient. The Lybyers argue that the trial court's instruction did not inform the jury that the PUD had the burden of proving that the Lybyers' actions prior to the cutting led the PUD to believe that an ***agency*** relationship existed between the Lybyers and their son.

*1. **Agency***

HN6[↑] An ***agency*** relationship "arises from manifestations that one party consents that another shall act on his behalf and subject to his control, and corresponding manifestations of consent by another party to act on behalf of and subject **[*4]** to the control of the other." *Matsumura v. Eilert, 74 Wn.2d 362, 368, 444 P.2d 806 (1968)* (citing *RESTATEMENT (SECOND) OF **AGENCY** § 1* (1958)). It may exist either expressly or by implication. *Stansfield v. Douglas County, 107 Wn. App. 1, 17, 27 P.3d 205*, *review denied, 105 Wn.2d 1009 (2001)*. It does not exist unless the facts establish mutual consent and control by the principal of the agent. *Uni-Com Northwest, Ltd. v. Argus Publ'g Co., 47 Wn. App. 787, 796, 737 P.2d 304*, *review denied, 108 Wn.2d 1032 (1987)*.

2. Authority

HN7[↑] An agent's authority to bind their principal may be either actual or apparent. *King v. Riveland, 125 Wn.2d 500, 507, 886 P.2d 160 (1994)*. Actual authority can be either express or implied. *King, 125 Wn.2d at 507*; *see also* RESTATEMENT (THIRD) OF ***AGENCY*** § 3.01 (2001) (*HN8*[↑] actual authority is created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent take action on the principal's behalf). *HN9*[↑] Implied actual authority exists when the principal **[*5]** actually intended the agent to have such authority. *King, 125 Wn.2d at 507*. It arises when the agent consistently exercises a power not expressly given by the principal, but the principal, knowing of the action, sanctions it by making no objection. *King, 125 Wn.2d at 507*. *HN10*[↑] ***Express authority*** is authority that a principal directly conveys to an agent in express terms. *See* RESTATEMENT (THIRD) OF ***AGENCY*** § 2.01, cmt. b (2001) (as commonly used, the term "***express authority***" often means actual authority that the principal has stated in very specific or detailed language).

HN11[↑] Apparent authority, on the other hand,

requires objective manifestations to be made to a third party. Smith v. Hansen, Hansen & Johnson Inc., 63 Wn. App. 355, 363, 818 P.2d 1127 (1991), review denied, 118 Wn.2d 1023, 827 P.2d 1392 (1992). Apparent authority may be inferred only from the acts of the principal, not from the acts of the agent. Hansen v. Horn Rapids O.R.V. Park of the City of Richland, 85 Wn. App. 424, 430, 932 P.2d 724 (citing Mauch v. Kissling, 56 Wn. App. 312, 316, 783 P.2d 601 (1989)), **[*6]** review denied, 133 Wn.2d 1012 (1997). Manifestations to third parties support a finding of apparent authority when they cause the person claiming authority existed to actually or subjectively believe that the agent had authority and the third party's belief is objectively reasonable. King, 125 Wn.2d at 507.

The Lybyers are correct that HN12[↑] apparent authority cannot be inferred from the acts of the agent alone. Hansen, 85 Wn. App. at 430. Rather, the principal's conduct must lead a reasonable person to believe that the agent had authority to act. State v. French, 88 Wn. App. 586, 595, 945 P.2d 752 (1997). The Lybyers' proposed modification of the PUD's proposed jury instruction, however, misstates the law. The Lybyers' proposed modification read as follows:

> The ***agency*** relationship may be established for a limited purpose. An implied ***agency*** may be established from the facts and circumstances. **A third party is only able to rely on an *agency*, whether express or implied, if the acts of the principal indicate the existence of an *agency* relationship to a third party.** If the ***agency*** relationship is established, **[*7]** the relationship exists whether or not the parties understood the exact nature of the relationship. (emphasis added)

The trial court's instruction to the jury omitted the Lybyer's modification, which was the insertion of the third sentence highlighted in boldface.

The misstatement of law in the Lybyers' proposed modification is the placement of an apparent authority instruction, which describes an agent's scope of authority, within an ***agency*** instruction. All instruction number 13 discussed was the existence of an ***agency*** relationship. The agent's scope of authority instruction was discussed in instruction number 14. [1] By placing its apparent authority modification in the ***agency*** instruction, the Lybyers made it seem that apparent authority was the only kind of authority the jury could find if an ***agency*** relationship existed. This is not true. The PUD presented evidence that an ***agency*** relationship existed and argued that Anthony had actual, not apparent authority.

[*8] Thus, although the Lybyers expressed their dissatisfaction with the PUD's proposed jury instruction, they failed to propose a correct jury instruction. *See* Crittenden v. Fibreboard Corp., 58 Wn. App. 649, 655, 794 P.2d 554 (1990) (HN13[↑] if a party is not satisfied with a jury instruction, it must propose a correct instruction; if it does not do so, it cannot complain about the court's failure to give the instruction). Because the Lybyers' proposed modification misstated the law, the court did not abuse its discretion in denying the modification and accepting the PUD's proposed jury instruction.

In addition, it would have been improper for the court to give an "apparent authority" instruction. The Lybyers' position was that Anthony had no authority, actual or apparent. An apparent authority instruction was not necessary for them to argue their theory of the case. Furthermore, the PUD was arguing "actual authority."

Therefore, we hold that the court's instructions were legally sufficient and allowed each party to argue their theory of their case. The court did not err in denying the Lybyers' proposed modification to Instruction No. 13.

B. Duty

The Lybyers also **[*9]** contend that the court abused its

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[1] Instruction No. 12, No. 13, and No. 14 provided as follows:

Instruction No. 12: An agent is a person employed under an express or implied agreement to perform services for another person called the principal, and who is subject to the principal's control or right to control the manner and means of performing the services. One may be an agent even though he or she receives no payment for services. The ***agency*** agreement may be oral or in writing.

Instruction No. 13: The ***agency*** relationship may be established for a limited purpose. An implied ***agency*** may be established from the facts and circumstances. If the ***agency*** relationship is established, the relationship exists whether or not the parties understood the exact nature of the relationship.

Instruction No. 14: An agent is acting within the scope of authority if the agent is engaged in the performance of duties which were expressly or impliedly assigned to the agent by the principal. Likewise, an agent is acting within the scope of authority if the agent is engaged in the furtherance of the principal's interests.

discretion in rejecting its proposed jury instruction that the PUD had a duty to identify and speak with the legal owner of the property or the legal owner's authorized agent before cutting or removing the trees. The record, however, does not disclose that the Lybyers took exception to the court's failure to give their proposed instruction. And, the Lybyers conceded at oral argument that there was no exception on the record.

HN14[↑] If a party is dissatisfied with an instruction, it is that party's duty to propose an appropriate instruction, and if the court fails to give the instruction, to take exception to that failure. Hoglund v. Raymark Indus., Inc., 50 Wn. App. 360, 368, 749 P.2d 164 (1987), *review denied*, 110 Wn.2d 1008 (1988); CR 51(f). The failure to object, before the jury is instructed, to enable the trial court to avoid error, violates CR 51(f). Peterson v. Littlejohn, 56 Wn. App. 1, 11, 781 P.2d 1329 (1989). Because the Lybyers did not properly object to the trial court's rejection of their proposed duty jury instruction, we decline review of this contention. *See* Ryder v. Kelly-Springfield Tire, Co., 91 Wn.2d 111, 114, 587 P.2d 160 (1978) **[*10]** (where exception is not taken, the alleged error will not be entertained on appeal); *see also* Couch v. Mine Safety Appliances Co., 107 Wn.2d 232, 244-45, 728 P.2d 585 (1986).

II. Facially Neutral Jury Instruction

The Lybyers contend that the court's jury instructions were not facially neutral because they contained the crossed out phrase "DEFENDANT'S PROPOSED JURY INSTRUCTIONS" on the first page. But the Lybyers did not object to this caption at trial and, instead, raise the issue for the first time on appeal. Absent manifest constitutional error, a party waives his challenge to a jury instruction by failing to object at trial. State v. Bailey, 114 Wn.2d 340, 345, 787 P.2d 1378 (1990). The caption does not constitute a manifest constitutional error and the Lybyers waive this issue on appeal.

Furthermore, while the Lybyers argue that their contention is an issue of first impression, they cite no authority and do not explain why the crossed out caption prejudiced them. HN15[↑] An appellate court need not consider arguments for which a party has cited no authority. State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990). **[*11]** Thus, we decline review of this contention.

III. Judgment As A Matter Of Law

The Lybyers also contend that the court erred in denying its motion for judgment as a matter of law. The Lybyers argue that if the jury had been properly instructed, there would be no basis for it to find an ***agency*** relationship, or actual or apparent authority between the Lybyers and their son Anthony.

HN16[↑] We review a motion for judgment as a matter of law de novo, applying the same legal standard as the trial court. Hume v. Am. Disposal Co., 124 Wn.2d 656, 667, 880 P.2d 988 (1994), *cert. denied*, 513 U.S. 1112, 130 L. Ed. 2d 788, 115 S. Ct. 905 (1995). HN17[↑] Judgment as a matter of law is proper only when the court can find, as a matter of law, that there is neither evidence nor reasonable inference therefrom sufficient to sustain the verdict. Goodman v. Goodman, 128 Wn.2d 366, 371, 907 P.2d 290 (1995) (citing Brashear v. Puget Sound Power & Light Co., 100 Wn.2d 204, 208-09, 667 P.2d 78 (1983) (quoting Hojem v. Kelly, 93 Wn.2d 143, 145, 606 P.2d 275 (1980)). HN18[↑] A motion for a judgment as a matter of law admits the truth **[*12]** of the opponent's evidence and all inferences reasonably drawn therefrom, and it requires the evidence to be interpreted most strongly against the moving party and in the light most favorable to the opponent. Goodman, 128 Wn.2d at 371.

HN19[↑] Our review of a denial of a motion for judgment as a matter of law is confined to whether the evidence presented was sufficient to sustain the jury's verdict. Indus. Indem. Co. v. Kallevig, 114 Wn.2d 907, 792 P.2d 520 (1990). The record must contain a sufficient quantity of evidence to persuade a rational, fair-minded person of the truth of the premises in question. Canron, Inc., v. Fed. Ins. Co., 82 Wn. App. 480, 486, 918 P.2d 937 (1996), *review denied*, 131 Wn.2d 1002, 932 P.2d 643 (1997). HN20[↑] We overturn a jury's verdict only if substantial evidence does not support it. Burnside v. Simpson Paper Co., 123 Wn.2d 93, 107-08, 864 P.2d 937 (1994). We may not substitute our judgment for that of the jury as long as there is evidence that, if believed, would support the verdict. Burnside, 123 Wn.2d at 108 (quoting State v. O'Connell, 83 Wn.2d 797, 839, 523 P.2d 872 (1974)). **[*13]** No element of discretion is involved. Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 188, 23 P.3d 440 (2001) (quoting Aluminum Co. of Am. v. Aetna Cas. & Sur., 140 Wn.2d 517, 529, 998 P.2d 856 (2000)) (internal citations omitted).

The trial court did not err in denying the Lybyers' motion for judgment as a matter of law. Because of the conflicting testimony at trial, the PUD's alleged trespass was an issue of fact for the jury to determine. *See generally* Bill McCurley Chevrolet Inc. v. Rutz, 61 Wn.

App. 53, 57, 808 P.2d 1167 (**agency** relationship generally a question of fact), *review denied*, 117 Wn.2d 1015, 816 P.2d 1223 (1991). The jury received adequate actual authority instructions, and it believed Asplundh's testimony that Anthony gave them permission to remove the alder trees and that Anthony was the Lybyers' agent and acted with authority. HN21[] Reviewing courts must defer to the trier of fact when there is conflicting testimony, credibility determinations, and weighing of the evidence. *See* State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (credibility determinations are for the trier **[*14]** of fact and cannot be reviewed on appeal.) The issue of authority was an issue of fact upon which there was substantial evidence supporting the jury's verdict. Thus, the court did not err in denying the Lybyers' motion for judgment as a matter of law.

The Lybyers also assigned error to the trial court's denial of their *CR 59* motion for new trial, which was combined with its *CR 50* motion. The Lybyers, however, provided no argument regarding a *CR 59* motion and only argued that the trial court erred in not granting them judgment as a matter of law. Thus, we decline review of this portion of the assignment of error. *See* RAP 10.3(a)(5) HN22[] (claimed errors without argument or citations to authority are deemed waived); *see also* Dennison, 115 Wn.2d at 629 (we need not consider arguments that are not developed in the briefs and for which a party has not cited authority).

IV. Evidence

HN23[] The decision to admit or to exclude evidence lies largely within the trial court's discretion; we will not reverse the trial court absent an abuse of discretion. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). An abuse of discretion exists only where **[*15]** no reasonable person would take the trial court's view. Castellanos, 132 Wn.2d at 97.

A. Photographs and video

The Lybyers contend that the trial court abused its discretion in allowing the PUD to show the jury a photograph, exhibit 48, and a video, exhibit 54, of their property because they were prejudicial. The Lybyers argue that the photograph and video depicted their property from angles not accurately reflecting the proximity of the power lines to their trees and that they were taken two years after Asplundh removed their trees.

The Lybyers' contention is without merit. HN24[] Nearly all evidence is prejudicial in the sense that it is usually offered with the purpose of inducing the trier of fact to reach one conclusion and not another. Evidence is only unfairly prejudicial under *ER 403* [2] "if it is evidence 'dragged in' for the sake of its prejudicial effect or is likely to trigger an emotional response rather than a rational decision among the jurors." Hayes v. Wieber Enter., Inc., 105 Wn. App. 611, 618, 20 P.3d 496 (2001) (citing Carson v. Fine, 123 Wn.2d 206, 223-24, 867 P.2d 610 (1994)). The burden of showing **[*16]** prejudice is on the party seeking to exclude the evidence. Carson, 123 Wn.2d at 225.

The Lybyers do not meet their burden of showing prejudice with a mere argument that the photograph and videotape portray their property from inaccurate angles and improper time periods. The photograph and videotape do not trigger an emotional response and merely show the property at issue.

As to the videotape's authenticity, the court ruled that it was not necessary for someone from the Department of Transportation to testify that the video was that of the Lybyers' property. *See* State v. Newman, 4 Wn. App. 588, 593, 484 P.2d 473 HN26[] (a videotape is authenticated by testimony establishing **[*17]** that the video is a fair and accurate depiction of what is portrayed), *review denied*, 79 Wn.2d 1004 (1971). Rick Milbourn laid the foundation for the videotape's admissibility and the Lybyers had the opportunity to cross-examine Milbourn regarding the videotape's angle and time period. Thus, a proper foundation existed for the videotape's admissibility.

The Lybyers also argue that the trial court allowed the PUD to show the jury exhibits 51, 53, 57, 58, 59, 60, 61, and 63, photographs the court did not admit. The Lybyers, however, provide no argument, aside from the photographs being shown to the jury, of how the photographs, as demonstrative evidence, were prejudicial. *See* 5-D KARL B. TEGLAND, WASHINGTON PRACTICE, COURTROOM

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[2] ***ER 403*** provides as follows:

HN25[] Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

HANDBOOK ON WASHINGTON EVIDENCE. 202 (2001) (demonstrative evidence refers to tangible evidence, as opposed to oral testimony describing something tangible, that shows rather than tells). Thus, this contention is without merit.

B. Contract

Finally, the Lybyers contend that the court erred in not admitting exhibits 18 and 47, which were the contract between the PUD and Asplundh in full and in redacted form. The Lybyers argue that **[*18]** the contract was relevant to show the PUD's standard of care and how it disregarded its duties to them under both the contract and timber trespass law.

But it is undisputed that the Lybyers were not parties to the contract. Nor did they ever plead or offer a third party beneficiary claim at trial. Further, the court allowed the Lybyers to bring in every relevant contractual term and allowed considerable latitude in questioning witnesses regarding those terms. The court also found that there might have been confusion if the redacted document was admitted. Thus, the court did not abuse its discretion in not admitting the contract document.

Affirmed.

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

Bridgewater, J.

We concur:

Seinfeld, J. Armstrong, C. J.