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## JURISDICTIONAL STATEMENT

This is a negligence action wherein plaintiff tripped on an uneven seam between the sidewalk of the entrance to defendant's store and the parking lot. The trial court entered a judgment in favor of defendant pursuant to the jury verdict returned in the cause. The issue on appeal is whether the trial court erred in permitting the defendant to elicit testimony from an employee-witness to testify, over the objection of counsel for plaintiff, that plaintiff purportedly stated that she did not trip as she was entering the store. Such alleged admission was never disclosed at any stage of the pretrial discovery and prejudiced plaintiff in the eyes of the jury by calling into question the credibility of plaintiff as to how the accident occurred. The Court of Appeals for the Eastern District of Missouri entered an opinion affirming the judgment of the trial court. This court sustained the Application for Transfer filed by appellants pursuant to an order dated December 24, 2002.

TABLE OF AUTHORITIES

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## STATEMENT OF FACTS

This negligence case arises out of an accident where plaintiff Janet Mitchell tripped on an uneven seam or joint between the parking lot and sidewalk entrance to the Schnuck's store on Shackelford Road at approximately 9:30 p.m. (T. 14). Mrs. Mitchell was a 56 year old woman at the time of the fall. She sustained a tibial plateau fracture of her right knee and an aggravation of pre-existing arthritic changes in her left knee for which she underwent arthroscopic surgery.

On November 7, 1997, Mrs. Mitchell went to the Schnuck's store near her home located on Shackelford Drive in North County. (T. 13-14). It was about 9:30 p.m. and was dark. (T. 14). While Mrs. Mitchell had been to the store in the past, she did not regularly shop there because her husband worked at Shop 'n Save. (T. 14-15).

She parked her car immediately across from the north doors that led into the store. (T. 16). While crossing the driveway portion of the parking lot she looked both ways for traffic as she was approaching the sidewalk leading to the north store entrance. (T. 16). The automatic doors were a few feet from the edge of the sidewalk, so she directed her attention to the doors as she approached the joint between the parking lot and the sidewalk. (T. 17). She testified that there were no lights shining on the seam between the parking lot and the sidewalk. (T. 17). The parking lot was asphalt and the sidewalk was concrete. (T. 17-18). She testified that she tripped on the concrete "lip" that was between 1 to 2 inches higher than the surface of the asphalt parking lot. (T. 19-20).

As a result, she fell forward landing on her knees and elbows. (T. 21). She

immediately experienced severe pain but was able to crawl to the automatic doors and pull herself up on the door rails and onto a nearby cart in order to get through the doors and into the store. (T. 21-22). She spoke to a cashier named Donna and felt like she was going to pass out. (T. 22-23). She did not recall Donna asking her any other questions beyond whether she could help her. *Id.* Ultimately, an ambulance arrived on the scene and took her to the hospital. (T. 24).

The only witness called to testify by the defendant was Donna Wahoff. (T. 62). At the time of trial she was employed by Schnucks as an assistant customer service manager at its store on Shackelford. *Id.* She was working as the manager-on-duty at the same store at the time that Mrs. Mitchell was injured. (T. 62-63). She testified that she saw Mrs. Mitchell trying to come through the store doors at approximately 9:30 p.m., but that she could not walk on her own. (T. 63-64). She approached her and could tell that she was in a lot of pain but stated that “*I honestly don’t remember what she said at that point, but I helped her ... and got a chair for her.*” (T. 64). [Emphasis added]. She then testified, over the objection of counsel for plaintiff, that “She said she didn’t trip over anything, she just fell.” *Id.*

Prior to the testimony of Ms. Wahoff, counsel for plaintiff made a motion to limit her testimony in chambers to what had been disclosed in response to discovery requests filed by defendant during pre-trial discovery. (T. 56-61). Specifically, defendant provided

the following response to court-approved interrogatories<sup>1</sup>:

2.     STATEMENTS

State whether or not, following the date of the occurrence mentioned in the Petition in this case, a statement, interview, or report, or a stenographic, mechanical, electrical, audio, video, motion picture, photograph, or other recording, or transcription thereof, of the Plaintiff, or of a statement made by the Plaintiff and contemporaneously recorded, has been secured from Plaintiff or taken on Plaintiff; and, if so, state the following:

- (a)     Date, place and time taken;
- (b)     Names and addresses of the person or persons connected with taking it;
- (c)     Names and addresses of all persons present at the time it was taken;
- (d)     Whether the statement was oral, written, shorthand, recorded, taped, etc.;
- (e)     Was it signed?
- (f)     Names and addresses of the persons or organizations under whose direction and upon whose behalf it was taken or made; and
- (g)     Please attach an exact copy of the original of said statement, interview, report, file, or tape to your answers to these interrogatories; *if oral, please state verbatim the contents* thereof.

**ANSWER:**    *No such statement has been taken from Plaintiff.* Plaintiff

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<sup>1</sup> Rule 32.2.2 of the Circuit Court of the Twenty-Second Judicial Circuit [St. Louis City] states that: “Any party propounding interrogatories in ... slip and fall cases *shall use pattern interrogatories approved by the court.*” *Id.* [Emphasis added]. The interrogatory served on defendant requesting statements was the court-required interrogatory.

did have a short conversation with Defendant's employee Donna Wahoff immediately after her injury. That conversation was not recorded. [Emphasis added]. (L.F. Pg. 8-9).

The defendant further provided the following response to plaintiff's request for production of documents:

8. Any and all statements, interviews, or reports, or a stenographic, mechanical, electrical, audio, video, motion picture, photograph or other records, or transcription thereof, of the Plaintiffs, or of a statement made by Plaintiffs and contemporaneously recorded, that has been secured from Plaintiffs or taken of Plaintiffs.

**RESPONSE:** None. (L.F. 17)

Defendant filed both of these responses on November 15, 1999. On July 27, 2000, just before defendant took the deposition of plaintiff, Mrs. Mitchell, counsel for defendant faxed an incident report to counsel for plaintiff containing the statement that plaintiff allegedly made regarding how the accident occurred. (L.F. 19 and 19a marked as plaintiff's Ex. 4 at T. 58). Under item "13. How did Accident Happen?", defendant recorded that plaintiff "alleges entering store and she fell on sidewalk and went in to tell someone at cust svc." (L.F. 19).

Counsel for plaintiff objected to the fact that "it's now apparent that Mr. Isaacson wants to have Miss Wahoff testify beyond the purview of what's been identified and say *that client affirmatively represented that she did not trip but that she fell*, and I think that goes beyond anything that's been disclosed in the vein of a statement as requested." (T. 53). [Emphasis added]. Essentially, counsel for defendant indicated that, because Ms.

Wahoff was identified as someone who spoke to plaintiff, defendant was relieved of the obligation of providing a verbatim recital of what was said because she could have been deposed. (T. 53-55). The court held that, even though the interrogatory asked for “a verbatim account of the contents of the statement and that was not provided, ...it was conspicuous, it was not provided.” (T. 56). At that juncture, the court offered counsel for plaintiff the opportunity to interview the witness, which counsel did.

After the brief interview, counsel for plaintiff renewed the motion to limit the testimony to only that which was contained in the document produced and not go beyond that by stating that plaintiff affirmatively denied tripping when asked by the employee-witness. Counsel for defendant renewed its position on the matter but also indicated that it could not be a surprise because he asked plaintiff in her deposition whether she told anyone that she did not trip but rather just fell, which she unequivocally denied. (T. 60). Counsel for plaintiff responded by indicating that this very fact required defendant to supplement its responses if it intended to put this matter into issue by virtue of a purported admission of plaintiff to the contrary. (T. 61). Nevertheless, the court denied this motion. (T. 61).

Ms. Wahoff further testified that she inspected the area after the ambulance arrived and did not see any debris or other matter that might cause someone to slip. (T. 65). She testified that she estimated that the concrete seam was about ¼ of an inch above the parking lot surface but she did not measure it. (T. 71 and 73).

This cause of action was tried to a jury on June 26-27, 2001 and the trial court entered a Judgment in favor of defendant on June 27, 2001, pursuant to the jury verdict

returned in the cause. (L.F. pgs 20 and 22). The verdict and judgment entered thereon found that neither the plaintiff Janet Sue Mitchell nor defendant was at fault. The Court of Appeals for the Eastern District issued an opinion affirming the judgment of the trial court. The opinion of the court of appeals acknowledges that (1) the defendant committed a discovery violation by not disclosing the verbatim statement of plaintiff; and (2) that the admission of such statement was prejudicial. Nevertheless, the court concludes that the trial court did not abuse its discretion in permitting the defendant to benefit from its prejudicial discovery violation.

POINTS RELIED ON

*The trial court erred in failing to limit the testimony of defendant's only witness, who was employed by defendant both at the time of trial and the time of the fall in question, and permitting defendant's employee to testify, over the objection of counsel for plaintiff, to a purported admission by plaintiff that she did not trip because such statement constituted an unsworn, oral statement by plaintiff that was never disclosed at any stage of the pretrial discovery and such testimony directly called into question the credibility of plaintiff regarding how the accident occurred and prejudiced plaintiff in the eyes of the jury.*

The trial court erred in failing to limit the testimony of defendant's only witness, who was employed by defendant both at the time of trial and the time of the fall in question, and permitting defendant's employee to testify, over the objection of counsel for plaintiff, to a purported admission by plaintiff that she did not trip because such statement constituted an unsworn, oral statement by plaintiff that was never disclosed at any stage of the pretrial discovery and such testimony directly called into question the credibility of plaintiff regarding how the accident occurred and prejudiced plaintiff in the eyes of the jury.

Defendant was permitted, over the objection of plaintiff, to elicit testimony from its employee-witness that plaintiff affirmatively stated that “she did not trip” when she fell while attempting to enter the store. Plaintiff moved to exclude such testimony before defendant’s witness took the stand predicated upon the representation by counsel for defendant in opening statement that the employee-witness he intended to call would testify that she specifically asked the plaintiff whether she tripped and she allegedly denied that she did. (T. 11). This was the first time that this specific and crucial statement attributed to plaintiff was divulged.

Counsel for plaintiff pointed out to the court that defendant answered a court-approved interrogatory<sup>2</sup> asking defendant to state verbatim any oral statements made by

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<sup>2</sup> The purpose of issuing pattern interrogatories is to dispense with the time-consuming bickering and gamesmanship frequently encountered in pre-trial discovery.

plaintiff and responded to a request for production that asked defendant to produce any statements of plaintiff but in neither case did defendant disclose the critical statement of plaintiff allegedly denying that she tripped. Defendant merely produced an accident report given by plaintiff to defendant's employee that contained a general statement that "alleges entering store and she fell on sidewalk." This statement was not inconsistent with plaintiff's testimony of how the accident occurred. But the new and refined version was diametrically opposed to plaintiff's testimony concerning her accident.

In eliciting such testimony from its employee-witness, defendant was using such statement as an "admission of a party opponent" to attack the credibility of plaintiff and directly controvert the manner in which plaintiff testified that she fell on defendant's premises. Because there were no witnesses to the fall, the defendant had no one to challenge plaintiff's version of the incident. Its only evidence in this regard was the statement purportedly made to defendant's employee that was never disclosed to plaintiff at any time during discovery.

Plaintiffs concede that an admission by a party-opponent is "admissible as an exception to the hearsay rule if it meets the following requirements: (1) a conscious or voluntary acknowledgment by a party-opponent of the existence of certain facts; (2) the matter acknowledged must be relevant to the cause of the party offering the admission; and (3) the matter acknowledged must be unfavorable to, or inconsistent with, the position now taken by the party-opponent." *Nettie's Flower Garden, Inc. v. SIS, Inc.*, 869 S.W.2d 226, 229 (Mo.App.E.D.1993). However, it has been held that such is admissible only if the trial

court is “satisfied that the statement used as an admission was accurately recorded.” *State ex rel. Nixon v. Estes*, 41 S.W.3d 25, 27 (Mo. App. WD 2001). In the line of cases discussing such admissions, the statement usually takes the form of a prior deposition although need not be a sworn statement. In *Estes, supra*, the court held that the defendant was prejudiced because the uncertified transcripts were the only evidence that the state produced that showed that he knowingly violated the Missouri Merchandising Practices Act. Consequently, the judgment was reversed.

In the case at bar, the only evidence that defendant presented that tended to establish that plaintiff did not trip as she testified was the statement of an employee of defendant that plaintiff denied that she tripped when questioned about the incident immediately after the injury.<sup>3</sup> Defendant did not disclose this statement at any stage in the pretrial discovery even though it was keenly aware that it would use such as an admission of a party opponent. Moreover, this statement did not appear in the accident report that defendant’s employee filled out and turned over to plaintiff as the only statement that plaintiff made concerning the incident. Such concealment can not and should not be condoned by the court. Because such testimony called directly into question the credibility of the plaintiff as to the critical

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<sup>3</sup> Interestingly, this employee-witness stated in her testimony that she could not “honestly ... remember” what plaintiff said when she first approached her, yet she specifically remembers that plaintiff denied tripping when she questioned her during the brief encounter. (T. 64).

facts of the case, it was prejudicial. See *Phillips v. American Motorist Ins. Co.*, 996 S.W.2d 584, 594 (Mo. App. WD 1999)(where trial court ruling affects jury's credibility evaluation it is deemed to be prejudicial). Trial by ambush and surprise is rightly condemned particularly when it involves statements of a party that are not revealed despite the request for such. See *State ex rel. Plank v. Koehr*, 831 S.W.2d 926, 927 (Mo. banc 1992)(discovery designed to eliminate concealment and surprise).

When confronted with a similar situation, this court concluded in *Fisher v. Waste Management of Missouri*, 58 S.W.3d 523, 527 (Mo. 2001) that:

The request for "statements" under section 287.215 is simple and straightforward. The *claimant asks for his statements and, if they are not produced, the statements are not admissible in evidence.* The statute seems designed to avoid surprises. It would not facilitate settlement to allow the employer to withhold a statement, including a surveillance videotape, so that it may be used as a surprise at a claimant's hearing. That would encourage cases to go to hearings, rather than to be settled. *Id.* at 527.

*Fisher* also held that the undisclosed statement was not admissible even though it acknowledged that it could have been obtained by taking the deposition of the employer and serving a *subpoena duces tecum*. *Id.* at 525.

The fact that the *Fisher* opinion dealt with the worker's compensation statute does not render it inapplicable to the case at bar. The principle is the same: If a statement of a party opponent is requested and not produced, it is not admissible. *Fisher* clearly instructs

that statements of party opponents are not to be the subject of rationalizations for springing them at trial irrespective of whether such statements are requested pursuant to the worker's compensation statute or the Missouri Rules of Civil Procedure.

Rule 56.01(b)(3) dealing with "General Provisions Governing Discovery" clearly places a party's statement concerning the action in a special and heightened category of discovery by directing that:

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Rule 56.01(b)(3).

Defendant should not be permitted to hide the ball particularly when it involves a statement that pertains to a specific and critical aspect of the opposing party's claim. The only fair way to address such conduct is to preclude such testimony concerning the undisclosed statement from being admitted into evidence. *See Fisher v. Waste Management of Missouri*, 58 S.W.3d 523, 527 (Mo. 2001).

At trial, counsel for defendant contended that the statement could not be considered a surprise because he asked plaintiff in her deposition whether she told anyone that she did not trip but rather just fell, which she unequivocally denied. (T. 60). Given this testimony, however, defendant was surely under a duty to supplement its responses to discovery requesting statements if it intended to put this matter into issue by virtue of a purported admission of plaintiff to the contrary. (T. 61). Rule 56.01(e) provides that:

A party who has responded to written interrogatories with a response that was complete when made is under no duty to supplement the response to include information

thereafter acquired, except as follows:

(2) A party is under a duty to amend a prior response seasonably if the party obtains information upon the basis of which the party knows that the response (A) was incorrect when made or (B) though correct when made is no longer true.

Here the defendant knew that whether or not the plaintiff tripped would be a key issue and that it intended to produce affirmative evidence directly contradicting the plaintiff's version of events. It did not intend to do this, however, by direct physical evidence, an independent eyewitness, a statement contained in a medical record or some other source independent of it. Rather it intended to do this solely through an alleged statement of the plaintiff herself as recounted by its employee over whom it had direct and exclusive control and access.<sup>4</sup>

The failure to produce this critical evidence in response to a direct request for such information or to supplement the discovery response pursuant to Rule 56.01(e) is a clear violation of both the letter and spirit of the applicable rules of discovery and must not be countenanced by this or any other court founded upon principles of fairness and justice.

The court of appeals found that defendant's failure to disclose the purported

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<sup>4</sup> In *State ex rel. Pitts v. Roberts*, 857 S.W.2d 200, 202 (Mo. 1993), this court clearly prohibited *ex parte* contact with employees of a corporate party who have managerial responsibility like the employee-witness called by defendant Schnucks. Consequently, the only way that plaintiff could ethically have discovered this purported statement attributed to her was for defendant to disclose such pursuant to its pre-trial discovery obligation.

statement was a violation of its discovery obligation and that it was prejudicial. The court ultimately concluded however that, because counsel for plaintiff was permitted to interview the witness just prior to her testimony in defendant's case, the trial court did not abuse its discretion in permitting the defendant to benefit from its prejudicial discovery violation. How can something that is prejudicial become less so by a 2 minute interview during the trial of the case? Such an admission changed the entire complexion of the case from focusing on whether the uneven seam was high enough to be dangerous to whether plaintiff was lying about whether she even tripped. Obviously, had the prejudicial testimony been disclosed during discovery, as the court of appeals concedes it should have, plaintiffs could have deposed the witness, conducted an investigation of her background and done other things to determine the veracity of her testimony in this regard. But when the crucial statement is disclosed for the first time during the heat of battle, after the jury has been impaneled and plaintiffs have already presented their evidence, there is no legitimate or reasonably effective way to counteract the prejudice.

If this court refuses to remand the case for a new trial and prohibit defendant from utilizing such evidence, such opinion will only serve to embolden the temptation to violate the discovery rules and spring such prejudicial evidence during trial. Instead of engendering trust among counsel for litigants with respect to clearly defined obligations and duties set forth in the rules pertaining to pre-trial discovery, such an opinion will effectively sanction and perpetuate the desire to gain an advantage by surprise and deceit through the withholding of prejudicial statements until the money has been spent and the

parties are in the throes of battle in the courtroom.

In the final analysis, the defendant violated the rules of discovery and was made to pay absolutely no price for such conduct. Adding insult to injury, the plaintiff paid a heavy price by being prejudiced in the eyes of the jury to the benefit and delight of the violating party.

For the foregoing reasons, this court should follow the precedent established in *Fisher v. Waste Management of Missouri*, 58 S.W.3d 523, 527 (Mo. Oct 23, 2001), and hold that the trial court committed reversible error in admitting the undisclosed statement and reverse and remand the case for a new trial directing the trial court not to admit the undisclosed statement.

Assuming *arguendo* that this court refuses to apply the reasoning in *Fisher* beyond the setting of a worker's compensation claim, this court should reexamine existing law with respect to whether the party violating the discovery obligation to provide any and all statements of a party opponent should have the burden of clearly establishing that the offended party will not suffer any prejudice as a result of the violative conduct. Presently, the victim of the discovery violation is required to establish that he or she suffered prejudice when the other party failed to produce the statements of the victim during discovery in order to prevail on appeal. Clearly, the failure to produce such statement of a party opponent is prejudicial or else the other side would not attempt to have it admitted into evidence. The only real question that remains is whether or not some circumstance might remove the prejudice or justify the failure of the party to produce such. This burden

should be on the party that violated the discovery rule. The victims of such conduct should not have to establish that they were prejudiced because the prejudice naturally flows from the failure to provide a statement that the violating party deems significant enough to then have introduced into evidence. If a party intends to use a statement of the opposing party at trial, it must produce such in pre-trial discovery or forfeit the right to use such.

CONCLUSION

The trial court erred in failing to limit the testimony of defendant's employee-witness by precluding her from testifying that plaintiff purportedly denied having tripped when questioned by the witness because defendant failed to disclose this alleged statement concerning the manner in which the accident occurred despite a request for a verbatim recital of the contents of any such statements. Plaintiffs request that the cause of action be remanded for a new trial with instructions that defendant is precluded from asserting such alleged statement by plaintiff and for such other and further relief as the court deems appropriate under the circumstances.

Respectfully submitted,  
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CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing in the form specified by Rule 84.06(a) and one copy in the form specified by Rule 84.06(g) were hand-delivered, on January 13, 2003 to: Robert J. Isaacson, Attorney for Defendant, 1010 Market Street, Suite 210, St. Louis, Missouri 63101.

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RULE 84.06 CERTIFICATES

Pursuant to Rule 84.06(c) the undersigned certifies that he has complied with Rule 55.03 and that the foregoing Appellants' Brief complies with the limitations contained in Rule 84.06(b) in that there are 4,636 words per the WordPerfect 6.1 word-processing system used by the undersigned, inclusive of Cover Page, signature blocks, appendix cover sheet and certificates.

Pursuant to Rule 84.06(g) the undersigned certifies that the floppy disk filed herewith and prepared by the WordPerfect 6.1 word-processing system has been scanned for viruses and to the best of the undersigned's knowledge, belief and technical capacity is free from detectable viruses.

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## APPENDIX

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