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NO.: 68909-6-1

DIVISION I OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

MAUREEN GEORGE, APPELLANT

v.

PROPERTY DEV. CORP., and WALLACE
PROPERTIES, INC., RESPONDENTS

BRIEF OF APPELLANTS

BRETT HERRON, WSBA 31573
ATTORNEYS FOR APPELLANT
PHILLIPS HERRON, PLLC
1750 112TH AVENUE NORTHEAST, SUITE A208
BELLEVUE, WASHINGTON 98004
TELEPHONE (425) 451-8110

Handwritten signature and stamp: *[Signature]*
03/01/2011 10:52 AM
1750 112th Ave NE
Bellevue, WA 98004

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**ASSIGNMENTS OF ERROR AND ISSUES PERTAINING
THERETO**

We allege that the trial court erred when it:

1. Ruled as a matter of law that spoliation of evidence did not apply in this matter and granted Respondents motion for summary judgment dismissing Maureen George's complaint for personal injury.

STATEMENT OF THE CASE

A. Facts

On July 13, 2008 Appellant Maureen George was sitting poolside at her apartment complex, Le Chateau apartments in Bellevue, waiting for her daughter and granddaughter to join her for an afternoon of swimming and relaxing at the pool. (CP25:48-49) As her daughter approached, Ms. George got up from her chair to allow her daughter to sit in her chair, as it was protected by shade, and moved to an adjacent chair. (CP25:49) As Ms. George sat down, the chair broke from its stem and she tipped backward striking her head on a concrete wall. Ms. George sustained a significant laceration to her head. There was a great deal of blood coming from Ms. George's head wound. Medics were called to the scene. She was evaluated, and treated at the scene. (CP25:49)

Later that evening, Ms. George's daughter became concerned that she was showing signs of a head injury so she drove her to Overlake Hospital emergency room. Ms. George was subsequently diagnosed with a mild traumatic brain injury. (CP25:49)

Shortly after the incident occurred, Le Chateau's assistant property manager came to the scene. He took control of the chair which had collapsed and put it in a secure location. Mr. Coyle told

Ms. George that the chair was being kept in a secured location in a subsequent conversation. (CP25:49)

On July 22, 2009, counsel for Ms. George sent a letter of representation to the insurance company for Respondent Property Development Corp. (CP25:49) In that letter, counsel inquired about the location of the chair and requested to personally inspect the chair to determine the cause of the collapse. In a telephone conversation with the adjuster shortly following the receipt of this letter, Ms. George's counsel was told that the chair could not be located. (CP25:49)

Ms. George filed a law suit on July 12, 2011 alleging that the Respondents failed to properly maintain and inspect common area furniture, and also failed to properly secure and preserve evidence. (CP25:50)

B. Procedural History

Wallace Properties and Property Development Corp. moved for summary judgment on the basis of lack of notice of a dangerous condition. (CP18:19)

Wallace Properties and Property Development Corp.'s motion for summary judgment was argued before the Honorable Palmer Robinson. After oral argument, Judge Robinson granted

Wallace Properties and Property Dev. Corp.'s joint motion for summary judgment dismissing Maureen George's complaint for personal injury. (CP34:97-99) Maureen George now appeals the order granting summary judgment in favor of Respondents.

C. Standard of Review

The standard of review for ruling on a summary judgment motion is de novo. Stewart v. Estate of Steiner, 122 Wn. App. 258, 93 P.3d 919 (2004). Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

ARGUMENT

A. The Respondents Failed to Preserve Crucial Evidence Which Severely Prejudiced Appellant and Which Raised Genuine Issues of Material Fact That Should Have Precluded Summary Judgment.

Spoliation is the failure to preserve evidence. Our Supreme Court has held, "where relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him." Pier 67, Inc. v.

King County, 89 Wn.2d 379 (1977). While sitting on the United States Court of Appeals for the First Circuit, then Circuit Judge (now Supreme Court Justice) Stephen G. Breyer discussed the law regarding the destruction of evidence:

Allowing a trier of fact to draw the [adverse] inference presumably deters parties from destroying relevant evidence before it can be introduced at trial. The inference also serves as a penalty, placing the risk of an erroneous judgment on the party that wrongfully created the risk. In McCormick's words, "the real underpinning of the rule of admissibility [may be] a desire to impose swift punishment, with a certain poetic justice, rather than concern over the niceties of proof." McCormick on Evidence § 273, at 661 (1972).

That this policy rationale goes beyond a mere determination of relevance has been clear from the beginning. In the famous case of *Armory v. Delamirie*, 1 Sta. 505, 93 Eng. Rep. 664 (K.B. 1722), the chimney sweep who sued the jeweler for return of the jewel he had found and left with the jeweler, was allowed to infer from the fact that the jeweler did not return the jewel that it was a stone "of the finest water." Were relevance all that was at issue, the inference would not necessarily be that the jewel was "of the finest water"; the fact that the jeweler kept the jewel proved that the jewel had value, but it did not prove the value of the jewel. Nonetheless, **the judge instructed the jury** to "presume the strongest against him, and make the value of the best jewels the measure of their damages" – a clear sign that **the inference was designed to serve a prophylactic and punitive purpose and not simply reflect relevance.**

Nation-Wide Check Corp. v. Forest Hills Distributors, Inc. 692 F.2d 214, 218 (1st Cir. 1982)(emphasis added).

Based on the Washington Spoliation Rule under Pier 67, Inc. v. King County, to establish spoliation, a party need only show (1) the destroyed evidence was relevant, (2) would properly be a part of the case, (3) was within the control of the adverse party, (4) the adverse party's interest would naturally be served by producing the evidence if it that party's version of the facts were to be true, and (5) the adverse party failed to produce the evidence. Id. at 385-386. The adverse party then has an opportunity to offer a satisfactory explanation. Case law has not clarified what "satisfactory explanation" will alleviate the need for a remedy. If the explanation is not satisfactory, then the court must determine what the remedy should be.

The party seeking a remedy for spoliation of evidence need not show bad faith or evil motive by the adverse party. In Pier 67, our Supreme Court imposed a rebuttable presumption in favor of the plaintiff because the County had destroyed some tax records that were at issue. Id. at 385. In that case, the plaintiff appealed from a property tax evaluation for purposes of the *ad valorem* property tax. Id. at 380. The plaintiff claimed that others got deductions that it did not. Id. at 381-382. Property tax assessments were presumed valid,

and the taxpayer had the burden of establishing by “clear and convincing evidence” that the assessments were illegal. Id. at 384. The plaintiff argued that the Assessor’s failure to produce records which would show that the Assessor did not allow certain deductions to other taxpayers for the contested years should create a presumption that the deductions were allowed; thus failure to allow the deductions to appellant constituted unlawful discrimination. King County did not preserve the records which contained the valuation techniques for the years at issue. Id. at 385. The trial court refused to impose the presumption and concluded that the contested tax assessments were valid because plaintiff could not meet his burden showing discrimination.

Our Supreme Court reversed the trial court and applied a *rebuttable presumption* that the missing records would have favored the plaintiff. Id. at 386-87. The Supreme Court did not remand for further hearings, but rendered a decision on the merits based on the presumption. It did so in spite of the heavy burden of proof on the taxpayer to show discrimination by clear and convincing evidence. The dissenting Justice noted that “there is no showing either that the destruction was willful [*sic*], deliberate or done with evil intent or that the attendant failure to produce arose other than from accidental

destruction or mere loss. The most appellant has shown is that no one knows what happened to the assessor's records." Since this language was in the dissent, it is clear that the justices considered the issue of bad faith. The other Justices obviously agreed that a showing of bad faith was not required, and that the mere failure to preserve the evidence was sufficient for finding of spoliation and the imposition of a rebuttable presumption remedy.

When it comes to remedies, Washington courts have contemplated several different types. Spoliation remedies include (1) permitting an inference that the destroyed evidence would have been unfavorable to the party who destroyed it, (2) applying a rebuttable presumption thereby shifting the burden of proof to the party who destroyed, altered, or lost the evidence, (3) treating the spoliation as a civil discovery violation and imposing sanctions under CR 37, (4) imposition of criminal sanctions, and (5) a separate tort action for intentional or negligent spoliation. Henderson v. Tyrell, 80 Wn. App. 592, 605 (1996). To determine when spoliation requires a remedy, Washington has adopted a two prong test (the *Henderson* test).

Under the test, the trial court weighs (1) the potential importance or relevance of the missing evidence and (2) the culpability or fault of the adverse party. Homeworks Constr., Inc. v.

also states that the patio furniture was left out in the elements year round. (CP26:58-60)

The chair was also in the sole control of Wallace Properties, Inc. Wallace Properties was the Property Management Company charged with the responsibility of managing the property, including the hiring of the onsite property managers. One of its resident property managers, Ron Coyle, saw the importance of the chair and took control of the chair and put it in a separate and safe location.

Under the Pier 67 factors, Wallace Properties and Property Development Corp. have the burden of coming forward with a satisfactory explanation for failing to preserve and produce the chair. Wallace Properties can only say that they do not know what happened to the chair and its whereabouts are unknown. This is not a satisfactory explanation. Wallace Properties knew immediately that the chair in question was an important piece of evidence. Its own agent, Mr. Coyle, quickly spirited the chair away into a separate and secure location. The Defendants did or should have anticipated the possibility of litigation. Wallace Properties and Property Development Corp. had a duty to preserve the evidence, and failed to do so.

In Segura v. K-mart Corp., the trial court deemed a store liable in a customer's slip-and-fall action because the store lost a bottle

from which automotive fluid leaked onto the floor. 133 N.M. 192 (Ct. App. 2002) The plaintiff customer slipped and fell while shopping in the automotive department of the defendant department store and suffered injuries to his back, shoulder, and knee. The plaintiff asked the store to produce the container in question, but the store could not locate it. The plaintiff filed a motion for sanctions, and the trial court ruled that the store knew or should have known that the container should be preserved as evidence. As a sanction for its failure to preserve the container, the court ruled that the store would be deemed negligent and its negligence would be considered a proximate cause of the plaintiff's injuries. *Id.* at 286-87.

In affirming the trial court, it was emphasized that the prejudice to the victim of spoliation can in some case weigh more heavily than the spoliator's degree of fault in determining an appropriate sanction. The court rejected defendant's argument that a rebuttable presumption would be a more appropriate sanction, observing that such a remedy would have permitted the store great latitude in arguing to the jury that an acknowledged hole in the container was more likely the result of a manufacturing defect, and a jury could have decided not to infer that the store was responsible. Because the plaintiff's only means for rebutting the theory of a manufacturing

defect would have been the container itself, the court stated, it was not unreasonable that the trial court found a stricter sanction to be warranted. Id.

Given Wallace's Properties and Property Development Corp.'s failure to preserve crucial evidence, the Plaintiff would be entitled to at least an inference that the missing evidence would have been unfavorable to Wallace Properties and Property Development Corp. and perhaps an even stricter sanction as in Pier 67 or Segura.

CONCLUSION

There are genuine issues of material fact that preclude the granting of Respondents' joint motion for summary judgment and the dismissal of Maureen George's complaint for personal injury.

REQUEST FOR EXPENSES

Appellant should be awarded her costs incurred on this appeal if she prevails. RAP 14.2, 18.1.

RESPECTFULLY SUBMITTED this 13th day of September, 2012.



Brett B. Herron, WSBA 31573
Attorney for Appellants



LEGAL SERVICES

abclegal.com

SEATTLE
910 5TH AVE.
SEATTLE, WA 98104
PH: 206-623-8771
206-682-1675
1-800-736-7295
FAX: 206-625-9247
sea@abclegal.com

TACOMA
943 TACOMA AVE. SO.
TACOMA, WA 98402
PH: 253-383-1791
1-800-383-1791
FAX: 253-272-9359
tac@abclegal.com

BELLEVUE
10655 NE 4th
Suite L101
BELLEVUE, WA 98004
PH: 425-455-0102
FAX: 425-455-3153
bel@abclegal.com

EVERETT
2927 ROCKEFELLER
EVERETT, WA 98201
PH: 425-258-4591
1-800-869-7785
FAX: 425-252-9322
eve@abclegal.com

OLYMPIA
119 W LEGION WAY
OLYMPIA, WA 98501
PH: 360-154-6595
1-800-828-0199
FAX: 360-357-3302
oly@abclegal.com

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1	Mark C. Dean 999 3rd Avenue, Ste. 2510 Seattle, WA 98104	3	Kathleen Thomson Gardner Bond Trabolsi 2200 Sixth Avenue, Ste. 600 Seattle, WA 98121
2		4	

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