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WASHINGTON STATE COURT OF APPEALS  
DIVISION II

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MARK HAUBRICH

Appellant,

v.

THE PIZZA SPECIALISTS INC., dba BREWERY CITY PIZZA  
COMPANY #3

Respondent

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RESPONDENTS' BRIEF

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## I. INTRODUCTION

This case arises from an accident that occurred on August 9, 2012, when a chair on the outside patio in which the Appellant, Mark Haubrich, was sitting broke. Haubrich moved for summary judgment based on the fact that Respondent, The Pizza Specialists dba Brewery City Pizza Company #3 (TPS), did not produce any evidence that the Haubrich had actual or constructive knowledge about any defect in the chair or that the Haubrich failed to exercise reasonable care. The trial court granted that motion and dismissed Haubrich's claims. Haubrich appeals that order.

The evidence in the record shows that TPS inspected each patio chair daily before putting it out for customer use. Managers were instructed to remove any potentially defective chairs after these inspection. Over the course of seven or eight years, TPS removed two chairs because of instability. There have been no other complaints about TPS's chairs or other injuries in the ten years that these chairs were in service. No other chairs have broken in a similar manner over the ten years that the chairs were in service.

Haubrich did not offer any evidence that TPS's procedure of inspecting the chairs each day was insufficient compared to the industry standard or that it had breached a duty of care to its customers. Further, Haubrich did not offer any evidence that TPS knew, or should have

known, that the chair was defective.

The Haubrich submitted a report from safety expert Thomas Baird, two weeks after the discovery deadline, in which Baird offered the opinion that the chair broke because of “exposure to ultraviolet light, extreme cold temperature, frequency and manner of use, and the likelihood of misuse or abuse.” Baird never examined the chair in question, never cited or examined any industry standard regarding use or inspection of plastic chairs, and never examined or analyzed any scientific or technical data related to the effects of ultraviolet light or weather on plastic chairs. The trial court properly concluded that Baird lacked the requisite expertise and that his report did not present any issues of material fact such that Haubrich’s case could survive summary judgment.

For all the reasons discussed herein, this court should affirm the Order Granting Summary Judgment.

## **II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

**No. 1:** The trial court correctly granted the defendant’s motion for summary judgment because Haubrich has offered no proof that the defendant had actual or constructive knowledge of any defect of the chair.

**No. 2:** The trial court correctly granted the defendant’s motion for summary judgment because TPS had an effective chair inspection program and Haubrich has not provided any evidence to the contrary.

**No. 3:** The trial court correctly granted TPS's motion for summary judgment because Haubrich's expert Tom Baird is not qualified to offer an opinion on the structural integrity of the chair.

**No. 4:** This court should not consider the Baird Report as it is not admissible evidence under CR 56(c).

### **III. STATEMENT OF THE CASE**

#### **Facts:**

This case concerns a fall from a broken chair that occurred on August 9, 2012. CP 294. Haubrich was eating dinner with a friend at TPS when his chair broke causing him to fall on the ground. Id. Haubrich alleges several injuries as a result of this fall. Id.

#### **The Chair**

During the summer months, TPS opens seating to their outdoor patio and puts out deck chairs for customers to use. CP 302. The deck chairs that were in use at the time of the accident were purchased by TPS in lot sometime in 2004 or 2005. CP 303. The batch of chairs that the chair in question came from were used until the spring of 2014. CP 304. The chairs were manufactured by Grosfillex. CP 315-316.

Prior to the incident in question there had been no complaints about any of the patio chairs used by the restaurant nor had there been any reported injuries from chairs breaking while in use. CP 304, 313-314,

317, 326. Dennis Gard, the president and owner of the company, had never heard of a customer report of a broken chair. CP 307. Gard did have reports of “cracks and fissures reported” to him but he never saw a chair in a “broken state.” Id. If he learned of a chair with a defect, he would instruct that the chair be taken out of service. Id. Evan Huff, the assistant manager on duty at the time of the incident, reported that he had never heard of any instance of a chair breaking on a customer. CP 326. Huff has been an assistant manager at the restaurant for eleven years. CP 327

Each chair has a “Recommended Maintenance and Safety Instructions” sticker attached to the bottom of it. The instructions read in part as follows:

Incorporate these safety and maintenance guidelines into your facility’s maintenance program to further ensure this chair’s safe use and useful life.

- Carefully inspect the chair daily for any sign of damage
- If damaged, immediately remove the chair from service
- Chairs should not be stacked more than 4’ (48”) high

CP 336.

Although TPS does not have an explicit written policy regarding the set-up of the chairs, the direction is to do “a look/sec...for all of the equipment, which would include umbrellas, tables, table legs, chairs.” CP 309, 312. It was the manager’s “responsibility to look at those items to

see if they're functional." CP 309. In addition to this general directive, the specifics of checking the equipment were discussed at various general management meetings. CP 309.

Each morning the opening manager checks all of the chairs as they are set out on the patio, according to these instructions. CP 325. The chairs and patio furniture are checked for cracks and general stability. Id. While setting up the deck, "if something is unsafe or not functioning properly they don't set it up." CP 325. Huff described that "when I pull the chairs out I'm checking the arms, making sure that there's—they're stable, there's no cracks, there's no frays." Id. If a chair is found to be defective it is immediately taken out and thrown in the dumpster. CP 327. Huff testified that in his eleven years at the restaurant he has set up the patio "hundreds of times" and he has taken only two chairs out of service for instability. Id. Although he travels between the three different restaurant locations, Gard is at each store at least twice a day to make sure that there are no problems. CP 301.

### **The Accident**

On August 9, 2012, Haubrich and his friend had finished eating dinner at TPS and as he went to leave, he began to stand up and the chair broke underneath him and he fell to the ground. CP 339. A waitress who saw Haubrich on the ground, but did not see him fall, left to find Huff. CP

321-323. At that point Haubrich began “yelling and screaming” at Huff “that the chair cut his ass.” Id. Huff spent several minutes trying to calm Haubrich down and repeatedly asked him whether he required medical attention. Haubrich refused. Id.

Huff left for a few minutes to call Gard to report what had happened. Id. By the time he returned, Haubrich had calmed down. Huff again offered to call 911 to have Haubrich evaluated, but was again refused. Id. Haubrich and his friend then walked out of the restaurant to their car and left. Id.

Gard arrived at the restaurant about fifteen minutes after he received the call from Huff. Gard then examined the chair and took it out of service and put it in storage. CP 305.

#### **Disclosure of the Baird Report**

The Haubrich filed suit against TPS on May 7, 2015. CP 294-297.

On September 11, 2015, TPS propounded interrogatories and requests for production to Haubrich. CP 126-131. Several interrogatories and a request for production pertained directly to the substance of the facts and opinions that any experts had as well as requesting the disclosure of any and all reports prepared by these experts. Id.

On November 5, 2015, Haubrich responded to these interrogatories and requests for production. With regard to the experts, Haubrich stated

that he would provide the information in accordance with the case scheduling order. CP 189-192. The same response was given with regard to any expert reports. Id.

On August 1, 2016, Tom Baird was first disclosed as a rebuttal witness in Haubrich's Disclosure of Rebuttal Witnesses. CP 141-144. Haubrich provided the following summary:

Tom Baird is a certified Legal Investigator and Court Qualified Safety Expert. He *may* be called to provide opinions based upon his education, training and experience as to the safety issues, safety violations, violations of the application of pertinent regulations, codes, standards and guidelines that caused the plaintiff's injuries in this case.

(emphasis added). No report or any further summary or supplemental discovery responses were provided prior to the discovery cutoff date ordered by the trial court. CP 126.

On August 17, 2016, Haubrich's counsel contacted Defense Counsel to request a site visit with Baird. On August 19, 2016, Haubrich's counsel requested to conduct the site visit on August 25, 2016. TPS agreed to that date. See emails attached as CP 185-187.

On August 25, 2016, Baird conducted a site visit of Brewery City Pizza. CP 119. Baird reviewed the pleadings, depositions of the parties, and photos of the broken chair. He also examined the chairs TPS currently uses that were purchased in 2014. He did not do a physical

examination of the subject chair. CP 193-206. Haubrich himself admitted that he was unaware of any examination or testing done to the subject chair. CP 317.

Discovery cutoff in this case was September 6, 2016. CP 124.

On September 8, 2016, TPS filed a Motion for Summary Judgment relying in large part on the Haubrich's failure to produce any expert discovery or other sufficient evidence to show negligence on the part of the Defendant. See CP 18-32 (Defendant's Motion for Summary Judgment) and CP 290-340 (Declaration of Theodore M. Miller in Support of Defendant's Motion for Summary Judgment).

On September 21, 2016, counsel for Haubrich emailed TPS Supplemental Interrogatory answers and a supplemental response to Requests for Production. CP 189-244. In that supplemental discovery, a report from Baird dated September 19, 2016 was included as well as two additional photographs that had not been previously disclosed.<sup>1</sup>

On September 22, 2016, counsel for the parties held a CR 26(i) discovery conference. Counsel for Haubrich stated that he had timely

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<sup>1</sup> This will be referred to as the "Baird Report" for purposes of this brief. This report was subsequently incorporated into the Declaration of Tom Baird submitted in support of Haubrich's Response to Motion for Summary Judgment. The Baird Report disclosed in the supplemental discovery answers is the same as the one contained in the Baird Declaration submitted in response to the summary judgment. For purposes of the summary judgment, the Baird Report incorporated as an exhibit into the Baird Declaration will be the one referenced.

disclosed Baird's opinions in his August 1, 2016, Rebuttal Witness disclosure and that provided adequate disclosure of Baird's opinions and expected testimony. Email confirming such conference contained in CP 246.

On September 29, 2016, TPS filed a Motion to Exclude Plaintiff's Expert Thomas Baird (CP 250-265 and CP 119-246) and on September 30, 2016, TPS filed a Motion to Strike From Plaintiff's Response to Defendant's Motion For Summary Judgment the Declaration of Thomas Baird (CP 105-114 and CP 115-117). TPS also filed a reply brief to Plaintiff's Response to Motion to Strike and Motion to Exclude Plaintiff's Expert Tom Baird (CP 342-348). These two motions along with the motion for summary judgment were set for hearing on October 7, 2016.

#### **Content of the Baird Report**

In his declaration in response to TPS's Motion for Summary Judgment, Baird provided his 37-page curriculum vitae (CV) outlining his credentials as a safety investigator/consultant. (CP 50-86). First, the introduction of his CV states that he conducts investigations "through a review of the case documents, site visits, evaluation of site data, research and analysis of safety issues, and the application of pertinent regulations, codes, standards and guidelines to the case issues." Nowhere in that description of the services he provides is there any mention of offering any

expertise, experience, or any services related to testing or analysis of materials as it pertains to material or structural analysis. Second, Baird then provides his credentials in reference to his various certifications, professional memberships, employment history with basic descriptions of the employment, professional presentation, published articles, published book reviews, education, and list of continuing education. Nowhere in any of those professional qualifications is there any background, education, or training that shows that he has any expertise in the area of structural or material analysis or the effects of the elements on structures or materials.

The Baird Report contains two opinions. The first opinion formed the basis for his second opinion. First, he concluded that “[t]he chair that collapsed was in an unreasonably hazardous and dangerous condition at the time of the incident and had exceeded its useful life.” CP 37. The basis of that opinion was that the “deterioration of the chair over the years caused a weak point where the chair arm meets the leg causing it to break.” Id. The second opinion was that “[t]he restaurant did not have an effective chair inspection program in place to assure that the chairs were safe for customers.” Id. The basis for that opinion was that “the useful life of this chair depends on the extent of its exposure to ultraviolet light, extreme cold temperature, frequency and manner of use, and the

likelihood of misuse or abuse.” He then reviewed the deposition of Huff and Gard. Baird writes, “I do not see any evidence that the restaurant *carefully* inspects each chair for damage.” (Emphasis added). CP 39. He also notes that “[a]n effective safety program has written policies and procedures.” Id. He concludes that “[c]areful inspections of the chairs were necessary and were not done by the restaurant.” Id. Baird did not actually inspect the chair in question. He also notes that his opinions in the report are “preliminary.” Id. Baird cites no published articles, scientific journals or peer reviewed studies, or any testing or other data pertaining strength of material used in patio furniture or the effects of the elements on such materials.

### **Summary Judgment Hearing**

The trial court granted TPS’s Motion for Summary judgment based on its review of Baird’s report. The trial court stated:

I have no bases (sic) provided by Mr. Baird as to his opinions in these records... Mr. Baird provided no information as to why he would have the expertise to say that a plastic chair, and apparently he's saying because the warranty is three years then anything over three years would be an old chair. He talked in terms of chairs that were six or seven years old, I'm sorry, that was seven or eight years old. But he doesn't indicate that there's a basis for saying if a chair is that old it's obviously going to be structurally dangerous, that is, likely to fail. He did not indicate that there were any outward manifestations of damage to this particular chair. As a matter of fact, he said it appears on the way it broke that there was a weakness

where the arm met the seat but he does not describe how that would be manifest, when would it have occurred, and how would it be manifest or issues that would need to be described, in this Court's opinion.

RP 28-29. Additionally, the court did not find any evidentiary basis to support the Haubrich's argument that the chair broke because of exposure to the elements because all of the chairs had the same exposure and only one broke. RP 30-31.

The court did not rule on the other two motions but noted that it considered them in ruling on the Motion for Summary Judgment. RP 32. The trial court found that the Baird Report did not provide a foundation for his opinion regarding why the chair broke or whether it was properly inspected. RP 28-31. Finally, the court noted that Haubrich made a conscious choice not to disclose the Baird Report in accordance with the case schedule, and that failure to do so was prejudicial to the defendant. RP 34.

Notice of appeal was filed on October 11, 2016.

#### **IV. ARGUMENT**

In his Issues Pertaining to Assignment of Errors, Haubrich raises three issues: (1) whether the TPS had actual or constructive notice of the dangerous condition of the chair in question when the "useful life" of the chair had been exceeded; (2) whether the TPS had an effective chair

inspection program; and (3) whether the trial court abused its discretion in determining that the Baird report did not provide the necessary foundation to support how or why the chair broke. The fourth issue is whether the Baird Report and Declaration should be considered at all because it was not properly disclosed and is therefore not admissible evidence under CR 56(c).

#### **A. Summary Judgment Standard**

An order granting summary judgment is reviewed de novo. Velt v. Burlington N. Santa Fe Corp., 171 Wn.2d 88, 98, 249 P.3d 607 (2011). Summary Judgment is proper if the evidence, viewed in a light most favorable to the nonmoving party, shows there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Wash. R. Civ. Pro. 56(c). An issue of material fact is one upon which the outcome of the litigation depends. Atherton Condo Ass'n v. Blume Dev., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Where the defendant is the moving party and has shown the absence of material fact, the plaintiff must come forward with competent evidence showing the existence of a genuine issue of material fact for trial. Young v. Key Pharms., Inc , 112 Wn.2d 216, 225, 770 P.2d 182 (1989) *overruled on other grounds by* Young v. Key Pharms., Inc , 130 Wn.2d 160, 922 P.2d 59 (1996).

To prevail on a motion for summary judgment, a party need only show an absence of evidence supporting an element essential to the opposing party's claim. *See, e.g., Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992); *Young v. Key Pharms., Inc.*, 112 Wn.2d at 225 (citation omitted). All evidence submitted by the parties to a motion for summary judgment must be "admissible in evidence." The nonmoving party, in responding to this motion for summary judgment, is prohibited from relying on "allegations, conjecture, or speculation to create an issue of material fact." CR 56(c); *Sortland v. Sandwick*, 63 Wn.2d 207, 211, 386 P.2d 130 (1963); *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960); *Geppert v. State*, 31 Wn. App. 33, 38, 639 P.2d 751 (1982).

**B. Summary judgment in favor of the TPS is proper because Haubrich presents no evidence that TPS had actual or constructive knowledge of any defect in the chair.**

To establish a claim, Haubrich in this case must show a (1) duty, (2) breach of that duty, (3) a resulting injury, and (4) proximate cause between the breach and the injury. *See Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994).

In Washington, an owner or occupier of a building "is liable for the injuries if it or its employees caused the unsafe condition or if it has actual or constructive knowledge that an unsafe condition exists." *Wiltse v.*

Albertson's Inc., 116 Wn.2d 452, 459, 805 P.2d 793 (1991) (citing Pimental v. Roundup Co., 100 Wn.2d 39, 44, 666 P.2d 888 (1983)). An owner is only liable for failure to disclose *known* dangers. Aspon v. Loomis, 62 Wn. App 818, 827, 816 P.2d 751 (1991). This includes either actual or constructive knowledge. "Constructive knowledge exists if the unsafe condition has been present long enough that a person exercising ordinary care would have discovered it." Wiltse, 116 Wn.2d at 459. *See also* Ingersoll v. DeBartolo, Inc., 123 Wn.2d 649, 652, 869 P.2d 1014 (1994) (Constructive knowledge only requires that the owner "had or should have had, knowledge of the dangerous condition in time to remedy the situation before the injury"). "The plaintiff has the burden of proving that the defendant had actual or constructive knowledge of the unsafe condition." Wiltse at 459. In Wiltse, the court noted that summary judgment was appropriate because the plaintiff could only provide that she slipped on a wet floor. The court noted, "Our cases indicate that something more must be proved to establish that the defendant had permitted a situation so dangerous to its invitees to exist." Wiltse at 459. The court states that in order for there to be negligence, the plaintiff must prove that water makes the floor slippery and that "the owner knew or should have known both that water would make the floor slippery and that there was water on the floor at the time the plaintiff slipped." Id.

An instructive case on the issues raised by Haubrich is Frederickson v. Bertolino's Tacoma, Inc., 131. Wn. App 183, 186, 127 P.3d 5 (2005). In that case, the plaintiff, a patron in the coffee shop, sued the coffee shop for negligently furnishing and maintaining its premises when a chair that he was sitting in broke and he fell and sustained injuries. Bertolino's moved for summary judgment on the basis that Frederickson presented no evidence that it had actual or constructive notice that the chair would collapse under Frederickson's weight, and that it failed to exercise reasonable care to protect Frederickson from the dangers of a collapsing chair. Frederickson at 187-188. Frederickson argued that he did not have to prove notice because it was reasonably foreseeable that due to the way that the coffee shop operated that a customer could be injured by a breaking chair. He also argued that Bertolino's had constructive knowledge of the danger of the chair. Id. at 188. The trial court granted summary judgment and that summary judgment was affirmed on appeal.

In reaching its decision, the Frederickson court examined the arguments made by Frederickson and rejected that a genuine issue of material fact existed. Frederickson argued that Bertolino's had constructive notice that the chairs were not safe because the chairs were purchased "used" and there was no "system" for inspecting chairs. Id. at

189-190. The court noted that Frederickson presented no evidence that antique or used chairs pose an unreasonable risk of harm to the customer nor did he present any evidence that a chair had broken before and injured a customer. Id. at 190. In addition, Frederickson argued that Bertolino's inspection system was inadequate because there was no "system" for inspecting the chairs. However, the court noted that Frederickson presented no evidence that Bertolino's failed to inspect the chairs or that the inspection routine did not meet industry standards. The court noted that the undisputed evidence was that each chair was inspected *weekly* and any defective chair was immediately repaired or discarded. Id. "In short, Frederickson presented no evidence that Bertolino's had either actual or constructive notice of any problem with the chair." Id. at 191.

The facts of the present case are identical to the Frederickson case and Haubrich in this case has the same failures of proof that the court noted in Frederickson. First and foremost, Haubrich has presented no evidence that any chair has previously broken and injured any customer. The only evidence before the court is that *no* patron of TPS has ever been injured by a breaking chair. CP 307. Thus, there was no actual notice of any dangerous condition related to the chairs.

Second, Haubrich argues that the chair had exceeded its useful life. Haubrich's only apparent "evidence" of this is that there was a three year

warranty on the chair. The Frederickson case makes clear that the age of a chair alone is not enough to create actual or constructive notice. In Frederickson, the chairs were antiques and “used.” In the present case, Haubrich presents no evidence on what the “useful life” of the chair in question is. The Baird Report is silent on that point. TPS had chairs that were only seven to eight years old. Haubrich argues that the fact that daily inspection of the chairs revealed two cracked chairs over the course of *seven to eight years* thereby demonstrating the dangerousness of the chairs. However, in Frederickson, the court noted that Bertolino’s found a defective rate in their chairs of about eight or nine *a year* (average of four a year that were discarded and four to five chairs that had to be repaired). Id. at 187. The court did not find that this defective rate (compared to TPS’s rate of two chairs over the course of seven to eight years) meant that Bertolino’s had actual or constructive notice of dangerous chairs. Thus, there is no evidence that TPS had constructive notice of any dangerous condition related to the chairs.

Third, as will be expanded upon below, TPS inspected the chairs *daily* when in use compared to the *weekly* inspection performed by Bertolino’s and the court found that acceptable since there was no evidence this violated any industry standard. In the present case, Haubrich presents no evidence of what the industry standard is and therefore

presents no evidence on how the TPS supposedly violated that standard. The Baird Report is completely silent on what constitutes the industry standard. Furthermore, the manager setting up the patio inspected each chair for stability and inspected for cracks each day that the patio is set up. CP 325. TPS's inspection routine took out of circulation at least two defective chairs and prevented any chairs from collapsing on a patron for at least seven years.

The Frederickson court further held that business owners are liable to a customer only if the unsafe condition was "caused by the proprietor or his employees, or the proprietor [had] actual or constructive notice of the unsafe condition." Frederickson at 189 (quoting Wiltse v. Alberton's, Inc., 116 Wn.2d 452, 460, 805 P2d 1014 (1994)). In that case, the court did not find the defendant liable for plaintiff's accident and granted summary judgment because neither the proprietor nor his employees caused the chair to break and they did not have knowledge of any unsafe conditions but rather actively worked to ensure the safety and stability of their chairs. Frederickson at 189. Similarly in this case, there is no evidence in the record that the defect in the chair was caused by TPS. The chair was manufactured by a third party company. No member of the staff was near the chair when it broke. TPS employees diligently inspected every chair each day the chairs were used. Hautbrich presented no

evidence that any TPS employee caused the defect in the chair that caused it to break. Therefore, no one at TPS had knowledge, or could have had knowledge, of any unsafe conditions.

Courts have held that there is an exception to the requirement of knowledge in order to find liability. The Pimentel Exception states that “an injured business invitee may be excused from proving notice if the unsafe condition causing the injury is ‘a continuous or foreseeably inherent in the nature of the business or mode of operation.’” Frederickson at 191 (quoting Pimentel v. Roundup Co., 100 Wn.2d 39, 40, 666 P.2d 888 (1983)). However, courts have determined that the Pimentel Exception only applies to “self-service” establishments. Frederickson at 191. There is no question that TPS is not a self-service establishment; it is a restaurant. Therefore, this exception does not apply and Haubrich must still prove that the defendant had knowledge of the defect.

**C. Haubrich has not presented any evidence that TPS’s daily inspection of the chairs was insufficient and that it breached a duty of care.**

The State of Washington has adopted the Restatement (Second) of Torts (1965) § 343 which provides that a “A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he...fails to exercise reasonable care to protect them against the danger.” Leonard v. Pay’n Save Drug Stores, Inc., 75 Wn. App 445,

447, 880 P.2d 61 (1994).

Courts require that unsafe conditions be reasonably foreseeable to attach liability. Ingersoll, 123 Wn.2d at 654. Consequently, businesses have a general duty of care as a “reasonable person under the circumstances.” O’Neill v. City of Port Orchard, 194 Wn. App 759, 771, 375 P.3d 709 (2016) (quoting Keller v. City of Spokane, 146 Wn.2d 237, 243, 44 P.3d 845 (2002)).

As noted above in Frederickson, the court held that reasonable care requires inspection of the premises for danger “followed by such repair, safeguards, or warning as may be reasonably necessary for [the invitee’s] protection under the circumstances.” Frederickson at 189 (quoting Tincani v. Inland Empire Zoological Soc’y, 124 Wn.2d 121, 139, 875 P.2d 621 (1982)). As noted above, in the Frederickson case the plaintiff argued that since there was no official “system” for inspecting the chairs the defendant did not exercise reasonable care. Id. at 190. The court held that the defendant’s unofficial examination of the chairs and the preventative measures he took to ensure their safety was more than sufficient for reasonable care. *See also* O’Donnell v. Zupan Enterprises, Inc., 107 Wn. App 854, 860, 28 P.3d 799 (2001)(finding defendant had exercised reasonable care in keeping the floor clean even without a set cleaning or inspection schedule). Additionally, the Frederickson court noted that the

plaintiff presented no evidence that the defendant fell below industry standards in his examination. Frederickson at 190.

Similarly, in this case Haubrich argues that TPS is liable for his alleged injuries because they did not “carefully” inspect the chairs and had no formalized inspection system. “Carefully” is never qualified or defined by Haubrich.<sup>2</sup> Although TPS did not have an official chair examination policy it was general practice to check for deficiencies in the chairs daily before they were put out for customer use. This practice was discussed in multiple management meetings. There is no evidence in the record that TPS was not in full compliance with the maintenance and safety instructions listed on the bottom of the chair. TPS inspected the chairs each day for any signs of damage. TPS immediately removed any damaged chairs from service. There is no evidence that the chairs were not stacked in accordance with the guidelines on the chairs. These preventative measures meet the standard for reasonable care. Haubrich has presented no evidence that TPS did not inspect the chairs or had acted carelessly in setting them out for public use.

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<sup>2</sup> As noted below, simply adding an adverb such as “carefully” does not create a genuine issue of material fact. The Baird Report never qualifies or defines what “carefully” means in terms of the chair inspection. The evidence is uncontradicted that the chairs were inspected daily. However, it appears that Haubrich is now arguing that the Baird Report creates a genuine issue of material fact because Baird used an undefined adverb in his ultimate opinion. As noted below, this is still nothing more than a conclusory statement

In Tavai v. Walmart Stores, Inc., plaintiff was injured when she slipped on a puddle of water at a Walmart store. Tavai v. Walmart Stores, Inc., 176 Wn. App 122, 126, 307 P.3d 811 (2013). Plaintiff's expert contended that the wet floor "posed a serious slip hazard" that was equivalent to "ice and compact snow." There were also 51 other reported falls at the Walmart during the previous two years. Id. at 133. Accordingly, she argued that this raised issues that required a trial. The court disagreed and held that the plaintiff did not provide enough evidence that the defendant was negligent and breached its duty of reasonable care notwithstanding the number of previous falls. Id. at 134.

In this case there have been no previous accidents with any of TPS's chairs and there is no evidence that the chairs posed a serious hazard. TPS took greater precautions than the defendant in Tavai. Haubrich has presented no evidence that TPS failed to exercise reasonable care. TPS has not breached a duty to Haubrich because it exercised more than reasonable care in examining the chairs each day before use.

**D. The trial court correctly found that the Baird Report did not provide a proper foundation for his opinions concerning the structural integrity of the chair or effects of weather, light, etc. and was properly excluded because he does not have the necessary experience to qualify as an expert on plastics**

CR 56(c) states, "Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal

knowledge, shall set forth such facts **as would be admissible in evidence**, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” (emphasis added). “The trial court has discretion whether to accept or reject an untimely declaration. In addition, CR 56(e) requires that a declaration be limited to matters that would be admissible in evidence.” Southwick v. Seattle Police Officer John Doe #1-5, 145 Wn.App. 292, 301, 186 P.3d 1089 (Div. 1, 2008) (citing Brown v. Peoples Mortgage Co., 48 Wn.App. 554, 559, 739 P.2d 1188 (1987)).

*1 Haubrich did not establish a proper foundation showing that Baird qualifies as an expert in structural analysis, material analysis, or the effects of ultraviolet light on plastics*

The admissibility of expert testimony in Washington is generally governed by ER 702. ER 702 provides that:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702 involves a two-step threshold inquiry by the court: (1) **whether the witness qualifies as an expert**; and (2) whether the expert testimony would be helpful to the trier of fact. *See* Reese v. Stroh, 128 Wn.2d 300, 306, 907 P.2d 282 (1995) (emphasis added).

The qualifications of an expert witness to express an opinion “are matters addressed to the discretion of the trial judge.” Elber v. Larson, 142 Wn. App. 243, 247, 173 P.3d 990 (2007) (citation omitted). The

burden is on the party offering the expert to establish that a proper foundation exists qualifying that witness to be an expert on the subject to which they are testifying. *See* Sehlin v. Chicago, Milwaukee, St. Paul and Pacific R. Co., 38 Wn. App. 125, 132-33, 686 P.2d 492 (1984). Moreover, “[e]xpert testimony is helpful if it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury.” Carlton v. Vancouver Care LLC, 155 Wn. App. 151, 161, 231 P.3d 1241 (2010).

Absent the above showing by the party seeking to admit the expert’s testimony, the expert’s opinion is not admissible:

No expert opinion is admissible over objection unless the witness has first been qualified by a showing that he or she has sufficient expertise to state a helpful and meaningful opinion.

Tegland, 5B Wash. Prac., *Evidence Law & Prac.* § 702.5 (5th ed. 2012) (citation omitted).

Indeed, if the expert will not assist the trier of fact, he or she is thus unqualified and should be excluded from testifying. *See, e.g.,* State v. Greene, 139 Wn.2d 64, 73, 984 P.2d 1024 (1999) (expert testimony excluded as not helpful when it was not possible to reliably connect the symptoms of dissociate identity disorder to the sanity or mental capacity of the defendant); Tortes v. King County, 119 Wn. App. 1, 13-14, 84 P.3d 252 (2003); (expert properly excluded when he lacked knowledge of the standard of care of a public transit operator); Goehle v. Fred Hutchinson Cancer Research Ctr., 100 Wn. App. 609, 619-20, 1 P.3d 579 (2000)

(employment discrimination expert excluded when she was “wanting in the education, training, and experience required to assist the jury”).

Relevant here, a corollary rule is that an expert’s testimony is not admissible if it is rendered on a subject that is beyond the scope of that expert’s area of expertise. *See, e.g., Esperaza v. Skyreach Equip., Inc.*, 103 Wn. App. 916, 924, 15 P.3d 188 (2000) (“the expert testimony of an otherwise qualified witness is not admissible if the issue at hand lies outside the witnesses’ area of expertise.”) (citation omitted). It is a proper exercise of the trial court’s discretion to exclude otherwise unqualified experts that cannot help the finder of fact at trial; a witness not familiar with the standard of care is not qualified to testify and should be excluded. *See Winkler v. Gidding*, 146 Wn. App. 387, 391-92, 190 P.3d 117 (2008).

In his report, Baird offers several opinions concerning the structural integrity of the chair in question. He concludes that the “chair deteriorated to the point that it broke and collapsed.” CP 195. He goes on to state in that paragraph, “The deterioration of the chair over the years caused a weak point where the chair meets the leg causing it to break.” *Id.* He states that the “useful life of this chair also depends on the extent of its exposure to ultraviolet light, extreme cold temperature, frequency and manner of use, and the likelihood of misuse or abuse.” CP 196. The

chairs were old and had been outside exposed to extreme weather conditions for 7-8 years. Careful inspections of the chairs were necessary and were not done by the restaurant.” CP 197.

First and foremost, there is nothing in Baird’s 37-page CV that shows he has any experience in the area of material or structural analysis. Haubrich argues that Baird has operated two different restaurants, investigated and consulted on nearly 1300 injury cases, and is a certified safety manager. Appellant’s Opening Brief at 6. However, none of these so called “credentials” qualify him to offer any opinion on material or structural analysis (i.e., structurally why this particular chair failed). In addition to not having any training or expertise in the area of structural or material analysis, Baird’s declaration, report, and CV do not show that he has any experience or expertise investigating any type of similar accident involving broken chairs.

In addition to the lack of any technical qualifications to render an opinion on structural analysis, Baird did not do any testing of the chair in question. Not only did he do nothing but examine photos of the chair, but his report and declaration do not examine any technical data concerning the type of chair in question or the material used. He cites no technical data from the manufacturer (beyond that printed warning on the bottom of the chair) or from other credible source. He does not discuss any scientific

studies or other credible sources concerning the effects of ultraviolet light or other weather effects on outdoor chairs or similar materials. He cites no authority whatsoever that ultraviolet light can effect materials at all. Furthermore, he has no training or background in any of those areas. All he presents is his conclusory opinion. The record is clear that Baird does not have expertise in the area he is providing opinions in and his opinions are wholly unsupported by any accepted scientific research or analysis.

2. *Baird's report did not contain any material facts but merely conclusory statements*

Courts have held that affidavits must set forth facts that are distinguished from an opinion. Roger Crane & Associates, Inc. v. Felice, 74 Wn. App 769, 779, 875 P.2d 705 (1994); Grimwood v. University of Puget Sound, Inc., 110 Wn.2d 355, 359, 753 P.2d 517 (1988). The Grimwood court held that an adverse party to a summary judgment motion “may not rest upon the mere allegations or denials of his pleading,” and that his response “must set forth specific facts showing that there is a genuine issue for trial.” Grimwood, 110 Wn.2d at 359. The court continued that conclusory statements of fact will not suffice to create an issue of material fact to overcome a summary judgment dismissal. Id. at 360. “A ‘fact’ is a reality rather than supposition or opinion.” McBride v. Walla Walla County, 95 Wn.App. 33, 37, 975 P.2d 1029 (1999) citing

Grimwood , 110 Wn.2d at 359. Courts have also held that expert reports should be excluded if the expert lacks personal knowledge of the event. Moore v. Hagge, 158 Wn. App. 137, 157, 241 P.3d 787 (2010).

The non-moving party must submit *specific facts* to rebut the moving party's contentions that disclose a genuine issue of material fact. Greenhalgh v. Department of Corrections, 160 Wn. App 706, 714, 248 P.3d 150 (2011). In the case of Miller v. Likins, the plaintiff's friend was standing next to him when he was hit by a motor vehicle. Miller v. Likins, 109 Wn. App 140, 143, 34 P.3d 835 (2001). The plaintiff hired an expert who relied extensively on the eyewitness account of the friend. Id. at 149. The expert did not do an independent quantitative analysis of the accident scene and he admitted that he could not have determined the point of impact in this accident. Id. He relied on a "more probable than not" standard. Id. at 148. The court held that the expert's report lacked any factual basis because he relied solely on the testimony of a witness without any additional investigation. Id. at 149. *See also*, Elcon Construction, Inc., v. Eastern Washington University, 174 Wn.2d 157, 161, 273 P.3d 965 (2012) (holding that plaintiff did not overcome his burden of proof by merely labeling a letter as "intentional and vindictive." The court concluded that conclusory statements and speculation, without any factual basis, would not preclude a grant of summary judgment.)

In this case, the Baird Report does not have a sufficient factual basis to create an issue of material fact. He does not have personal knowledge of the defect because he did not examine the subject chair. Baird based his opinion that the chair was dangerous solely on photographs that were taken at the scene. His personal examination was of different chairs four years after the accident. He does not have any substantial facts proving that the chair was deficient.

Similarly, Baird did not do a quantitative examination of the chair. He relied completely on the testimony of witnesses, photographs, and generalizations about chairs. He relies on no competent scientific reports or other literature related to structural stability of patio chairs and the effects of the elements upon them. Therefore, the Baird Report does not present any issues of material fact because he did not do any independent analysis of the subject chair.

Courts also require affidavits to prove sufficient and competent evidence to establish material facts. Cho v. City of Seattle, 185 Wn. App 10, 12, 341 P.3d 309 (2014). The court in Cho v. City of Seattle held that summary judgment dismissal was appropriate because the expert's declaration contained only conclusory allegations. *Id.* at 20. The plaintiff offered the declaration of a human factors expert who opined that the fact that the defendant safely drove from her home to the place of plaintiff's

accident was evidence that the defendant was a careful driver. His opinion was in direct opposition to defendant's testimony that she was not paying attention when she hit the plaintiff. *Id.* at 19. *See also Greenhalgh*, 160 Wn. App at 713 (holding that plaintiff could not present affidavits from fellow inmates agreeing with his contentions because he did not have any concrete evidence substantiating his claims). In the present case, Baird's opinions completely ignore the only evidence in the record: that TPS daily inspected the chairs. Baird attempts to get around this testimony by simply adding the word "carefully" to his opinion. His opinion was that the chairs were not "carefully inspected." CP 39. Haubrich apparently argues that Baird's inclusion of the adverb "carefully" somehow creates a genuine issue of material fact precluding summary judgment. However, just like the cases cited above, adding descriptive words such as "carefully" is nothing more than providing an unsubstantiated conclusory opinion. There are no facts to justify what "carefully" means. Adding that adverb is the only way Haubrich and the Baird Report can attempt to get around the uncontroverted evidence that the chairs were inspected daily. As noted above, the Baird Report never defines what "carefully" means in terms of an industry or safety standards. Therefore, the Baird Report contains nothing more than an unsupported conclusory statement

that does not create a genuine issue of material fact. As such, the trial court was proper in granting summary judgment.

Finally, the actual reality of what happened with the patio chairs in question also further undermines the Baird Report and shows that these opinions were nothing more than conjecture. The chairs were purchased sometime in 2004 or 2005 and were in use until 2014. CP 303 and CP 304. The Baird Report states that the chairs were prone to fail because of the effects of weather upon them. However, the evidence in the record is that the chair in question in this case is the only one that is known to have broken in a similar manner. The other patio chair stored in the same manner and in the same conditions as the chair in question were used for another two years after this accident without any of them breaking. Thus, if the Baird Report were right, other chairs would have broken in a similar manner in the two years subsequent to this present accident, yet none did. This is further proof that the Baird Report is nothing but a meaningless conclusory opinion manufactured only in a vain attempt to get around summary judgment.<sup>3</sup>

**E. This Court should not consider the Baird Report as it is not admissible evidence under CR 56.**

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<sup>3</sup> Further support by the fact that this was not disclosed until after discovery cutoff and after TPS filed its motion for summary judgment.

“W]hen a motion to strike is made in conjunction with a motion for summary judgment, we review de novo.” Southwick v. Seattle Police Officer John Doe #s 1-5, 145 Wn. App. 292, 297, 186 P.3d 1089 (2008). In that case, the court noted that in analyzing CR 56(c) the court must analyze whether the evidence being presented is admissible evidence. The court noted that in that case, the declaration from the plaintiff’s expert was not admissible because it was not disclosed in accordance with the local court rules and case schedule. Id. at 301. As such, it was not error to strike the declaration used in summary judgment as the evidence was not admissible based on the discovery violations.

In this case, this Court should exclude the Baird Report because it was not timely submitted during discovery and therefore is not “admissible evidence” under CR 56(c). In this case, the TPS requested that Haubrich identify each expert he intends to call and “state the substance of the facts and opinions on which each expert identified is expected to testify.” Interrogatory No. 29 at CP 128-129. Further, Haubrich stated that he will disclose such opinions “will be identified according to the case scheduling order.” CP 129. Similarly, TPS requested copies of all reports from experts that Haubrich intended to call at trial. Request for Production No. 7 at CP 130. Again, Haubrich responded that such reports shall be provided in accordance with the case

scheduling order. CP130. Discovery cutoff in this case was September 6, 2016. The Baird Report was not provided until September 21, 2016. At the motions hearing, the trial court did consider the Baird Report and declaration, but did note that “I would, nevertheless, have stricken Mr. Baird’s report from consideration as to summary judgment.” RP 32. The trial court went on to state that Haubrich did not comply with the court’s case schedule, that there was prejudice to TPS, and that lesser sanctions would not have been appropriate. RP 32-34.<sup>4</sup>

The record is clear that Haubrich did not properly disclose the Baird Report within the timeframe ordered by the trial court. The Baird Report was provided fifteen days after the discovery cutoff in this case. The trial court found that the Haubrich’s failure to disclose this report was a conscious choice that the Haubrich made and that such a failure to disclose was prejudicial. RP 33-34. As such, on a review de novo where there is a motion to strike a declaration, this Court should not consider the Baird report because it is not admissible evidence under CR 56(c).

#### **V. RAP 18.1**

Pursuant to RAP 18.1, TPS requests that any and all statutory costs and fees that it may be entitled to as the prevailing party.

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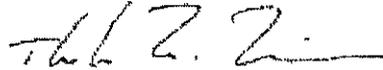
<sup>4</sup> The trial court considered the motion for summary judgment first and because the court dismissed the case it rendered the motion to strike the declaration of Baird and the motion to exclude the trial testimony of Baird moot.

## VI. CONCLUSION

In this case, the Haubrich presents no evidence that TPS violated any duty and that it had actual or constructive knowledge of any dangerous condition with regard to the patio chairs. The so called expert opinions contained in the Baird Report lack an adequate foundation or expertise to render an opinion on the structural integrity of the chair in question of the effect of the elements upon those chairs. Furthermore, the lack of foundation means that the Baird Declaration and Report are nothing more than conclusory statements not supported by facts in the case. Finally, this Court should not consider the Baird Declaration and Report as it is not admissible evidence under CR 56(e).

DATED this 15<sup>th</sup> day of March, 2017.

LAW OFFICES OF SWEENEY & DIETZLER



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Theodore M. Miller, WSBA No. 39069  
Attorney for Respondent

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY under penalty of perjury that on the 15<sup>th</sup> day of March, 2017, I sent for filing and delivery a true and correct copy of the foregoing **Respondent's Brief** by the method indicated below, and addressed to the following:

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