

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.**

Respondent

**BRIEF OF RESPONDENT
WALLACE PROPERTIES, INC.**

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2012 OCT 11 PM 2:30
COURT OF APPEALS
STATE OF WASHINGTON

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A. ASSIGNMENT OF ERROR

Respondent Wallace Properties, Inc. assigns no error to the trial court's Order Granting Defendants' Joint Motion for Summary Judgment.

1. Issues Pertaining To Appellant's Assignment Of Error

1. Is Wallace Properties, Inc. entitled to summary judgment where the Appellant (hereinafter "Plaintiff"), an invitee on property managed by Wallace Properties, does not present evidence that Wallace Properties had actual or constructive notice of the dangerous condition of a chair or evidence of negligence? *Yes.*

2. Is Wallace Properties entitled to summary judgment where Plaintiff's sole argument against the motion for summary judgment is that defendants are guilty of spoliation of evidence when, in fact, the undisputed evidence is that Wallace Properties maintained safe possession of the chair at all times that it was the property manager and the chair did not become lost until after Wallace Properties ceased being the property manager? *Yes.*

3. Assuming, arguendo, a spoliation of evidence occurred, does that relieve plaintiff from presenting evidence that defendants had notice of the chair's dangerous condition? *No.*

B. COUNTER-STATEMENT OF THE CASE

Plaintiff brings this action for personal injuries allegedly sustained on July 13, 2008 when she sat in a chair at the poolside of the Le Chateau Apartments and the chair broke, causing her to fall and hit her head. (CP 72). Defendant Wallace Properties, Inc. was the Property Manager for the Le Chateau Apartments from February 1, 2004 until February 2009. (CP 26 & 83). Defendant Property Development Corporation is alleged to be the owner of the apartment complex. Plaintiff was a tenant of the Le Chateau Apartments. (CP 26).

Wallace Properties, Inc. is not a designer or manufacturer of any products. It did not have any involvement whatsoever in the design or manufacture of the chair involved in plaintiff's accident at the Le Chateau Apartments. (CP 27)

As part of an upgrade of the Le Chateau Apartment complex, matching patio tables and chairs were purchased for the patio surrounding the swimming pool at the apartment complex. The metal tables and chairs were a common and appropriate type of outdoor poolside furniture. (CP

27). They were marketed for sale as common outdoor patio furniture by a retail seller. (CP 27). The matching tables and chairs are believed to have been purchased at Home Depot in May of 2004. (CP 27 & 42).

The pool and its patio tables and chairs were located immediately outside the cabana for the apartment complex, which is the clubhouse for the complex. As part of Wallace Properties, Inc.'s routine maintenance of the cabana, pool and poolside furniture, the chairs and tables were periodically inspected, cleaned and arranged. (CP 27). This occurred daily during the summer season when the pool was open for use. (CP 27).

The evidence is undisputed that at no time before plaintiff's accident, were Wallace Properties, Inc. or its employees aware of any defects, damage, cracks or breaks in the chair in which plaintiff sat and which collapsed on July 13, 2008. (CP 27). Further, Wallace Properties was not aware of any defects, damage, cracks or breaks in any of the chairs or tables that were purchased approximately four years earlier for use around the pool. (CP 27). Prior to plaintiff's accident, Wallace Properties, Inc. and its employees had no knowledge or reason to believe that the chair that broke under plaintiff's weight was dangerous or at risk of causing injury. (CP 27-28).

Plaintiff's deposition testimony was taken in this action on February 22, 2012. Plaintiff explained that when she sat in a swivel chair, the base of the chair directly under the chair seat broke and the back of the chair flipped backward. Her head hit the aggregate concrete foundation for a fence surrounding the pool and patio. (CP 36). There were four or five tables with approximately two similar metal swivel chairs and other non-swivel chairs around the tables at the poolside. (CP 37). Plaintiff had been to the pool area, at least, once each summer during the six or so years she had lived at the Le Chateau Apartments before the accident. (CP 34-35). She had sat in these chairs before the day of the accident and, like Wallace Properties, had never noticed any crack, break, damage or problem with any of the chairs before the accident. (CP 39-40). Also like Wallace Properties, plaintiff had no reason at the time to think the chair might be dangerous or broken. (CP 40). She testified:

Q. [D]id you see any cracks, did you see any damage to any of these types of chairs before your – your accident?

A. No.

(CP 40, lines 11-14).

During plaintiff's deposition, she acknowledged that she had no evidence that Wallace Properties, Inc. knew or had reason to know that the chair might break or be dangerous:

Q. [D]o you have any evidence that the property manager, the property management company knew or should have known that the chair you sat in might break or was dangerous before your accident?

A. I don't know.

(CP 41, lines 18-22).

Likewise, during plaintiff's deposition, she acknowledged that she had no evidence that the property owner knew or had reason to know that the chair might break or be dangerous. (CP 43).

Wallace Properties maintained safe possession of the chair during all times that it was the property manager for the Le Chateau Apartments. (CP58-59 & 84). It is undisputed that the chair did not become lost until after February 2009 when Wallace Properties ceased being the property manager. (CP 59 & 84). In February 2009, the property owner replaced Wallace Properties with a new property management company, Sherron Associates, Inc. (CP 83). At that time, the chair remained safely stored by Wallace Properties' assistant resident manager, Ron Coyle, in a locked utility room directly across from Mr. Coyle's apartment. (CR 58-59).

This is attested to by the President of Wallace Properties' Property

Management Division in the Second Declaration of Felicia Tsao (CP 83-85) and by Wallace Properties' former assistant resident manager, Ron Coyle, in the Declaration of Ron Coyle (CP 58-62), submitted by Plaintiff is apparent opposition to the defendants' joint motion for summary judgment.

Ms. Tsao testified as follows:

Wallace Properties, Inc ceased being the Property Manager for the Le Chateau Apartments in February of 2009. At that time, the apartment owner replaced Wallace Properties, Inc. with Sherron Associates, Inc. as the property manager. ...[A]t the time that Wallace Properties, Inc. ceased being the property manager, the broken chair involved in Ms. George's accident was safely retained in locked storage at the Le Chateau Apartments.

The plaintiff submitted a declaration of Ron Coyle. Mr. Coyle was employed by Wallace Properties, Inc. as the assistant resident manager at the Le Chateau Apartments. As an employee of Wallace Properties, Inc., Mr. Coyle fulfilled any legal duty to which Wallace Properties, Inc. may be held with respect to preserving the chair as potential evidence.

Wallace Properties, Inc. had no control over the chair once it ceased being the property manager for the Le Chateau Apartments. Further, Wallace Properties, Inc. had no knowledge or involvement regarding what happened to the chair after February of 2009.

(CP 83-84).

Mr. Coyle testified how he acted properly to preserve and protect the chair as an employee of Wallace Properties:

Realizing the importance of the chair, I removed the chair and put it in utility room #2, which was directly across the hallway from my unit, for safekeeping. This was a locked room with only property management employees having access. I placed a note on the chair which stated Do Not Remove.

(CP 58-59).

Mr. Coyle continued to explain that the chair was lost sometime after March 12, 2010 when Sherron Properties was the property management company:

Around the first part of 2009, I became aware that the property management company was going to change from Wallace Properties to Sherron and Associates. I sent to Connie Shyne, the property manager for Wallace Properties an email on February 6, 2009, reiterating the importance of preserving the chair and the possibility of litigation (attached as Ex. 1 is a true and correct copy of the email). Also attached is an email sent to Crystal Schroeder from **Sherron Associates dated March 12, 2009**, recapping what had occurred thus far. (Ex. 2 is a true and correct copy of the email) **At the time of this March 12, 2009 email, the chair was still located in the utility room across the hall from my unit. Shortly thereafter the chair had disappeared from the room.**

[CP 59 (Emphasis added)].

Moreover, plaintiff's counsel did not notify the Le Chateau Apartments until months later on July 22, 2009 that he was representing

plaintiff in a potential claim and requested an inspection of the chair. (CP 63). This was five months after Wallace Properties ceased being the property manager.

C. ARGUMENT

1. **There can be No Sanction against Wallace Properties for Spoliation of Evidence because the Chair was Not Lost until after Wallace Properties Ceased Being the Property Manager**

Plaintiff's **sole** argument against defendants' motions for summary judgment is that defendants are guilty of spoliation of evidence and sanctions should be levied against the guilty defendants that preclude summary judgment. However, as explained in the Counter-Statement of the Case above, spoliation sanctions against Wallace Properties are inappropriate. The undisputed evidence is that Wallace Properties did not commit spoliation. Pursuant to the undisputed testimony of Felicia Tsao and Ron Coyle (submitted by plaintiff), Wallace Properties maintained safe possession of the chair at all times that it was the property manager for the Le Chateau Apartments. (CP 58-62 & 83-84). The undisputed evidence is that the chair did not become lost until after Wallace Properties ceased being the property manager.(CP 58-62 & 83-84).

The Trial Court understood this and asked plaintiff's counsel why this did not entitle Wallace Properties to summary judgment:

THE COURT: Okay. Well, let me ask you this: Mr. Dean says my client kept the chair, my client was no longer property manager, and something happened to the chair after the new property man- -- we did everything we should have done. We kept it on the off chance that someday we'd hear from somebody. And, A, we had no notice; and, B, we hung onto the chair at least as long as we were property managers. That's your argument; right?

MR. DEAN: Correct.

THE COURT: So tell me why he's not entitled to summary judgment.

(RP 18, lines 13-24).

Plaintiff's sole basis for opposing defendants' motions for summary judgment, spoliation of evidence, does not apply to Wallace Properties. Therefore, Wallace Properties is entitled to summary judgment.

2. **Plaintiff's Opposition Fails to Address the Basis of Defendants' Motions; that Defendants had No Notice that the Chair was Dangerous**

The State Supreme Court has explained how negligence in a premises liability action is predicated upon the property owner's actual or imputed knowledge of the danger, without which there can be no liability:

Basic in the law of negligence is the tenet that the duty to use care is predicated upon **knowledge of danger**, and the care which must be used in any particular situation is in proportion to the actor's knowledge, actual or imputed, of the danger to another in the act to be performed.

This principle is an integral part of the law relating to the liability of the owners or occupants of premises.

Leek .v Tacoma Baseball Club, Inc., 38 Wn.2d 362, 365-66, 229 P.2d 329 (1951) (citations omitted. Emphasis added).

The plaintiff must establish that the defendant “knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees.”

Ford v. Red Lion Inns, 67 Wn. App. 766, 770, 840 P.2d 198 (1992). The Supreme Court explained:

Washington Law requires plaintiffs to show the landowner had actual or constructive notice of the unsafe condition. ...The notice requirement insures liability attaches only to owners once they have become or should have become aware of a dangerous situation.

Iwai v. State, 129 Wn.2d 84, 96-97, 915 P.2d 1089 (1996) (Citations omitted. Emphasis added). Accord, Ingersoll v. Debartolo, Inc., 123 Wn.2d 649, 652, 869 P.2d 1014 (1984).

The plaintiff must establish three essential elements in a premises liability case, which the courts describe with only slight variation:

Generally speaking, the possessor of land is liable for injuries to a business visitor caused by a condition encountered on the premises **only if he (a) knows or should have known of such condition** and that it involved an unreasonable risk; (b) has no reason to believe that the visitor will discover the condition or realize the risk; and (c) fails to make the condition reasonably safe or to warn the visitor so that the latter may avoid the harm.

Leek .v Tacoma Baseball Club, Inc., *supra*, 38 Wn.2d at 365-66 (citations omitted. Emphasis added). Accord Ford v. Red Lion Inns, *supra*, 67 Wn. App. at 770; Iwai v. Washington, *supra*, 129 Wn.2d at 93-94; WPI 120.07.

The plaintiff fails to present any evidence that the defendants knew or should have known of the alleged danger. No one had ever complained about the chairs or been injured by them. The defendants had no knowledge of any crack, break, damage, defect or danger involving the chair or chairs. (CP 27-28).

The plaintiff cannot establish constructive notice because the chair was only four years old, well within the presumed reasonable safe life expectancy. (CP 27). Washington's Product Liability Act, RCW 7.72.060, establishes a presumption of twelve years as the "useful safe life" of manufactured products. The chair was only one-third of this age.

Defendants' motions were based on the primary argument that defendants are entitled to summary judgment unless plaintiff presents evidence that defendants had notice that the chair was dangerous.

Tellingly, plaintiff completely ignored this altogether in her opposition to the Trial Court and again in her brief to the Appellate Court. Plaintiff presents no evidence that either defendant had any notice that the chair was dangerous. Plaintiff does not even address the issue of notice. By her silence, plaintiff concedes that she has no evidence that either defendant had notice.

Instead, plaintiff argues that since defendants failed to maintain control of the chair, their motions should be denied. (As shown above, this argument does not apply to Wallace Properties.) However, the chair has nothing to do with plaintiff's obligation to produce evidence of notice. Defendants did not move for summary judgment by denying that the chair was defective or had broken. If they were, then the loss of the chair would be a loss of evidence that might reasonably establish that the chair had a defect or had broken. For purposes of their motions, however, defendants conceded that the plaintiff was injured because the chair was defective and broke. (CP 80).

Plaintiff has a separate and distinct obligation under Washington law to produce evidence that the defendants had notice that the chair was defective and might break. The chair does not contain evidence of notice. Therefore, the loss of the chair is not material to defendants' motions. The

chair's availability would not give plaintiff the evidence of notice she needs to create a genuine issue of material fact. Therefore, plaintiff's cry of spoliation is irrelevant to the basis for defendants' motion for summary judgment.

The Trial Court recognized exactly this in repeatedly asking plaintiff's counsel during oral argument to explain how availability of the chair would provide evidence of notice:

THE COURT: So -- okay. So -- so it -- if you'd had the chair and had an expert look at it and they said it was a bad weld, what's that got to do with no- -- well, with notice to the property owner?

* * *

THE COURT: Okay. So -- so he says boy, this was one lousy weld. So how does that change whether or not they knew about it? Because I mean is their maintenance guy supposed to analyze good welds and bad welds?

* * *

THE COURT: Say -- say you got a mechanic -- an engineer who goes out and says this was a bad weld. Then what?

(RP 14, line 18 – RP 16, line 6).

In the Brief of Appellant, plaintiff correctly states that the first of five elements a party must show to establish spoliation is “(1) the destroyed evidence was relevant”. (Brief of Appellant, p. 6.) However,

the chair is not relevant evidence regarding the essential and missing evidence of notice and, therefore, not relevant to the defendants' motions for summary judgment.

In the Brief of Appellant, plaintiff also correctly notes that the appropriate remedy for spoliation requires a two prong 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." (Brief of Appellant, p. 8.) Since the missing chair is not relevant to the dispositive issue of notice and there is no evidence that anyone destroyed the chair in bad faith, any sanction should be minor. The sanction should not include denying a motion for summary judgment based on plaintiff's failure to produce evidence on an issue unrelated to the missing chair.

Plaintiff cannot hide behind the loss of the chair to avoid her failure to present the essential evidence of notice.

3. **The Plaintiff Does not Raise a Genuine Issue that the Defendants were Negligent.**

In addition to notice, plaintiff must also raise a genuine issue that the defendant "fails to exercise reasonable care to protect them against the danger". Considering the defendants' lack of notice, the plaintiff cannot establish any genuine issue of fact that the defendants failed to exercise

reasonable care. Plaintiff presents no evidence to raise a genuine issue regarding negligence by defendants.

The plaintiff cannot claim that the fact that she fell is evidence, in itself, that defendants were negligent. The case law specifically holds that this argument is erroneous. In Las v. Yellow Front Stores, Inc., 66 Wn. App. 196, 831 P.2d 744 (1992), the plaintiff sued a store at which she was shopping when five or six skillets fell from a shelf injuring her foot. The court rejected the plaintiff's argument that the fact that the skillets fell from the shelf was evidence of defendant's negligence. The Appellate Court affirmed summary judgment for the defendant. The court stated "Las continually asserts the pans could not have fallen without negligence on someone's part, but she fails to demonstrate that the pans could not have fallen without the negligence of Yellow Front Stores. It is quite easy to contemplate an accident such as this without the negligence of any party. The fact there was an accident and an injury does not necessarily mean there was negligence." Id. at 201-02.

Negligence cannot be inferred from the mere fact of an accident and injury. Brandt v. Market Basket Stores, Inc., 72 Wn. App.2d 447, 449-50, 433 P.2d 863 (1967); Merrick v. Sears Roebuck & Co., 67 Wn.2d 462, 429, 407 P.2d 960 (1965). Landowners are not the insurers of the

safety of invitees on their property. Memel v. Reimer, 85 Wn.2d 685, 689, 538 P.2d 517 (1975); Maynard v. Sisters of Providence, 72 Wn. App. 879, 844, 866 P.2d 1272 (1994).

Plaintiff argues only that the patio furniture was left outdoors, no substantive maintenance other than general cleaning was performed, and no maintenance logs or inspection checklists were kept. (CP 54). At issue is common outdoor patio furniture, not hi-tech machinery. Wallace Properties, Inc. did not use or maintain maintenance logs or inspection checklists for the patio furniture because that is neither expected nor standard practices for property managers in the State of Washington. (CP 84). No statute, code, regulation or other law obligates a property manager to do so. The apartment property owner did not ask or obligate Wallace Properties, Inc. to do so. (CP 84). The evidence is undisputed that the use and maintenance of the chair was in full compliance with the industry standards to which property managers are held in the State of Washington. (CP 84).

4. **Fredrickson v. Bertolino's Tacoma, Inc. is Directly on Point and Compels Summary Judgment.**

An Appellate Court opinion is directly on point and compels summary judgment for defendants. Fredrickson v. Bertolino's Tacoma,

Inc., 131 Wn.App. 183, 189, 127 P.3d 5 (2005) (citing Tincani, 124 Wn.2d at 139; Restatement (Second) of Torts § 343). Fredrickson involved a customer in a coffee shop who sat on a chair that gave way causing an injury. Mr. Frederickson argued that the coffee shop owner negligently furnished and maintained its premises. Id. at 187. The defendant moved for summary judgment, arguing, as do the defendants in the present appeal, that plaintiff presented no evidence that (1) defendant had actual or constructive notice the chair would collapse, and (2) that defendant had failed to exercise reasonable care to protect plaintiff. Id. at 188. Plaintiff responded that he did not have to prove notice because it was reasonably foreseeable that using only antique chairs meant that a chair would foreseeably break. Id. Summary judgment in favor of defendant was affirmed by the Court of Appeals. Id. In the present action, the argument for summary judgment is much stronger than in Fredrickson because the poolside chair was only four years old, not an antique.

D. CONCLUSION

Wallace Properties is entitled to summary judgment because plaintiff fails to raise a genuine issue of fact that Wallace Properties (1) had notice of the chair's dangerous condition and (2) was negligent. Plaintiff's failure to offer evidence of those essential elements of her case

cannot be excused by a spoliation of evidence argument that clearly does not apply to Wallace Properties and, even if it did, is irrelevant to the issue notice.

DATED: October 11, 2012.

THE LAW OFFICES OF MARK DEAN

A handwritten signature in black ink that reads "Mark C. Dean". The signature is written in a cursive style with a large, stylized "M" and "D".

Mark C. Dean, WSBA # 12897
Attorneys for Respondent
Wallace Properties, Inc.

CERTIFICATE OF SERVICE

Brigitte Edgman certifies upon penalty of perjury:

I have on this date served the foregoing document upon the following party by the following means:

TO:	BY:
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DATED: October 11, 2012.



Brigitte Edgman