

NO. 35653-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BARBARA SAYERS, APPELLANT

V.

WESLEY N. SAYERS and JEAN W. SAYERS, and the Marital Community Composed
thereof,

BRIEF OF PETITIONER

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BARBARA SAYERS as Appellant

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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PROPERTY

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COURT OF APPEALS DIVISION TWO
STATE OF WASHINGTON

BARBARA SAYERS, a
single person,

Appellant,
vs.

WESLEY N. SAYERS
and JEAN W.
SAYERS, and the
marital community
composed thereof,

Respondents.

Case No. 35653-8-II

BRIEF OF
APPELLANT

I. ASSIGNMENT(S) OF ERROR

No. 1 The trial court erred in finding no issue of material fact existed in this case when entering the order on October 20, 2006, granting the Defendant's Motion for Summary Judgment.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

No. 1

Did the trial court err when it granted the defendant's motion for summary judgment by finding that there was no genuine issue of

1 material fact after reviewing evidence regarding the placement of a bed
2 in a room which was not the Plaintiff's, but which belonged to the
3 Defendants who had actual knowledge of the Plaintiff's need to have
4 the bed against the wall in order to rise safely from a rolling chair while
5 recuperating in the Defendants' home after knee surgery, and the
6 Defendants acknowledged that the bed had been moved from the place
7 where the Plaintiff needed to have it for safety reasons and the
8 Defendant did not notify the Plaintiff, and the change of placement of
9 the bed by a few inches caused the Plaintiff to fall when rising from a
10 rolling chair braced against the bed necessitating hospitalization,
11 several surgeries and ultimately the amputation of her leg?
12

13 **III. STATEMENT OF THE CASE**

14 In March, 2002, the Plaintiff, BARBARA SAYERS had partial
15 knee replacement surgery on her right knee. (CP 2, 13). After the
16 surgery she stayed at her parents' home, the home of Defendants
17 WESLEY N. and JEAN W. SAYERS. (CP 2, 13).
18

19 During the time of her recovery Plaintiff BARBARA SAYERS
20 used her parents' bedroom to stay in and work on the computer that
21 was on the desk in that room. (CP 2, 13). BARBARA SAYERS was
22 not any longer in a wheelchair but had to use walkers and like aids such
23 as a cane, to ambulate. (CP 42, Ex. 1, 3). BARBARA SAYERS would
24 sit in an office style chair on wheels at the desk, then push the chair
25 back until it hit the side of the bed and use the support of the chair

1 against the bed which was up against the wall to brace herself before
2 standing up and exiting the office chair. (CP 42, Ex.1, 2). Defendant
3 JEAN W. SAYERS was aware that Plaintiff BARBARA SAYERS
4 used this set of physical steps to exit the office chair and safely stand
5 up while her leg was healing. (CP 42, Ex. 2).
6

7 On or about April 10, 2002, Plaintiff BARBARA SAYERS
8 went about her usual work period in her parents' bedroom but this time
9 when she pushed the office chair back into the side of the bed and she
10 attempted to stand the bed shifted, causing BARBARA SAYERS to
11 lose her balance and fall. (CP 2, 13, 42, Ex. 1). The fall caused injury
12 to BARBARA SAYERS and she was transported to the hospital. The
13 surgical site on her right knee opened up during the fall and left the
14 surgical site exposed. (CP 2, 13, 42, Ex. 1). The Plaintiff later had
15 surgeries on that same knee and ultimately her leg was amputated. (CP
16 2, 13). The Plaintiff then filed this lawsuit. (CP 2, 13).
17

18 Defendant JEAN SAYERS admitted in her responses to
19 Plaintiff's Interrogatories and Requests for Production that she had
20 moved the bed out from the wall where Plaintiff BARBARA SAYERS
21 needed it to be to safely brace against the bed to get out of the office
22 chair. (CP 42, Ex. 2). Defendant JEAN W. SAYERS was aware of
23 this, knew Plaintiff BARBARA SAYERS needed to brace the office
24 chair against the bed, which needed to be against the wall for her to
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1 safely stand up, and Defendant JEAN W. SAYERS stated that she left
2 the bed out from the wall so the floor could be cleaned and that she did
3 not push the bed against the wall on 4/10/02. (CP 42, Ex. 2).

4 The Defendants filed a Motion for Summary Judgment on July
5 11, 2006. (CP 37). The Honorable Leonard Costello heard the motion
6 on September 15, 2006. (CP 44). The court took the matter under
7 advisement and issued a letter to counsel for the parties stating the
8 court would sign an order granting summary judgment in favor of the
9 Defendants. (CP 45). The court entered an Order Granting Summary
10 Judgment in favor of the Defendants on October 20, 2006. (CP 50).

11 The Plaintiff filed this appeal on November 17, 2006. (CP 51).

12 **IV. ARGUMENT**

13 **A. SUMMARY JUDGMENT**

14 Summary Judgment is reviewed de novo. *Sjogren v. Props. Of*
15 *the Pac. N.W., L.L.C.*, 118 Wn. App. 144, 75 P.3d 592 (2003), *citing*
16 *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 813,
17 854 P.2d 1072 (1993). The reviewing court considers all facts and
18 reasonable inferences in the light most favorable to the nonmoving
19 party. *Sjogren citing Mason v. Kenyon Zero Storage*, 71 Wn. App. 5,
20 8-9, 856 P.2d 410 (1993). Absent a genuine issue as to any material
21 fact, the moving party is entitled to summary judgment as a matter of
22 law. *Sjogren citing Condor Enters., Inc., v. Boise Cascade Corp.*, 71
23 Wn.App. 48, 54, 856 P.2d 713 (1993). Summary judgment is proper
24 “only if reasonable persons could reach only one conclusion from all of
25

1 the evidence.” *Sjogren citing Hansen v. Friend*, 118 Wn.2d 476, 485,
2 824 P.2d 483 (1992).

3 **B. DUTY TO PLAINTIFF**

4 To establish a negligence claim, a plaintiff must prove four
5 basic elements:

- 6 (1) the existence of a duty,
- 7 (2) breach of that duty,
- 8 (3) resulting injury, and
- 9 (4) proximate cause.

Sjogren at 148 citing Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d
43, 48, 914 P.2d 728 (1996).

10 “A licensee includes a social guest, that is, a person who has
11 been invited but does not meet the legal definition of invitee.” *Younce*
12 *v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986). The Supreme
13 Court of Washington replaced the duty owed toward licensees from
14 willful and wanton misconduct to “a duty to exercise reasonable care
15 toward licensees where there is a known dangerous condition on the
16 property which the possessor can reasonably anticipate the licensee will
17 not discover or will fail to realize the risks involved.” *Younce at 667*
18 *citing Memel v. Reimer*, 85 Wn.2d 685, 689, 538 P.2d 517 (1975).

19
20 It is undisputed between the parties that the Plaintiff was a
21 guest, and therefore, a licensee, in the case at hand. As discussed later
22 in this brief, Defendant JEAN W. SAYERS failed to exercise
23 reasonable care toward Plaintiff BARBARA SAYERS, a licensee,
24 where Defendant JEAN W. SAYERS could reasonably anticipate that
25

1 Plaintiff BARBARA SAYERS would fail to discover, and, therefore,
2 breached her duty to the Plaintiff which caused injury to the Plaintiff.

3 **C. OPEN AND OBVIOUS DANGERS**

4 In some cases, a possessor must even warn a guest about
5 dangers that are open and obvious. *Sjogren at 148-49 citing Frobige v.*
6 *Gordon*, 124 Wn.2d 732, 735, 881 P.2d 226 (1994), *Tincani v. Inland*
7 *Empire Zoological Soc'y*, 124 Wn.2d 121, 139, 875 P.2d 621 (1994);
8 RESTATEMENT (SECOND) OF TORTS § 343A (1965).

9
10 *Tincani* differs factually from this case in that it involved a
11 landlord's duty to a guest of a tenant and the present case deals with the
12 parents' duty to the guest daughter staying in her parent's bedroom in
13 their home while she recuperates from knee surgery. Defendants,
14 however, argued at the trial court level that the alleged dangerous
15 condition in the present case, as was argued in *Tincani*, was of a nature
16 that was "equally open and apparent to the plaintiff when she entered
17 the room." (RP 6-7). Even if the placement of the bed in this case,
18 which the Plaintiff argued created a dangerous condition, (RP 6-8), was
19 an "equally open and apparent" condition, if the possessor of the
20 property "has reason to expect that the invitee's attention may be
21 distracted, so that he (or she) will not discover what is obvious, or will
22 forget what he (or she) has discovered, or fail to protect . . . against it, .
23 . ." the Defendant would have a duty to warn the Plaintiff about the
24
25

1 condition or face liability. *Sjogren at 149 citing* RESTATEMENT
2 (SECOND) OF TORTS, § 343A.

3 Distraction of the Plaintiff to the placement of the bed was
4 proffered to the trial court at the time of the Defendants' Summary
5 Judgment hearing. (CP 42, Ex. 3, CP 35, Ex. 3). This can also be
6 illustrated by the arguments made by the Defendants in their Motion for
7 Summary Judgment where it was acknowledged by Defendants'
8 counsel that the placement of this bed was only 2-3 inches from where
9 the bed had been against the wall where the Plaintiff safely braced
10 against it in the weeks prior to the injury in this case. (RP 10).

11 Because the placement of the bed in this particular case created
12 a dangerous condition that the Plaintiff would not have noticed as she
13 was distracted entering a non-familiar room and negotiating around
14 other pieces of furniture to get to the desk, and the placement of the bed
15 only differed by two to three inches but that difference was the reason
16 the Plaintiff rolling her chair back to the bed was no longer a safe
17 method to employ in rising from the chair, the Court should find that
18 the Defendants owed a duty to the Plaintiff to warn her about the
19 different placement of the bed, and in failing to do so, breached their
20 duty to the Plaintiff.
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1 **D. DANGEROUS CONDITION**

2 With respect to the question of whether the placement of the
3 bed in the present case was, in fact, a dangerous condition, the trial
4 court made no specific findings. If we assume, however, that the trial
5 court ordering that “no genuine issue of material fact” existed took into
6 consideration that the placement of the bed did not constitute a
7 dangerous condition, the Plaintiff argues that this finding should have
8 been left to the jury, and in fact, the disagreement between the Plaintiff
9 and Defendants over whether the placement of the bed created a
10 dangerous condition, is a dispute of a material fact which precludes
11 summary judgment.
12

13 In *Sjogren* , the order granting Summary Judgment in favor of
14 the Respondent was found to be improper. The court held in *Sjogren*:

15 In short, it would be error here, as it was in *Tincani*, to instruct
16 that the landlord never has a duty to warn about open and apparent
17 dangers. And the court’s summary judgment in favor of Properties had
18 the same effect; it was a ruling that Properties had no duty under any
19 circumstances to warn of or correct the obvious danger.
20 *Sjogren at 150.*

21 In *Sjogren* the plaintiff left her daughter’s apartment and went
22 down a darkened stairway, one that was not dark when she first arrived.
23 The plaintiff had been there more than ten times before, during the day
24 and night, but at the time in question the stairway lights were not
25 working. When the plaintiff got halfway down the stairs her daughter
 closed the apartment door which cut out any light coming from the

1 apartment and the stairway became “pitch dark”. *Sjogren at 147*. The
2 plaintiff proceeded slowly down the stairs holding the hand railing, but
3 misjudged a step and a landing and fell, catching her foot in the
4 opening between two steps and fractured her leg. *Sjogren at 147*.

5 *Sjogren* sued the apartment owner and the defendant moved for
6 summary judgment arguing that it was “not liable for the darkened
7 stairway because the stairs were an obvious hazard.” *Sjogren at 147*.
8 The trial court agreed and granted the defendant’s motion.
9

10 In the present case the Defendants argued at the trial court level
11 that the placement of the bed was open and obvious and alternatively,
12 not a dangerous condition. (RP 6). But in applying *Sjogren*, the
13 Plaintiff in the present case should have the benefit of a fact finder’s
14 decision over whether she was actually aware of the different
15 placement of the bed and what risk that caused for her in this particular
16 case just as the court found in *Sjogren* that the Plaintiff there may have
17 not been aware that the lights on the stairway were not operating as she
18 entered the stairway when it was daylight. *Sjogren at 149*.
19

20 The court specifically found that by the trial court ruling that the
21 darkened stairway was an “open and obvious” condition, it erred, and
22 that, “. . . an issue of material fact exists as to whether *Sjogren*
23 knowingly exposed herself to the darkened stairway condition.”
24 *Sjogren at 149*.
25

1 As in *Sjogren*, the Plaintiff in the present case presented a
2 genuine issue of material fact; whether or not she was aware, or should
3 have been aware, of the placement of the bed. Alternatively, even if
4 the placement of the bed was an “open and obvious” condition there is
5 an issue of material fact whether the Defendant had reason to expect
6 that the Plaintiff’s attention might be distracted and that the Plaintiff
7 would not discover that the placement of the bed had changed and,
8 therefore, whether the Defendants had a duty to warn the Plaintiff of
9 the movement of the bed.
10

11 The trial court erred in granting summary judgment in favor of
12 the Defendants because, like *Sjogren*, the effect of that ruling is to state,
13 as a matter of law, that all reasonable minds could not differ as to
14 finding that the placement of the bed was not dangerous under the facts
15 of this case, or that if the placement of the bed was open and apparent
16 that the Plaintiff could not have been distracted or that she could not
17 have failed to discover the bed had been moved.
18

19 Because the evidence presented in this case clearly showed,
20 through photographs and sworn declarations that there is a dispute
21 between the Plaintiff and Defendant as to these factual matters,
22 summary judgment was improper and the Court of Appeals should
23 reverse the trial court’s ruling.
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V. CONCLUSION

Because the trial court granted the Respondent's Motion for Summary Judgment when an issue of material fact existed as to the whether a dangerous condition was created or not created by the Defendant(s), and if the condition was "open and obvious" whether the Plaintiff was distracted and failed to notice the dangerous condition requiring the Defendants to warn the Plaintiff of the condition, and such findings being the duty of the jury or fact finder in this case, the Court of Appeals should vacate the Order Granting Defendant's Motion for Summary Judgment and allow this case to proceed in the Superior Court.

RESPECTFULLY SUBMITTED THIS 8 DAY of March, 2007.

BISHOP, CUNNINGHAM & ANDREWS P.S., INC.



SANDRA C. LaCELLE WSBA#29654
Counsel for the Appellant

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY YN
DEPUTY

COURT OF APPEALS DIVISION TWO
STATE OF WASHINGTON

BARBARA SAYERS, a
single person,

Case No. 35653-8-II

Appellant,

DECLARATION OF
SERVICE

vs.

WESLEY N. SAYERS
and JEAN W.
SAYERS, and the
marital community
composed thereof,

Respondents.

KAYLEIGH P. LaCELLE declares as follows:

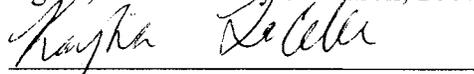
- 1. I am over the age of 18 and competent to make this declaration;
- 2. On March 9, 2007, I personally delivered to the hands of

Diana Scamporrina

at the law office of Beth Jensen, located at 1021 Regents Blvd.,
Fircrest, Washington, Counsel for the Respondents, a true and accurate
copy of the AMENDED TRANSCRIPTION AND STATEMENT OF

1 ARRANGEMENTS and the BRIEF OF APPELLANT in the above
2 referenced case.

3
4 Declared under penalty of perjury under the laws of the State of
5 Washington at Fircrest, Washington, this ninth day of March, 2007.

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7 Kayleigh P. LaCelle
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