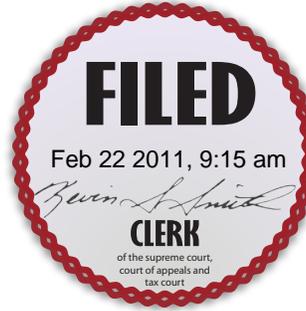


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE**  
**COURT OF APPEALS OF INDIANA**

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LEO MACHINE & TOOL, INC., DAVID L. SMITH, )  
BRIAN K. REASER and ELMOTEC STATOMAT, INC., )

Appellants-Plaintiffs, )

vs. )

GARY M. GERARDOT, )

Appellee-Defendant. )

No. 02A03-1006-PL-365

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APPEAL FROM THE ALLEN SUPERIOR COURT  
The Honorable David J. Avery, Judge  
Cause No. 02D01-0804-PL-180

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February 22, 2011

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellants-Plaintiffs, Leo Machine & Tool, Inc. (Leo Machine & Tool), David L. Smith (Smith), Brian K. Reaser (Reaser), and Elmotec Statomat, Inc. (Elmotec) (collectively, the Appellants), appeal the trial court's summary judgment that Appellee-Defendant, Gary M. Gerardot (Gerardot), had no notice of a defect in the electrical wiring of the premises and thus did not owe the Appellants a duty to maintain and repair the premises' electrical system. In addition, the Appellants appeal the trial court's denial of its motions for sanctions for spoliation of evidence against Gerardot.

We affirm.

## ISSUES

The Appellants raise two issues on appeal, which we restate as:

- (1) Whether the trial court properly concluded that the designated evidence established that Gerardot had no knowledge of any latent defect or problem with the electrical wiring at the premises which the Appellants allege may have caused the fire; and
- (2) Whether the trial court properly denied the Appellants' motion for sanctions for spoliation of evidence by determining that the Appellants failed to meet their burden of proof that Gerardot's insurance company had intentionally destroyed relevant evidence which was under its control.

## FACTS AND PROCEDURAL HISTORY

Leo Machine & Tool was created by Smith and Reaser in 1998. In 2001, Smith and Reaser decided to move their operations into a building owned by Gerardot at 13130 U.S. 27 South in Fort Wayne, Indiana. The lease originally executed between Gerardot as landlord and Leo Machine & Tool, Smith, and Reaser as tenants expired in March of 2006. On August 1, 2006, the same respective parties entered into a second real estate lease agreement for the premises, which provided in pertinent part:

### Section 4. TENANT ACCEPTS PREMISES

4.01 Tenant has inspected the Premises and is satisfied with its physical condition. Except as otherwise specified in this Lease:

- (a) Tenant's taking possession of the Premises shall be conclusive evidence of receipt thereof in good order and repair; and
- (b) Tenant acknowledges that neither Landlord nor any of Landlord's agents has made any representation as to the condition or state of repair of the Premises or made any agreements or promises to repair or improve it either before or after execution of this Lease.

### Section 5. REPAIRS AND MAINTENANCE

#### 5.01 Landlord's Obligation

Landlord agrees, at Landlord's sole expense, to keep in good repair and working order (except to the extent damaged by Tenant's fault):

- (a) all structural portions of the Premises, including (without limitation) foundations, walls, floors, stairways, roof and exterior portions hereof; and
- (b) all electrical, gas, water, central heating, central air conditioning, and plumbing equipment and appliances, and any other equipment appliances furnished by Landlord under this Lease.

(Appellee's App. pp. 56-57).

The lease expired on March 30, 2007. However, Leo Machine & Tool remained on the premises and the parties agreed to operate on a month-to-month lease applying the terms of the expired lease agreement. Elmotec used a small office on the second floor of Gerardot's building and coordinated the joint projects worked on by Leo Machine & Tool and Elmotec.

Prior to moving into the premises in 2001, Leo Machine & Tool inspected the building but did not request an electrician to inspect the wiring. In fact, other than an inspection of the heat pump which ceased to operate in the summer of 2005, no inspection of the electrical wiring ever took place. With Gerardot's approval, Leo Machine & Tool brought out a service repairman and, at Leo Machine & Tool's choice, the heat pump was disconnected. Despite Leo Machine & Tool's request to get the heat pump repaired, Gerardot never did so. On August 27, 2007, a fire destroyed the leased premises.

On March 4, 2008, Leo Machine & Tool, Smith and Reaser filed a complaint against Gerardot, alleging (1) a breach of the lease agreement by failing to make repairs and perform maintenance; (2) breach of contract for failure to pay damages; (3) negligence for lack of maintenance and repair; (4) negligence for failure to properly zone the premises; (5) negligence for failure to furnish reasonable fire detection and firefighting equipment; and (6) a request for attorney fees. That same day, Elmotec also filed a complaint against Gerardot, claiming (1) negligence for lack of maintenance and repair; (2) negligence for failure to properly zone the premises; and (3) negligence for failure to furnish reasonable fire detection and firefighting equipment. On April 23, 2008, Gerardot filed his answer to Leo Machine &

Tool, Smith, and Reaser's complaint, together with his counterclaim claiming that Leo Machine & Tool's negligence caused the fire that destroyed the premises. On May 12, 2008, Gerardot filed his answer to Elmotec's complaint.

On September 25, 2009, Leo Machine & Tool filed a motion seeking sanctions against Gerardot for spoliation of the evidence. On November 23, 2009, Gerardot replied to the motion for sanctions. On November 25, 2009, the trial court conducted a hearing on this motion which the court subsequently denied on November 30, 2009.

On February 1, 2010, the trial court granted Gerardot's motion for summary judgment on all of the Appellants' allegations, with the exception of their negligence claims for Gerardot's failure to have the property properly zoned. On April 14, 2010, Gerardot moved for summary judgment on this remaining claim. Two days later, Leo Machine & Tool, Smith, and Reaser filed their motion for summary judgment on Gerardot's counterclaim of negligence. On May 27, 2010, the Appellants and Gerardot filed a joint motion to grant the pending motions for summary judgment, thus ensuring that this appeal could proceed. On May 28, 2010, the trial court issued its summary judgment in favor of Gerardot and against the Appellants. In addition, the trial court granted summary judgment for Leo Machine & Tool, Smith, and Reaser on Gerardot's counterclaim.

The Appellants now appeal. Additional facts will be provided as necessary.

#### DISCUSSION AND DECISION

The Appellants present this court with a two-fold argument. First, they contend that the trial court erred when it granted summary judgment to Gerardot concluding that he had

no notice of a defect in the electrical wiring at the premises, and therefore did not owe the Appellants a duty to maintain and repair the premises' electrical wiring. Secondly, the Appellants claim that the trial court erred when it denied their motion for sanctions against Gerardot on its claim of spoliation of evidence.

### I. *Standard of Review*

Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C). In reviewing a trial court's ruling on summary judgment, this court stands in the shoes of the trial court, applying the same standards in deciding whether to affirm or reverse summary judgment. *First Farmers Bank & Trust Co. v. Whorley*, 981 N.E.2d 604, 607 (Ind. Ct. App. 2008), *trans. denied*. Thus, on appeal, we must determine whether there is a genuine issue of material fact and whether the trial court has correctly applied the law. *Id.* at 607-08. In doing so, we consider all of the designated evidence in the light most favorable to the non-moving party. *Id.* at 608. The party appealing the grant of summary judgment has the burden of persuading this court that the trial court's ruling was improper. *Id.* When the defendant is the moving party, the defendant must show that the undisputed facts negate at least one element of the plaintiff's cause of action or that the defendant has a factually unchallenged affirmative defense that bars the plaintiff's claim. *Id.* Accordingly, the grant of summary judgment must be reversed if the record discloses an incorrect application of the law to the facts. *Id.*

We observe that in the present case, the trial court entered detailed and helpful findings of fact and conclusions of law in support of its judgment. Special findings are not required in summary judgment proceedings and are not binding on appeal. *Id.* However, such findings offer this court valuable insight into the trial court's rationale for its review and facilitate appellate review. *Id.*

## II. *Duty to Repair and Maintain*

Focusing on the lease agreement, the Appellants argue that Gerardot, as the landlord, had incurred a duty to keep the premises in good repair and working order. Therefore, because Gerardot failed to take any action after the Appellants discussed their concerns with the electrical systems of the heat pumps, Gerardot breached his duty under the lease.

At common law, landlord and tenant relations were governed by ordinary principles of contract law: the letting of the premises was treated as a sale of a chattel interest in the property. *Dickison v. Hargitt*, 611 N.E.2d 691, 694 (Ind. Ct. App. 1993). A tenant who had the opportunity to inspect the premises before accepting them was considered to have accepted the premises in their existing condition, and having done so, usually could not later complain about a defect. *Id.* This policy, known as “*caveat lessee*,” or “let the lessee beware,” has been adopted in Indiana and has been summarized as follows: a landlord who gives a tenant full control and possession of the leased property generally will not be liable for personal injuries sustained by the tenant or other persons lawfully upon the leased property. *Id.*

Here, the designated evidence reflects that prior to moving into the premises in 2001, Leo Machine & Tool inspected the building. Furthermore, Section 4 of the lease agreement establishes that “taking possession of the Premises shall be conclusive evidence of receipt thereof in good order and repair.” As such, pursuant to the general rule of *caveat lessee*, Gerardot is not liable for any damages caused by the condition of the building.

Nevertheless, the Appellants now claim that there is a genuine issue of material fact that precludes the entry of summary judgment because Gerardot contractually agreed to make repairs and keep the premises in working order but failed to do so. In support of this argument, the Appellants refer to *Childress v. Bowers*, 546 N.E.2d 1221, 1223 (Ind. 1989), where our supreme court adopted the Restatement (Second) of Torts § 357 (1965), stating that a landlord incurs liability for conditions of disrepair existing before or arising after the tenant takes possession of the premises if (a) the landlord contracted in the lease or otherwise to keep the land in repair, and (b) the disrepair created an unreasonable risk to persons upon the land which the performance of the agreement would have prevented, and (c) the landlord fails to exercise reasonable care to perform his contract.

Turning to the designated evidence before us, it is undisputed that Gerardot incurred a contractual duty to keep the premises in good repair and working order.<sup>1</sup> With respect to the disrepair, the evidence indicates that during the summer of 2005, one of the building’s heat pumps, which blows both hot and cold air, ceased working. With Gerardot’s approval, Leo

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<sup>1</sup> In their appellate brief, the Appellants also refer to Gerardot’s duty to inspect the premises. Our review of the lease agreement indicates that Gerardot only incurred a duty to repair and keep the premises in working order; instead, the duty to inspect was incurred by Leo Machine & Tool.

Machine & Tool brought out a service repairman. The repair person stated that “the motor in that particular unit had a dead short, a short to ground, so when you tried to turn that air conditioning unit on, it would immediately blow the breaker.” (Appellant’s App. pp. 260-61). At Leo Machine & Tool’s choice, the heat pump was disconnected. Despite its request to have the heat pump repaired, Gerardot never did so. Accordingly, the evidence reflects that Gerardot was put on notice that the heat pump’s wiring was defective.

However, even though the heat pump remained in disrepair, there is no evidence that this created an unreasonable risk. In their appellate brief, the Appellants appear to suggest that the electrical wiring of the heat pump was the source of the fire. An investigation of the cause of the fire was undertaken by Daryl W. Gordon (Gordon), Senior Fire and Explosion Investigator for Midwest Forensic Services, Inc. (Midwest). His overall conclusion

is that the point of the fire origin could not then or now be established based on any physical evidence. Further, the source of the heat of fire ignition cannot be established nor is it possible with any degree of scientific evidence to identify the material first ignited by that heat source. Consequently, the origin and cause for this fire are undeterminable and remain unknown.

(Appellee’s App. p. 83). In addition, Leo Machine & Tool’s insurance carrier, Westfield Insurance Companies, retained the services of Steve Weddington (Weddington) of Donan Engineering Company, Inc. to help determine the cause of the fire. Weddington reached the following conclusion:

Based on information from [Smith], Mr. Knapke, and the phones from the Fire Chief and Mr. Shanabarger, the area of origin is within the west exterior wall in proximity to the exterior air conditioning units. The fact that the fire occurred within the wall indicates that this is not a tenant-related fire. The point of origin and the conclusive cause of the fire cannot be determined due to the demolition of the structure prior to the study. The only known ignition

source within the area of origin is electrical, which would be a component of the structure. The most plausible scenario for the fire is an electrical event occurring within the west exterior wall that resulted in the ignition of surrounding combustibles. This is an undetermined fire.

(Appellant's App. p. 240).<sup>2</sup>

Because there is no designated evidence before us indicating that the malfunctioning electrical wiring of the heat pump was the source of the fire, we cannot conclude that the neglected disrepair amounted to an unreasonable risk, sufficient to incur liability on Gerardot's part. As a result, we find that the trial court properly entered summary judgment in favor of Gerardot.

### III. *Spoliation of Evidence*

Next, the Appellants contend that the destruction of the electrical panel while in possession of an agent of Gerardot's insurance carrier constituted spoliation of evidence under Indiana law and therefore the Appellants were entitled to an evidentiary inference against Gerardot. The record reflects that subsequent to the fire of the premises on August 27, 2007, Smith removed the electrical panel which supplied power to the heat pumps from the scarred premises. On October 5, 2007, Smith returned the electrical panel to the fire scene for a meeting with the fire investigators hired by Leo Machine & Tool's insurance company and Gerardot's insurance carrier. The panel was photographed but not assembled.

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<sup>2</sup> In their appellate brief, the Appellants also rely on the findings of the following experts: Keith Witwer, Kevin Leech, Al Lester, and Tim Blauvelt. However, as pointed out by Gerardot, the affidavits of these experts were not designated within the time for filing a response to the motion for summary judgment and thus were stricken by a trial court's order of February 1, 2010. As such, these affidavits are not properly before us and we cannot consider them.

During this meeting, Weddington, the fire investigator hired by Leo Machine & Tool's insurance company, noted that there was no evidence of fire damage to the panel or readily visible unusual electrical activity to the panel. In addition, the report states that it appeared that the breakers to the units were in the tripped position. At the close of the meeting, the panel was placed in possession of Midwest, Gerardot's insurance carrier's agent. At some point following the meeting, Midwest issued a report opining that the cause of the fire was undeterminable. On February 11, 2008, prior to the initiation of the litigation, Gerardot's insurance company authorized its agent to dispose of the electrical panel. After learning of the destruction of the panel, the Appellants filed a motion for sanctions against Gerardot for spoliation of the evidence.

Spoliation of evidence is the intentional destruction, mutilation, alteration, or concealment of evidence. *Glotzbach v. Froman*, 854 N.E.2d 337, 338 (Ind. 2006). If spoliation **by a party to a lawsuit** is proved, the jury may infer that the missing evidence was unfavorable to that party. *Id.* (emphasis added). We note that while the Appellants filed a suit against Gerardot for spoliation of evidence; they did not file a third-party claim against Gerardot's insurance carrier for destruction of evidence. The record is devoid of any evidence establishing that Gerardot ever had possession of the electrical panel or ordered its destruction. As such, the Appellants' claim against Gerardot fails.

Nevertheless, even if the spoliation claim was filed against an appropriate party and was properly before us, it would still be unsuccessful. The designated evidence clearly reflects that all parties had access to the electrical panel prior to its destruction. Specifically,

although Smith had taken possession of the panel immediately after the fire department had released the premises, approximately five weeks later he brought the electrical panel to a meeting where all parties were present. As such, the fire investigators hired by Leo Machine & Tool's insurance company and Gerardot's insurance carrier both had access to the panel. In his report, Weddington, the investigator employed by Leo Machine & Tool's insurance carrier, noted that he had access to all evidence at the scene and based thereon he concluded that the source of the fire was indeterminable. At the close of the meeting, Gerardot's insurance company took possession of the panel. The investigator hired by Gerardot's insurance carrier concurred with Weddington's conclusion that the origin of the fire could not be established. Based on this evidence, it is undisputed that both parties' investigators had access to the electrical panel when drafting their findings and prior to its destruction. At the same time, we note that no request was ever made to safeguard the electrical panel. Therefore, we cannot say that Gerardot's insurance carrier intentionally destroyed or concealed the electrical panel. We affirm the trial court.

#### CONCLUSION

Based on the foregoing, we conclude that the trial court properly granted summary judgment in favor of Gerardot.

Affirmed.

ROBB, C.J., and BROWN, J., concur.