

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

PATRICK J. ALBANESE,

Plaintiff,

vs.

KMART CORPORATION and MARTHA
STEWART LIVING OMNIMEDIA, INC.,

Defendants.

KMART CORPORATION and MARTHA
STEWART LIVING OMNIMEDIA, INC.,

Third-Party Plaintiffs,

vs.

ROBERT AND MARY DOPF,

Third-Party Defendants.

NO. 4:08-cv-503

**THIRD PARTY COMPLAINT AND
JURY DEMAND**

Third-Party Plaintiffs Kmart Corporation ("Kmart") and Martha Stewart Living Omnimedia, Inc. ("MSLO") for their Third-Party Complaint and Jury Demand against Robert and Mary Dopf state:

JURISDICTION AND VENUE

1. Kmart is a Michigan corporation and is qualified and licensed to transact business in the state of Iowa.
2. MSLO is a Delaware corporation and is qualified and licensed to transact business in the state of Iowa.
3. Third-Party Defendants Robert and Mary Dopf ("the Dopfs") are citizens of and reside in Polk County, Iowa, and are husband and wife.

4. As there is diversity between the parties, and because the Plaintiff Patrick J. Albanese's claims for medical and compensatory damages exceed \$75,000, jurisdiction of the parties and subject matter is appropriate under 28 U.S.C. § 1332.

FACTS

5. Upon information and belief, the Dopfs purchased an outdoor patio lounge chair [hereafter "the subject chair"] from Kmart in Urbandale, Iowa, sometime in 2003-2004.

6. June 17, 2008, the Dopfs invited to or permitted Plaintiff Albanese on their home premises.

7. At some time on June 17, 2008, Plaintiff Albanese, with the Dopfs' implied or express permission, used the subject chair and was injured.

8. November 17, 2008, Plaintiff Albanese filed an action against Kmart and MSLO alleging the Defendants are strictly liable for an alleged defective design of the subject chair, negligence in an alleged failure to warn of said defective condition, negligence in an alleged failure to inspect the chair, negligence in designing the chair, and breach of implied warranty of merchantability.

COUNT I-NEGLIGENCE

9. The Dopfs were in custody and control of the subject chair before and at the time of Plaintiff Albanese's injury.

10. The Dopfs, jointly and/or individually, were negligent as follows:

a. Failing to inspect the subject chair to discover an unreasonably dangerous condition to a user;

b. Failing to maintain and repair the subject chair in a reasonably safe condition, including tightening all screws, bolts, and fasteners on the subject chair prior to Plaintiff Albanese's use;

c. Failing to warn Plaintiff Albanese of the condition of the subject chair which the Dopfs knew or reasonably should have known presented an unreasonable risk of injury to a user.

11. The Dopfs' negligence was a proximate cause of injury and damages to Plaintiff Albanese.

12. If Plaintiff Albanese is entitled to recover damages from Kmart and MSLO, then Kmart and MSLO are entitled to contribution from Third-Party Defendants Robert and Mary Dopf as concurrent tortfeasors in an amount or percentage supported by Iowa common law and/or Iowa Code Chapter 668.

WHEREFORE, Third-Party Plaintiffs Kmart and MSLO respectfully request judgment against Third-Party Defendants Robert and Mary Dopf for contribution in an amount of or percentage as supported by Iowa common law and/or Iowa Code Chapter 668 plus the costs of this action.

JURY DEMAND

Defendants and Third-Party Plaintiffs, Kmart and MSLO request a trial by jury on all issues tried in the above case.

/s/Scott E. McLeod
SCOTT E. McLEOD, AT0005182
AMY L. REASNER, AT0006390
of
LYNCH DALLAS, P.C.
526 Second Avenue SE
P.O. Box 2457
Cedar Rapids, Iowa 52406-2457
Telephone: (319) 365-9101
Facsimile: (319) 866-9721
Email: smcleod@lynchdallas.com
areasner@lynchdallas.com

ATTORNEYS FOR DEFENDANTS
K-MART CORPORATION AND
MARTHA STEWART LIVING OMNIMEDIA, INC.