

75161-1

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Court of Appeals
Division I
State of Washington
No. 75161-1

75161-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Diana Painter, an individual,

Appellant,

v.

Patricia L. Sullivan and “John Doe” Sullivan, husband and wife and the
marital community composed thereof

Respondents.

BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant Diana Painter appeals summary judgment dismissal of her claim alleging her landlord negligently maintained unsafe premises. Ms. Painter turned her ankle and fractured her fibula when she stepped on a mole hill. The mole hill was located on a walkway and concealed by tall grass. Patricia Sullivan, her landlord, neglected to maintain this well-traveled walkway.

Respondent argued to the trial court that mole hills are, broadly speaking, open and obvious conditions attendant to rural property. She also argued the specific mole hill causing injury was concealed and therefore an unknown dangerous condition she had no duty to make safe. She also argued the condition could only be concealed or open and obvious because if she knew the condition was unsafe, then Ms. Painter must have as well. In either case, there is no duty to address the grass concealing the mole hills. The trial court ruled without offering analysis, but the ruling defies precedent and is in error.

The Supreme Court has ruled on similar facts that the duty to remedy unsafe conditions does not require landowner notice of a specific instance of a generally dangerous condition. Nor, the Court held, does knowledge of that danger by an invitee insulate a landowner from liability

when, as in this case, a landowner should expect an invitee to take the risk of injury by travelling on the unsafe pathway. This authority is controlling, and the trial court's summary judgment dismissal should be reversed.

II. ASSIGNMENT OF ERROR

The superior court erred in entering its *Order Granting Defendant's Motion for Summary Judgment of Dismissal*. The superior court erred in ruling that Respondent did not owe her tenant a duty to maintain reasonably safe common areas when the unsafe condition was known to the landlord and a reasonable jury could conclude that tenants would use the only pathway available to them despite the risk of injury.

III. ISSUE

Does Washington law require a landlord to safely maintain a pathway, with no alternative route, that contains mole hills concealed by tall grass?

IV. STATEMENT OF THE CASE

The facts pertinent to this appeal are both brief and undisputed. Appellant Diana Painter rented one unit in a duplex owned by respondent Patricia Sullivan. Clerk's Papers (CP) 27. The property, in rural Enumclaw, Washington, appealed to Ms. Painter because it included a corral in which she could house her two horses. CP 28. She watered the

horses by turning on a spigot, attached to a hose, which filled a water trough in the corral. CP 34.

The pathway from the water trough to the spigot contained mole hills and tall grass. CP 37. The balance of the pasture did as well, but the grass was short and the mole hills visible. *Id.* On July 26, 2012, Ms. Painter stepped on one of the mole hills, turned her ankle, and broke her fibula. CP 36. Ms. Painter filed a lawsuit alleging the grass on the walkway should have been cut, but the case was dismissed on summary judgment. CP 85-86. Ms. Painter timely filed this appeal. CP 87-91.

V. ARGUMENT

Patricia Sullivan rented property to Diana Painter that included a barn for horses. The horses on Ms. Sullivan's land were given water from a spigot located near the trough out of which they drank. As owner, Ms. Sullivan was aware of this configuration, and was aware that her tenant, Ms. Painter, had only one way to water her horses: walk on the path from the spigot to the trough. Ms. Sullivan was aware that her property commonly suffered mole hills which disturbed the ground creating uneven surfaces. She was also aware that the pathway from the spigot to the trough was covered in high grass, concealing the mole hills and creating a dangerous condition. Finally, she was aware that her tenants had no

choice but to use this pathway to water their horses. Under these facts, Ms. Sullivan owed a duty to Ms. Painter and a jury should decide whether that duty was breached.

A. This Appeal Presents Questions of Law Reviewed De Novo

An appellate court reviews a superior court's summary judgment order de novo. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517 (2009). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). In this case, the facts permit the inference that Ms. Sullivan, the landlord, was aware that the pathway from the water spigot to the trough was unsafe and would be traversed by her tenant notwithstanding risk of injury. This satisfies criteria in Washington courts for a premises liability case

B. Patricia Sullivan Owed a Duty to her Tenant to Exercise Reasonable Care to Safely Maintain a Pathway She Knew Would Be Regularly Used

Washington law imposes liability on landlords for physical harm caused to tenants by a condition on the land if a landlord:

(a) 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, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

McDonald v. Cove to Clover, 180 Wn. App. 1, 4-5 (2014) (citing Restatement (Second) of Torts §§ 343 and 343A (1965))

Respondent argued that liability could not be imposed because the Plaintiff could not have it both ways. She argued that either the dangerous condition was unknown to the landowner or open and apparent to the tenant and one of those two facts prevented liability. This misstates the law. A landlord may be unaware of a specific risk and a tenant may be aware of that risk, but liability may still be imposed on the landlord. And it is so in this case. Two cases decide the outcome of this one. *Iwai v. State*, 129 Wn.2d 84 (1996) and *Mucsi v. Graoch Assocs. Ltd. P'ship No. 12*, 144 Wn.2d 847 (2001).

(1) Ms. Painter's Knowledge that the Pathway was Unsafe Because the Tall Grass Concealed Mole Hills Does Not Eliminate Her Landlord's Duty to Remedy that Unsafe Condition

In *Iwai*, the Supreme Court ruled a landowner owed a duty to a plaintiff who slipped on snow and ice in a parking lot in spite of the fact that she was aware of that condition. 144 Wn.2d at 87-89. The court held that even though the Plaintiff knew about the dangerous pathway, and

could anticipate the risk of traversing it, a duty to protect against that danger still exists when the landowner “has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable [person] in [that] position the advantages of doing so would outweigh the apparent risk.” *Id.* at 94 (quoting RESTATEMENT (SECOND) OF TORTS § 343A cmt. f (1965)). In this case, as in *Iwai*, the dangerous condition existed on the only pathway available to the invitee. Ms. Iwai had no option but to walk through the parking lot; Ms. Painter had no option but to walk through tall grass covering mole hills to bring water to her horses.

Musci v. Graoch Assocs. P’ship #12 is an even more compelling case supporting reversal. In this case, the Supreme Court reversed the Court of Appeals applying *Iwai* to a case in which the plaintiff invitee had more than one option to leave a common area at an apartment complex. One route was safe and cleared of snow but the other, a less commonly used side exit, was covered with snow and ice. 144 Wn.2d. at 853. Notwithstanding the fact that Mr. Musci observed the snow and ice on the pathway he traversed, before he traversed it, the Court held that his actual knowledge did not foreclose landowner liability. *Id.* at 860; 863. As in *Iwai*, the reason why was that the landowner could reasonably anticipate

an invitee would try to negotiate those risks – even when other routes were available. *Id.*

Washington law holds that an invitee may be aware of an unsafe condition, but when a landowner has reason to think the invitee will nevertheless travel upon the unsafe pathway the landowner has a duty to exercise reasonable care to protect an invitee from that danger. In this case, Ms. Painter had no choice but to walk through tall grass concealing dangerous mole hills. Ms. Sullivan, whose land was an appealing rental property because it housed horses, was aware of Ms. Painter’s need to water her horses and that there was no way to do so without walking on an unsafe pathway. She, therefore, was obligated to cut the grass.¹

2. Notice Does Not Require Knowledge of the Specific Molehill Which Caused Injury, But Rather Knowledge that Molehills Are Foreseeable and Will Be Concealed by Tall Grass

Iwai also addressed Ms. Sullivan’s contention that her lack of knowledge of the dangerous condition, defined as the single mole hill which caused injury, precluded liability. The Court explained that actual notice of an unsafe condition is not required when the unsafe condition is foreseeable. *Id.* at 98. The Court held that “[p]laintiffs’ failure to establish actual or constructive notice of the specific dangerous condition should not preclude a trial court from hearing this case.” *Id.* at 101. The Court

¹ A few minutes using a weed-wacker would have satisfied reasonable care.

directly answered Respondent's logic that notice fails because notice requires knowledge of the specific mole hill that caused Ms. Painter's injury. The Court explained, "[a] strict application of the notice requirement would unfairly allow [the landowner] to plead ignorance about each patch of ice causing an injury, despite its general knowledge of the situation." *Id.* Because foreseeability is a question of fact, the Court held that "a jury must decide." *Id.* at 102.

Musci also addressed the question of notice, and ruled under analogous facts that the landowner had notice of the unsafe condition. The Court ruled that the evidence viewed in the light most favorable to the invitee compelled the inference that the landowner had "actual knowledge that accumulations of snow and ice persisted on the walkways from those exits." 144 Wn.2d at 862. In this case, actual notice may also be established. The *unsafe pathway* from the water spigot to the horse trough was known to Ms. Sullivan. Her defense, that she did not know about the solitary mole hill that injured Ms. Painter, mistakes what the dangerous condition was.

The mole hill, by itself, was not a dangerous condition. The tall grass, by itself, was not a dangerous condition. It is the combination of mole hills and tall grass that was a dangerous condition. The landowner knew that dangerous condition existed. Mole hills were predictable on the

regularly traversed path to and from the water spigot and the horse stall. The landowner may not have been aware of the specific mole hill, but was aware that mole hills were common in that area. She was also aware that the tall grass on the walkway concealed the mole hills, preventing the mole hills from being open and obvious as they were where the grass was short.

VI. CONCLUSION

The Supreme Court twice addressed analogous facts, where an invitee is aware that a pathway is unsafe, nevertheless walks on it, and is injured. Contrary to respondent's arguments to the trial court, this does not defeat a landowner's duty to maintain safe premises. A reasonable jury can conclude Ms. Sullivan could foresee that Ms. Painter would water her horses using the unsafe pathway, and that creates a duty to make the pathway safe. The Supreme Court also made clear that ignorance of a single manifestation of a dangerous condition is no defense when that manifestation is predictable. A reasonable jury can conclude Ms. Sullivan could foresee that mole hills would appear in the tall grass where she knew Ms. Painter regularly walked to water her horses, and this creates a duty to make the pathway safe. The trial court's dismissal is contrary to Supreme Court precedent and should be reversed.

September 1, 2016

Respectfully submitted,

3-7-7

Bryan D. Doran WSBA 38480

CERTIFICATE OF SERVICE

The undersigned hereby certifies under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner noted below a true and correct copy of the foregoing to the parties mentioned below as indicated:

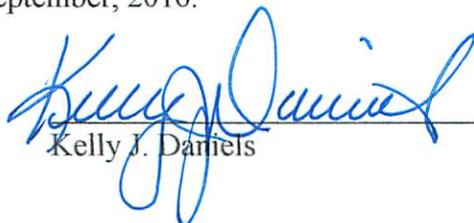
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DATED this 1st day of September, 2016.



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