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COURT OF APPEALS  
DIVISION TWO

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STATE OF WASHINGTON

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

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RAMONA A. DILLEY, as Personal Representative of  
the Estate of JACK EVAN DILLEY; RAMONA A.  
DILLEY, Individually; JACK J. DILLEY, Individually,

Appellants,

vs.

SHIRLEY ANN ROLLINS, a single woman and SBR  
COMPANY, a general partnership,

Respondents.

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BRIEF OF APPELLANTS

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Thomas A. Brown, W.S.B.A. #4160  
Attorney for Appellants

Brown Lewis Janhunen & Spencer  
Bank of America Building, Suite 501  
101 East Market Street  
Aberdeen, WA 98520  
(360) 533-1600

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BRIEF OF APPELLANTS

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## **A. ASSIGNMENTS OF ERROR**

### **Assignments of Error**

#### Assignment of Error No. 1.

The trial court erred in entering the order filed on October 17, 2005, granting the motion to dismiss under CR 12 (b)(6).

#### Assignment of Error No. 2.

The trial court erred in not treating the Motion to Dismiss as a Motion for Summary Judgment under CR 56.

#### Assignment of Error No. 3.

The trial court erred in not viewing the facts in the light most favorable to the non-moving party, as required by CR 56.

#### Assignment of Error No. 4.

The trial court erred by misinterpreting the applicable law, as to the liability of a prior owner of real estate.

### **Issues Pertaining to Assignments of Error**

No. 1. Should the Court have treated the Motion to Dismiss by the respondents as a Motion to Dismiss under CR 12(b)(6) or as a Motion for Summary Judgment under CR 56?

No. 2. Should the Court have examined the disputed facts in the light most favorable to the non-moving party?

No. 3. Under Washington law, can a vendor of land retain a degree of responsibility for injuries sustained by third parties on the land after the effective transfer of title?

No 4. Does a mere allegation that a landowner knew of the dangerous condition, especially when denied by that current landowner, bind the Plaintiffs to the truth of that allegation for purposes of a subsequent Motion to Dismiss by another party?

## **B. STATEMENT OF THE CASE**

On September 9, 2001, Evan Dilley, the thirteen-year-old son of Jack and Ramona Dilley was killed while riding his all-terrain vehicle on property owned by S & R Holdings and its principals (referred to throughout this brief as “the current landowners”). (CP 1-10)

The basis of the lawsuit was that there was a dangerous concealed hole on the premises, and that the current landowners knew that the premises was frequented by riders of recreational vehicles, such as all-terrain vehicles and small motorcycles and knew or should have known about the existence of the dangerous hole. (CP 1-10)

In May of 2002, a lawsuit was commenced against the current landowners. (CP 1-10)

During the lawsuit, evidence was developed that the prior owners of the property, Shirley Ann Rollins and SBR Company (referred to throughout this brief as “the prior landowners”) knew of the dangerous condition of the property when they sold it to the current landowners. (CP 94-119, 120-143, 86-93)

The current landowners denied any knowledge of the dangerous condition of the property, and pointed to the prior landowners as the culpable parties. (CP 11-14, 31-36)

Ultimately, the prior landowners were included as additional defendants and the current landowners filed a cross-claim against them, alleging that the prior landowners were totally responsible. (CP 31-36, 37-40,41-50, 53-61)

In a subsequent mediation, the case against the current landowners was settled, leaving the prior landowners as the only remaining defendants.(CP 79-82)

The prior landowners filed a motion to dismiss pursuant to CR12(b)(6). (CP 83-85, 144-147)

This motion was contested by the Dilleys on the grounds that the subject matter of the motion was not amenable to disposition on Rule 12(b)(6); and, more importantly, that the prior owners' theory that a prior owner automatically is excused from liability was inconsistent with established law. (CP 86-93) (RP 2-19)

To the surprise of everyone, the trial court agreed with the arguments raised by the prior landowners, and dismissed the case under the provisions of CR 12(b)(6), (CP 151, 152-154) even though matters

outside the pleadings were considered by the Court (or at least provided to the Court during the handling of the motion and not excluded). (CP 15-27, 94-119, 120-143)

This appeal followed.

## C. ARGUMENT

### Civil Rule 12(b)(6)

The prior landowners couched their motion in the trial court as one arising under Civil Rule 12(b)(6). That Rule reads, in pertinent part, as follows:

“Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleador be made by motion: “ \* \* \* (6) failure to state a claim upon which relief can be granted. \* \* \* ”

The Rule goes on to state:

“If on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion by Rule 56.”

It is well established law that a motion to dismiss for failure to state a claim must be denied, unless there is no state of facts which Plaintiff could prove consistent with the complaint that would entitle the Plaintiff to the relief sought. *Halvorson vs. Dahl*, 89 Wn.2d 673, 574 P.2d

1190 (1978). That case provides that even a hypothetical situation related to the facts set forth in the complaint should defeat the motion.

In the federal system, a motion to dismiss for failure to state a claim is regarded as a motion that is sparingly granted; and, even if it would be granted, amendment is freely allowed to save the lawsuit. *Hall vs. City of Santa Barbara*, 833 F.2d 1270 (1986); *MacLaughlin vs. Union Switch and Signal Company*, 168 F.2d 46 (1948).

If there is any state of facts which the Dilleys could prove, consistent with the complaint, that would entitle the Dilleys to relief, the motion must be denied.

#### **Liability of Prior Owner**

The motion by the prior landowners is based on the premise that – in order to be liable for a condition of the premises - they must have been the owners of the property at the time the injury occurred. They argued in the trial court that a former owner cannot be liable for injury arising from a condition of the property.

The position taken by the prior landowners is not supported by any relevant case law.

To the contrary, this issue has previously been disposed of in a very similar case decided by this Court. In *Seattle First National Bank vs. State*, 14 Wn.App. 168, 540 P.2d 443, (1975), the Defendant *State* made a similar argument to the one raised here; namely, that they should be entitled to dismissal on the theory that no duty was owed to the injured party on the dates he was injured, because the property had been sold by the Defendant. The court held that the prior owner could indeed be held liable.

Here is what this Division of the Court of Appeals had to say:

This jurisdiction has recognized the possibility of, but has not yet established criteria under which, a vendor of land retains a degree of responsibility for injuries sustained by third parties on the land after the effective transfer of title. *Dipangrazio v. Salamonsen*, 64 Wn.2d 720, 393 P.2d 936 (1964). The *Restatement (Second) of Torts*, § 353 (1965) provides a guide for determining those criteria.

We need not consider all conditions under which a transferor of land remains subject to liability for injuries sustained by others on the land. We do decide, however, that when land contains an attractive nuisance, the existence and dangerous condition of which are or ought to be known to the owner but not to his vendee, the owner's liability will continue after transfer of title until the owner has either disclosed the risk to his vendee or, after sale, the vendee has had a reasonable opportunity to discover the nuisance and to abate it.

The facts in the case at bench and the reasonable inferences therefrom are capable of being interpreted to support conclusions (1) that the State maintained an attractive nuisance on its land at the site where Tamara was subsequently injured, (2) the dangerous condition and the existence of the nuisance ought to have been known to the State, (3) the State did not disclose the risk to Mr. McDowell, the vendee, (4) the nuisance--including the likelihood of a substantial sloughing of the embankment and the fact that small children were accustomed to resort to the area--were not readily obvious to Mr. McDowell, and (5) after transfer of title he did not have a reasonable opportunity to take effective precautions against the nuisance even if he had discovered its existence.

Review of this decision was denied by the Supreme Court at 86

Wn.2d 1004. The case cited above also discusses the applicability of *The Restatement (Second) of Torts*, § 353 (1965), which reads as follows:

Undisclosed Dangerous Conditions Known to Vendor:

- 1). A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if

- a) The vendee does not know or have reason to know of the condition or the risk involved, and
  - b) The vendor knows or has to reason know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.
- 2). If the vendor actively conceals the condition, the liability stated in Subsection 1) continues until the vendee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise, the liability continues only until the vendee has had reasonable opportunity to discover the condition and to take such precautions.

Here, we have absolute certainty from the deposition of the prior landowner Shirley Rollins that she did have knowledge of the dangerous condition.

While she says that she notified the current landowners, the current landowners testified to the contrary, and denied that any notice of any kind was ever received. More importantly, whatever the current landowners did or didn't do, it is clear that the prior landowner did not make sure that the dangerous condition had been made safe. Certainly, the factual situation is muddled and contested, negating the possibility of relief under either CR 56 or CR 12.

### **Inconsistent Allegations**

In a very unusual argument, the prior landowner asserted to the trial court that the Dilleys cannot claim that the current landowner did not know about the danger or was not warned, because the Dilleys *alleged* during the lawsuit that the current landowner did know (or should have known) of the dangerous condition. In other words, they claim that we are somehow estopped from claiming what the prior landowner testified to during her deposition is true, because we alternatively alleged that somebody else was at fault!! Washington law and practice is clear on this point: the pleading of inconsistent positions is allowed and it does not create some sort of estoppel against the pursuit of either position. CR 8(e)(2) absolutely allows the pleading of positions which may be inconsistent. The rule provides:

“A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A

party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or both. All statements shall be made subject to the obligations set forth in rule 11.”

This basic rule of procedure has been repeatedly upheld by the Washington Courts. *Melby v Hawkins Pontiac, Inc.*, 13 Wn.App. 745, 537 P.2d 807 (1975); *Noble v. Ogborn*, 43 Wn.App. 387, 717 P.2d 285 (1986); *Port of Seattle v. Lexington Insurance Company*, 111 Wn.App. 901, 48 P.3d 334 (2002).

Here, the Dilleys faced the classic situation where both defendant groups denied responsibility, and each pointed at the other. Obviously, the pleadings had to accommodate the reality that one of these parties was accurately and truthfully reporting the facts and the other was not.

#### D. CONCLUSION

The Motion brought by the prior landowners was clearly not cognizable under CR 12(b)(6), since it depended on matters outside the pleadings, which were apparently considered by the Court.

Even if it had been characterized as a Motion for Summary Judgment pursuant to CR 56, there were disputed issues of material fact, which would cause the motion to be denied.

Both Washington decisional law and the *Restatement* hold that a prior owner of real estate may – under certain circumstances -- be liable for injuries caused by a dangerous condition on the land.

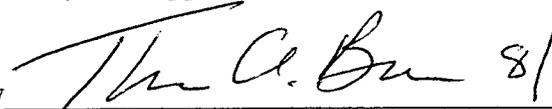
Pleading of alternative, inconsistent causes of action does not bar litigants from their day in Court.

The ruling of the trial court should be reversed and this matter should be allowed to proceed to trial.

Respectfully submitted,

BROWN LEWIS JANHUNEN & SPENCER  
Attorneys for Appellants

By

 8/9/06

THOMAS A. BROWN, WSBA #4160

BROWN LEWIS JANHUNEN & SPENCER

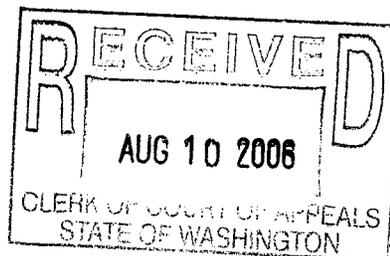
A PROFESSIONAL SERVICE CORPORATION  
ATTORNEYS AT LAW  
BANK OF AMERICA BUILDING  
101 EAST MARKET STREET, SUITE 501  
POST OFFICE BOX 1806  
ABERDEEN, WASHINGTON 98520  
(360) 533-1600 OR 532-1960  
FAX (360) 532-4116

THOMAS A. BROWN  
ABERDEEN OFFICE  
CURTIS M. JANHUNEN  
ABERDEEN OFFICE  
DOUGLAS C. LEWIS  
MONTESANO OFFICE  
MICHAEL G. SPENCER  
ABERDEEN OFFICE

MONTESANO OFFICE  
101 SOUTH MAIN STREET  
POST OFFICE BOX 111  
MONTESANO, WASHINGTON 98563  
(360) 249-4800  
FAX (360) 249-6222

August 9, 2006

Clerk of the Court  
Washington State Court of Appeals  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454



Re: Court of Appeals No. 34121-2-II  
Case Title: Ramona A. Dilley et al, Appellants v  
S & R Holdings LLC, et al, Respondents  
Grays Harbor County No. 02-2-00693-7

Dear Mr. Ponzoha:

Enclosed for filing in the above matter is the original and copy of the **BRIEF OF APPELLANTS**.

With this filing, would you please ~~strike the sanctions scheduled for August 11<sup>th</sup> and the sanction hearing scheduled for August 14<sup>th</sup>.~~

By copy of this letter, I am providing a copy of the brief to Novelle Ballard, the attorney for the respondents.

Cordially,

A handwritten signature in cursive script, appearing to read "Tom Brown".

THOMAS A. BROWN  
TAB/kr  
Enclosure