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COURT OF APPEALS
DIVISION II
COURT HOUSE
STATE OF WASHINGTON
EX-100
1997

NO. 34121-2-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents.

RESPONDENTS' REPLY BRIEF

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- No. 1 Did the trial court properly consider the Respondents' Motion to Dismiss for Failure to State a Claim for which Relief can be Granted, or should it have treated the motion as a Summary Judgment motion even though the Appellants' presented no admissible evidence to create a genuine issue of material fact?
- No. 2 Should the trial court have considered "disputed facts" when no admissible evidence of disputed facts were properly presented to the court and the motion in question was solely based on the allegations in the Appellants' First Amended Complaint for Damages?
- No. 3 Will a vendor of land that no longer possesses or controls the land be held liable for a condition on the land even though plaintiffs' allege that the current owners knew or had reason to know of the condition and should have taken remedial action?
- No. 4 In a CR 12(b)(6) motion to dismiss, must the trial court accept a plaintiff's allegations in a complaint as true?
- No. 5 May the Appellants set forth on appeal a theory that was not presented to the trial court?

B. STATEMENT OF THE CASE

On May 16, 2002, Appellants filed a lawsuit against S & RHoldings, LLC, and two “John Does” alleging that Randy Rognlin and Scott Rognlin are the members of S&R Holdings and that Scott Rognlin entered into an oral agreement to lease property in Grays Harbor County to Jack J. Dilly. According to the Complaint, Jack Dilly advised Mr. Rognlin that Dilly’s teenage son, Jack Evan Dilly would also be residing on the property. The complaint alleged, *inter alia*, that the defendants failed to properly inspect the property for hazards and dangerous conditions and breached their duty to maintain the property in a reasonably safe condition. The complaint also alleged violations of the Washington State Landlord-Tenant Act. As a result of these breaches of duty, Jack Evan Dilly was killed when an ATV he was operating fell into a pit on the property. (CP 1-10).

On September 8, 2004, Appellants filed their First Amended Complaint for Damages, adding Randy and Scott Rognlin, together with their wives, Rognlin’s Inc., and Respondents Shirley Ann Rollins and SBR Company, a general partnership with Ms. Rollins being the general partner. (CP 53-61). That amended complaint was the subject of the Respondent’s Motion to Dismiss Per CR 12(b)(6) and is the subject of this appeal.

Paragraph 11 of the First Amended Complaint alleged that the

property where the accident occurred was previously owned by Respondents Rollins and SBR Company, but that Defendant S & R Holdings was the owner of the real property at the time of the accident. Paragraph 12 of the amended complaint alleged that the decedent's father and one of the principals of S & R Holdings entered into a tenancy agreement in August of 2001. The amended complaint later alleged that the accident happened on September 9, 2001. Therefore, Appellants' amended complaint alleged that the accident occurred while Defendant S & R Holdings and the Rognlins owned, possessed and controlled the real property. There was no allegation that Shirley Rollins and SRB Company owned, possessed and/or controlled the property at the time of the accident.

Furthermore, Appellants alleged in Paragraph 17 of their First Amended Complaint for Damages that all the defendants, including S & R Holding and the Rognlins, "... knew of or a reasonable inspection would have disclosed to each of the named Defendants the existence of the pit and the fact that it constituted an unreasonably dangerous condition or harm." (CP 53-61, at page 58). Paragraph 17 went on to allege, "The physical condition of the pit at the time of the accident confirmed that it had been in existence sufficiently long to provide all the Defendants ample opportunity to discover it and take the required remedial measures." [Emphasis added.] That paragraph of the First Amended Complaint For Damages also alleged that agents or employees of Defendants S & R Holdings and/or Rognlin's

Inc. operated heavy equipment within “mere feet” of the pit and it “...would have been readily visible to the operator of the equipment at that time.”

Because the Appellants’ First Amended Complaint For Damages affirmatively plead that the Respondents did not own the property and there was no allegation that they possessed and controlled that property at the time of the accident, Respondents moved to dismiss the Appellant’s claims against them for failing to state a claim for which relief can be granted pursuant to CR 12 (b)(6). (CP 83-85). In the meantime, the other defendants settled with the Appellants. (CP 79-82).

The Appellants attempted to convert the CR 12(b)(6) motion into a CR 56 summary judgment motion in their response to the motion to dismiss. (CP 86-93). Though they submitted portions of the depositions of Respondent Shirley Rollins (individually and as general partner of SRB Company) for the trial court’s consideration (CP 94-119 and CP 120-143), but they submitted no admissible evidence that the other defendants denied knowledge of the pit or that they could not have discovered the pit upon reasonable inspection, as argued by the Appellants in the trial court and now on appeal. Therefore, the trial court informed the parties by letter that it granted the motion to dismiss for failure to state a cause for which relief can be granted (CP 151) and subsequently entered an order to that effect. (CP 152-154). There is no indication that the trial court considered “...matters outside the pleadings...” as stated by the Appellants at page 5 of their brief.

Even if it had, there was no admissible evidence submitted to the trial court that created a genuine issue of material fact.

ARGUMENT

1. Appellants' First Amended Complaint for Damages failed to state a cause of action against Respondents Rollins and SRB.

CR 12(b)(6) provides that a complaint that fails to state a cause for which relief can be granted is subject to a motion to dismiss. In an action for negligence, a plaintiff must prove four basic elements: (1) the existence of a duty, (2) a breach of that duty, (3) resulting injury, and (4) proximate cause. Whether a duty exists is a question of law. *Tincani v. Inland Empire Zoological Society*, 124 Wn. 2d 121, 875 P. 2d 621 (1994). This being a premises liability case, the Appellants' complaint must contain allegations that would state a cause of action against Shirley Rollins and SRB Company as owners or possessors of the property. *Colman v. Hoffman*, 115 Wn. App 853, 64 P.3d 65 (2003) held:

[T]he common law duty of care existing in premises liability law is incumbent on the possessor of land. [citations omitted.]... The critical point is the possession itself.

In *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 869 P.2d 1014 (1994), the Washington Supreme Court adopted Restatement (Second) of Torts Sec. 328E (1965), which states:

A possessor of land is (a) a person who is in occupation of the land with intent to control it or (b) a person who has been in occupation of the land with intent to control it, if no

other person has subsequently occupied it with intent to control it, or (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b). [Emphasis added.]

The Appellants' amended complaint alleged that Respondents Rollins and SRB Company "previously" owned the land, but that at the time of the accident the land was owned, occupied and controlled by S & R Holdings, LLC. There was no allegation in the Appellants' amended complaint that at the time of the accident Respondents Rollins and SRB occupied the land with intent to control it.

As stated in *Porter v. Sadri*, 38 Wn. App. 174, 178 (1984):

Under the common law doctrine of caveat emptor, the vendor of land does not remain liable for injuries caused by dangerous conditions on the premises once the property has passed from his possession and control.

The Appellants' amended complaint alleged that Respondents Shirley Ann Rollins and SBR Company previously owned the property in question, but that at the time of the accident it was owned by S & R Holdings, with whom the plaintiffs settled their claim. Therefore, under the common law, Defendants Rollins and SBR owed no duty to the plaintiffs and the claims against them were properly dismissed.

The Appellants seek to invoke a narrow exception to the common law rule expressed in RESTATEMENT (SECOND) OF TORTS sec. 353. But, even considering that exception, the amended complaint still failed to

state a *prima facie* case as a matter of law. The Court in *Porter, supra*, at page 179 pointed out:

[I]n order to prevail under Sec.353, the injured party must show *inter alia* that the defendant's vendee does not or have reason to know of the condition or risk involved. [Emphasis added.]

In *Bailey v. Gammell*, 34 Wn. App. 417 (1983), the Court explained:

A reading of the comments to section 353 shows that the section is intended to apply to undisclosed *latent* defects and does not operate if the defects are patent. The vendor has no duty to warn the vendee of the extent of the risk in an obvious condition; the vendee has a duty to inspect in order to discover such patent defects. [Emphasis by the Court.]

In *Bailey, supra*, a guest in a house fell down an allegedly defective staircase and sued the former owner. The defendant moved to dismiss and the trial court granted the motion. On appeal, the plaintiff argued that section 353 created a cause of action against the former owner. The Court of Appeals recognized at page 418:

Generally, vendors have no duty to people injured on the premises after the sale, even for injuries caused by conditions existing at the time of the sale.

The Court upheld the dismissal, finding that the alleged defect in the property was patent and therefore not within the exception created by section 353.

Comment d. to section 353 is also instructive. It states in part:

A vendor, innocent of conscious deception, is entitled to expect, and therefore has reason to believe, that his vendee will discover a condition which would be disclosed by such an inspection as the vendee should make before buying the land and taking possession of it or before throwing it open to the entry of others. A vendor, therefore, is not required to exercise care to disclose dangerous conditions or to have an ordinarily retentive memory as to their existence, unless the condition is one which such an inspection by the vendee would not discover or, although the condition would be so discovered, the vendor realizes the risk involved therein and has reason to believe that his vendee will not realize it.

The Appellant's First Amended Complaint alleged that Defendants Rognlin and S & R Holdings knew or should have known of the pit, and that they had "ample opportunity" to discover the pit and take remedial action. Therefore, the Appellants' own pleading absolved the Respondents from liability.

The Appellants' reliance on *Seattle First National Bank v. State*, 14 Wn. App. 168 (1975) is misplaced. The Court did not discuss section 353 in its analysis. The holding is limited to attractive nuisances, and there is no suggestion that this is an attractive nuisance case. The later case of *Bailey v. Gammell, supra*, is more instructive as to how section 353 is to be applied. Even so, *Seattle First National Bank, supra*, specifically found (on

properly submitted evidence) that the condition on the property was not readily obvious and that the vendee did not have a reasonable opportunity to discover and remedy the attractive nuisance prior to the child's injury, creating an issue of fact as to whether the vendor of the land should be dismissed. No such evidence was submitted to the trial court in this case, and the issue before the Court in *Seattle First National Bank* was significantly different than that in this case.

Even in their pleadings in the trial court and in their brief on appeal, the plaintiffs acknowledge that Respondents Rollins and SBR Company did not own the property or exercise any control over the property at the time of the incident. They allege in their First Amended Complaint For Damages that all the defendants - including S & R Holdings, LLC, "... knew of or a reasonable inspection would have disclosed to each of the named Defendants the existence of the pit and the fact that it constituted an unreasonably dangerous condition or harm." *See* Plaintiff's First Amended Complaint for Damages, paragraph 17. (CP 53-61). When ruling on a motion to dismiss for failure to state a claim for which relief can be granted, the plaintiffs' factual allegations are presumed to be true. *Lien v. Barnett*, 58 Wn. App. 680, 683 (1990). The trial court and this Court must consider as true the Appellants' allegations that the S & R Holdings and the other named defendants that owned and controlled the property at the time of the accident knew or reasonably should have known of the dangerous

condition. Those allegations remove the exception of the non-liability of prior property owners created by section 353 from the case.

Also, CR 11 states that the signature of a party or of an attorney is a certification that the party or attorney has read the pleading and that it is well grounded in fact. Therefore, the Appellants are bound by the allegations in their complaint. The amended complaint alleged that Respondents Rollins and SBR were not the owners of the property and that the other defendants knew or should have known of the allegedly dangerous condition. As such, Respondents Rollins and SBR owe no duty to the Appellants and the claims against them were properly dismissed.

In opposing the Respondents' motion to dismiss, the Appellants attempted to include "matters outside of the pleading" in order to convert the motion into a summary judgment proceeding. However, a party may not rely on mere assertions in briefs or attorney's statements to support or defeat a motion for summary judgment. The party must produce evidence in the form of declarations, sworn deposition testimony, and so on. CR 56(e). The Appellants presented no admissible evidence to allow the trial court to treat the Respondents' CR 12(b)(6) motion as a summary judgment.

But, even if the trial court accepted the Appellants' hypothetical facts recited in their response to the motion to dismiss, the trial court still properly dismissed the case. Whether Defendants S & R Holdings and the Rognlins knew or didn't know about the pit was irrelevant to the case

against Respondents Rollins and SBR. Whether or not Shirley Rollins knew about the pit is irrelevant. Under section 353, constructive knowledge by the subsequent owner takes the case out of the exception created by that section. The amended complaint alleged that the actual owners of the property at the time of the accident should have known about the pit - which the Appellants alleged was a patent defect that would have been discovered upon a reasonable inspection. Accepting those allegations to be true (as the Court must) section 353 does not apply and Respondents Rollins and SBR owed no duty to the plaintiffs as a matter of law.

2. The Appellants’ argument of allowing “Inconsistent Allegations” may not be considered on appeal.

Beginning at page 11 of the Appellants’ brief, the Appellants argue that the trial court improperly dismissed their complaint because they are allowed to plead inconsistent positions in their First Amended Complaint for Damages. That argument was not made to the trial court (CP 83-93 and RP 8-19) and may not be raised for the first time on appeal. RAP 2.5(a). As stated in *Wolfe v. Legg*, 60 Wn. App 245 (1991) at pages 249-250:

A theory that was not presented to the trial court will not be considered on appeal unless it presents an issue of manifest error affecting a constitutional right. [*citations omitted*]. The reason for this rule is to ensure that the trial court is afforded the opportunity to correct any error that might occur, thereby avoiding unnecessary appeals and retrials.

Though RAP 2.5(a) does provide some exceptions to the rule, none of those apply in this case.

Even so, the Appellants' argument that CR 8(e)(2) allows them to plead inconsistent allegations fails. The rule allows a party to make two or more statements of a claim "alternately or hypothetically." In this case, the Appellants did not so plead. Instead, they lumped the defendants together, alleging that "all" defendants knew or should have known about the condition on the property and should have corrected it.

CR 8(e)(2) also states that alternative and hypothetical pleadings are subject to CR 11, requiring that the signature of an attorney on a pleading is a certification that the pleading is well grounded in fact. In this case, the Appellants plead that the other defendants, who were actually the owners and possessors of the property at the time of the accident, had "ample opportunity" to discover the condition and take remedial measures. Such an allegation is presumed to be true [*Lien v. Bennett*, 58 Wn. App. 680, 683 (1990)] and absolves the prior owner from liability.

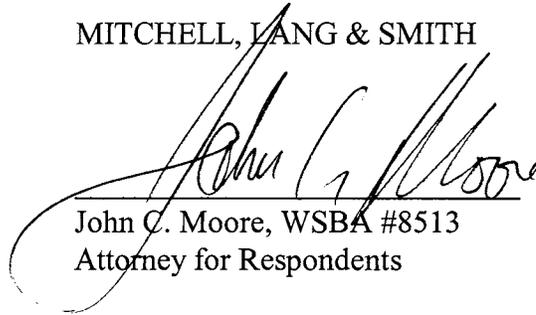
CONCLUSION

The Appellants were bound by their pleading. They alleged that Respondents Rollins and SBR Company did not own the property in question at the time of the accident in question. Prior owners of real property generally owe no duty to third persons injured on the property.

The exception under RESTATEMENT (SECOND) OF TORTS *section 353* to that general rule does not apply if the subsequent owner knew or should have known by a reasonable inspection the patent condition that caused the injury. The Appellants alleged that the purchasers of the property knew or should have known of the condition. The Court must accept the Appellants' factual allegations as true. Accepting those allegations as true, there are no facts consistent with the complaint that would state a cause for which relief can be granted as to Respondents Rollins and SBR Company. Therefore, the Appellants' claims in their First Amended Complaint for Damages against the Respondents were properly dismissed for failing to state a cause for which relief can be granted.

RESPECTFULLY SUBMITTED: October 6, 2006

MITCHELL, LANG & SMITH

A handwritten signature in black ink, appearing to read "John C. Moore", is written over a horizontal line. The signature is fluid and cursive.

John C. Moore, WSBA #8513
Attorney for Respondents

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COURT OF APPEALS
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RAMONA A. DILLEY, as)	NO. 4121-2-II
Personal Representative of the)	
Estate of JACK EVAN DILLEY;)	CERTIFICATE OF SERVICE
RAMONA A. DILLEY,)	
individually; JACK J. DILLEY,)	
Individually,)	
)	
Appellants,)	
)	
v.)	
)	
SHIRLEY ANN ROLLINS, a)	
single woman and SBR COMPANY,)	
a general partnership,)	
)	
Respondents.)	
_____)	

I, Sandra Barlow, declare under penalty of perjury under the laws of State of Washington as follows:

That at all times mentioned herein, I was over 18 years of age and an employee of Mitchell, Lang & Smith.

That on October 9, 2006, I caused to be served a true and correct copy of Respondents' Reply Brief upon the plaintiffs listed herein, via

facsimile and U.S. Mail to:

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