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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 38230-0-II

**COURT OF APPEALS,
DIVISION II
STATE OF WASHINGTON**

Jay Adams and Cynthia Adams,

Appellants,

v.

Larry Apeland and Sharon Apeland,
Husband and wife, and the marital community therein,

Respondents

RESPONDENTS' BRIEF

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INTRODUCTION

This case is about a landlord/tenant dispute that arose after the termination of the tenancy. On July 25, 2008 the trial court granted the landlords' motion for summary judgment. The tenants appeal this decision. The landlords request this Court affirm the trial court's decision.

COUNTER-STATEMENT OF ISSUES

1. Whether the trial court properly granted summary judgment when: (a) the tenants did not allege any physical injury; (b) there was no evidence indicating the lake water was unsafe; and (c) the tenants admit they did not drink the lake water.

COUNTER-STATEMENT OF CASE

Appellants Jay and Cynthia Adams (tenants) entered into a written rental agreement with defendants Larry and Sharon Apeland (landlords) on March 19, 1998 for a single family home located on at 4670 N. Tiger Lake Road (the residence) in Bremerton. CP 17-21. The residence is 1560 square feet of and is located on Tiger Lake. CP 17-18. The tenants paid a \$500.00 security deposit and \$150.00 pet deposit. CP 78. The lease was for one year and then switched to a month to month tenancy thereafter. CP 21.

The water for the residence was pumped directly from Tiger Lake. CP 77. The tenants were aware of this fact before the tenancy started and brought in their own drinking water throughout the life of the tenancy. CP 77-78. As a compromise for the inconvenience of bringing in their own drinking water the landlords agreed to a reduced rent of \$650 per month.

CP 18. However, the landlords informed the tenants the rent would be increased if a well was ever installed on the property. CP 18.

In March of 2004, six years after starting the tenancy, the tenants offered to buy the home for \$135,000. CP 18, CP 78. Because this offer was well below market value the landlords declined the offer. CP 18. In the early spring of 2007 the landlords installed a well on the property. CP 18. Shortly thereafter the tenants' rent was increased \$150.00 to \$800.00 per month. CP 18. This was the first time in nine years the tenants' rent was raised. CP 18. In the late spring of 2007 the landlords received an offer to buy the home from a neighbor for \$400,000. CP 18. They felt this was a good offer and agreed to sell the home. CP 18.

On June 21, 2007 the landlords served tenants with a notice of intent to vacate effective August 1, 2007. CP 18. The tenants vacated in a timely fashion and on August 2, 2007 the sale to the neighbor was finalized. CP 18.

The tenants did not leave a forwarding address when they left so the landlords did not know where to send the deposit. CP 18. However, the tenants called the landlords in September and inquired into the outstanding deposit. CP 18-19. The tenants relayed their current address and the landlords mailed the deposits, security and pet. CP 18-19. The landlords returned the full deposit despite the fact the residence was left

dirty with cat litter and feces dumped at the corner of the house and up the path. CP 18-19.

Tenants received the check dated September 25, 2007 for \$650 and cashed it on October 2, 2007. CP 78. On January 23, 2008 the tenants filed this lawsuit against the landlords alleging various causes of action including negligence and violations of the Residential Landlord-Tenant Act (RTLTA). CP 1-5.

The court granted the landlords' Motion for Summary Judgment after oral argument on July 25, 2008. CP 39-41.

ARGUMENT

A. Standard of Review

When reviewing an order granting summary judgment, the appellate court engages in the same inquiry as the trial court; thus, the standard of review is *de novo*. *McPhaden v. Scott*, 95 Wn.App 431, 434, 975 P.2d 1033 (1999). "Summary judgment is subject to a burden-shifting scheme. The moving party is entitled to summary judgment if it submits affidavits establishing it is entitled to judgment as a matter of law." *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552; 192 P.3d 886 (2008). The moving party is entitled to summary judgment as a matter of law when the evidence, taken in the light most favorable to the nonmoving party, creates no genuine issue of material fact. *Wash. R. Civ. Pro.* 56(c); *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). "A

genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation.” *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d at 552 citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982); *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 618 P.2d 96 (1980); *Wash. R. Civ. Pro.* 56(e).

To prevail on a motion for summary judgment, a defendant need only show an absence of evidence supporting an element essential to the plaintiff’s claim. *See e.g., Las v. Yellow Front Stores, Inc.*, 66 Wn.App. 196, 198, 831 P.2d 744 (1992); *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) *overruled on other grounds by Young v. Key Pharms., Inc.*, 130 Wn.2d 160, 922 P.2d 59 (1996). All evidence propounded by the parties to a motion for summary judgment must be “admissible in evidence.” Plaintiffs, in responding to a motion for summary judgment, are prohibited from relying on “allegations, conjecture, or speculation to create an issue of material fact.” *Wash. R. Civ. Pro.* 56(e); *Sortland v. Sandwick*, 63 Wn.2d 207, 211, 386 P.2d 130 (1963); *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960); *Geppert v. State*, 31 Wn.App. 33, 38, 639 P.2d 751 (1982).

CR 56(e) provides plaintiff “may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that

there is a genuine issue for trial. In response to a motion for summary judgment a party may not rest on mere allegations. If he does not so respond, summary judgment, if appropriate, shall be entered against him.” *Wash. R. Civ Pro.* 56(e) (emphasis added). A party seeking to avoid summary judgment cannot simply rest on conclusory allegations in his pleadings, but party must affirmatively present factual evidence upon which he relies. *Logan v. North-West Ins. Co.*, 45 Wn.App. 95, 724 P.2d 1059 (1986).

The court properly granted summary judgment because the tenants neither alleged any physical injury, nor presented any evidence indicating the lake water was unsafe. Moreover, the tenants’ claims were barred by the implied primary assumption of risk.

B. Tenants Fail To Allege Any Compensable Injury

The primary purpose of the civil tort system is to compensate injured persons. *See* David K. DeWolf & Keller W. Allen, 16 *Washington Practice, Tort Law and Practice* § 5.1, at 124 (2000). “Economic damages means objectively verifiable monetary losses.” *Wash. Rev. Code* 4.56.250(1)(a). In this case the tenants have no compensable injuries. Although the tenants’ complaint alleges the landlords proximately caused injury and damage, the tenants’ discovery responses belie this assertion. CP 78.

Tenants admit they did not drink the water from the lake and that they brought in their own drinking water. CP 78. More importantly, they have not treated with any health care providers as a result of the allegations set forth in the complaint. CP 78. Tenants have no injury or damage and, therefore, no cause of action.

C. Appellants Did Not Assign Error To The Trial Court's Order Granting Defendants' Motion To Strike

The tenants' Memorandum of Authorities in Opposition to Defendants' Motion to Summary Judgment contained numerous unsupported claims and the landlords moved to strike. CP 81-83. The trial court granted this motion and did not consider the unsupported statements in plaintiff's opposition. CP 39-41. The tenants do not assign error to this ruling. *Appellant's Brief*, p. 7. Accordingly, there is no facts or evidence suggesting the water was unsafe or harmful.

D. Appellants' Reliance on Tucker Is Misplaced

Appellants' brief relies primarily on the Division III case of *Tucker v. Hayford*, 118 Wn.App 246, 75 P.3d 980 (2003). The plaintiffs in *Tucker* sued for personal injuries resulting from drinking contaminated water. In *Tucker*, unlike this case, the plaintiffs became ill and saw their pediatric nurse practitioner. *Id* at 250. That health care professional suggested the plaintiffs test their well water. *Id*. The family did so and the results showed bacteria in the water. *Id*. The Tucker court went on to

hold that “a claim for *personal injuries* by a tenant can be premised on three distinct legal theories: contract (a rental agreement), common law obligations imposed on a landlord, and the Washington Residential Landlord-Tenant Act of 1973...” *Id* at 248 (emphasis added).

Tucker is distinguishable for three glaring reasons: (1) the plaintiffs in *Tucker* were injured; (2) presented evidence that the drinking water was unsafe; and (3) drank the water. Conversely, the tenants in this case were not injured, have not have they presented evidence suggesting the water from the lake is unsafe, and admitted they never drank the lake water. CP 78.

Appellants’ brief claims the *Tucker* court “awarded monetary awards for personal damages and all the rents collected by the Haywards during the Tucker’s residency.” *Appellants’ Brief*, p. 20. It is unclear where appellants draw this conclusion as it is not part of the Court’s decision. The *Tucker* court simply reversed the trial court’s summary judgment order; there was no discussion of the measure of damages.

The proper measure of damages for a breach of a landlord’s duties under RCW 59.18.060 is the difference between the value of the lease as warranted and the value of the lease with defects. *Wash. Rev. Code* § 59.18.110(1)(b). A damage award cannot be speculative, but must be reasonably certain. *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 16, 390

P.2d 277 (1964). The tenants in this case, however, have not put forth any evidence about the diminished value of the property without potable water and, accordingly, the court properly granted summary judgment.

This case at hand varies drastically from *Tucker*. The trial court's order should be affirmed.

E. The Implied Primary Assumption of the Risk Bars These Claims

"The assumption of risk doctrine is divided into four classifications: (1) express, (2) implied primary, (3) implied reasonable, and (4) implied unreasonable. Implied primary assumption of the risk means the plaintiff assumes the dangers that are *inherent in* and *necessary to* the particular sport or activity. Assumption of the risk in this form is really a principle of no duty, or no negligence, and so denies the existence of the underlying action. Therefore, implied primary assumption of the risk remains a complete bar to recovery." *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 143, 875 P.2d 671 (1994).

The tenants admit they were aware that the water for the residence was pumped from the lake in 1998. CP 77. They also admit the landlords specifically informed them in 1998 that the water for the residence was pumped from the lake. CP 77. Even if the tenants suffered any injury or damage their claims are barred by implied primary assumption of the risk.

F. The Tenants Failed To Meet Their Burden Under The RLTA

Under the Residential Landlord Tenant Act (RLTA), tenants are required to provide landlords with written notice if remedial action is needed. *Wash. Rev. Code* § 59.18.070. In this case the tenants admit they never delivered any written notices to the landlords regarding any defective conditions on the property. CP 79. In fact, the first notice the landlords ever received about any problems with the residence is when they were served with the summons and complaint. The tenants' claims under the RLTA, if any, must be dismissed.

G. The Tenants' Security Deposit Was Delivered When They Received A Forwarding Address

The tenants paid \$500 for a security deposit and \$150 for a pet deposit (\$600 total) when the lease commenced in 1998. CP 20. The Tenants quit the premises on August 1, 2007 but did not leave a forwarding address. CP 18-19. In September the tenants contacted the landlords and inquired into the deposit. CP 18-19. The landlords promptly sent the tenants a check for \$650 which was received and cashed. CP 78. The landlords did this despite the unsavory condition the tenants left the residence. CP 19.

There is no damage for withholding the security deposit because it was returned in full. The reason it was not done within 14 days is because the tenants failed to leave a forwarding address. CP 18-19.

H. The Landlords Did Not Take Retaliatory Action Under RCW 59.18.240

RCW 59.18.240 prohibits retaliatory actions by landlord when a

tenant, in good faith and lawfully:

(1) Complaints or reports by the tenant to a governmental authority concerning the failure of the landlord to substantially comply with any code, statute, ordinance, or regulation governing the maintenance or operation of the premises, if such condition may endanger or impair the health or safety of the tenant; or

(2) Assertions or enforcement by the tenant of his rights and remedies under this chapter.

Wash Rev. Code § 59.18.240.

However, the tenants admit they did not make “any complaints or reports to a governmental authority concerning the failure of the defendants to comply with any code, statute, ordinance, or other regulation governing the maintenance or operation of the premises.” CP 79. The trial court properly dismissed appellants’ claims under RCW 59.18.240.

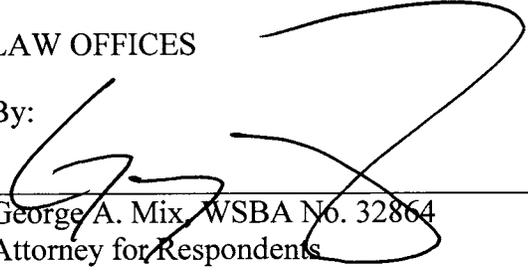
CONCLUSION

Based on the foregoing arguments this court should affirm the trial court’s dismissal of the tenants’ claims.

RESPECTFULLY SUBMITTED this 3rd day of March, 2009.

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IN THE COURT OF APPEALS,
DIVISION II
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY [Signature]
DEPUTY

JAY ADAMS and CYNTHIA ADAMS,
husband and wife,

Appellants,

v.

LARRY APELAND and SHARON
APELAND, husband and wife,

Respondents.

NO. 38230-0-II

CERTIFICATE OF
SERVICE

I certify that on the 4th day of March, 2009, I caused a true and correct copy of Respondent's Brief to be filed and served on the following in the manner indicated below:

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