

FILED
Court of Appeals
Division II
State of Washington
11/27/2018 8:00 AM

No. 51366-8-II

COURT OF APPEALS STATE OF WASHINGTON
DIVISION II

REBECCA FOWLER, an individual,

Appellant.

v.

BRENT SWIFT, in his individual
capacity, ROSANNE FINN, a single
individual,

Respondents.

And

SCOTT BERGFORD and PATRICIA BERGFORD, and the
marital community comprised thereof; JENNIFER NEVY, in her
individual capacity,

Defendants.

OPPOSITION BRIEF OF RESPONDENT
ROSANNE FINN

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INTRODUCTION

Along with several other parties, Respondent Rosanne Finn was sued by Plaintiff Rebecca Fowler for injuries incurred on November 19, 2014, when Ms. Fowler slipped and fell on an interior wooden staircase within a vintage Craftsman rental property.¹

Ms. Finn's sole connection to plaintiff Fowler was that she had previously occupied and leased that property months earlier. In late 2012, Ms. Finn leased the rental from defendants Patricia and Scott Bergford. (CP 94-98.) After the lease expired, Ms. Finn assigned her remaining month-to-month tenancy to defendant Jennifer Nevy, with whom Ms. Finn had been sharing the rental space. In May or June, after Ms. Finn moved out, Jennifer Nevy rented space to respondent Brent Swift. (CP 137-8.) At the time of her accident, Ms. Fowler was the invitee of Mr. Swift.

The Bergfords accepted the rent from Ms. Nevy (and her mother, Jane) and even tried to negotiate a new lease with them for several months after Fowler's accident. Ms. Finn, other tenants, and the Bergfords never detected any problems with or knew of accidents concerning the staircase. There is no allegation or evidence that anyone altered or damaged the staircase in any way.

¹ See Complaint for Personal Injuries and Negligence (CP 169-172.).

Accordingly, Ms. Finn owed no legal duty to Ms. Fowler, who was an invitee of a subsequent tenant in a rental property she had once occupied. Therefore, she respectfully requests that the order of the trial court dismissing her from the case be affirmed.

COUNTERSTATEMENT OF FACTS

On December 14, 2012, respondent Rosanne Finn signed a lease to rent a vintage Craftsman property (1516 Fourth Avenue in Olympia) from defendants Patricia and Scott Bergford, the owners, for just under a one-year tenancy. (CP 377-78.) Ms. Finn was the only tenant named on the lease; however, she shared the space with Jennifer Nevy and Tammy Putvin. *Id.* The lease term expired on November 30, 2013, and became a month-to-month tenancy. (CP 378, 430.)

In February 2014, Ms. Finn assigned her remaining month-to-month interest in the rental to Jennifer Nevy, who had been sharing the space, and vacated the premises, moving out. (CP 378.) Ms. Finn had no right to return to the property at that point; she would have needed permission from Jennifer Nevy to return. She certainly had no control over policies or how it was run by those remaining. (CP 378-79.)

Ms. Nevy said that the Bergfords knew that the occupants of the rental were running businesses out of the building, just as the previous lessee, Jessica Jensen, had done. (CP 314.)

In May or June of 2014, Jennifer Nevy rented space at the property to respondent Brent Swift. (CP 51-52.)

Mr. Swift did not know that Ms. Finn had any prior connection to the rental property; his agreement to rent was with Ms. Nevy. (CP 51-52.)

From February 2014 forward, Ms. Nevy would collect funds from other occupants, then sent Patricia Bergford a check from her mother, Jane Falding. (CP 313-14, 445.)

Defendant Patricia Bergford accepted and deposited these monthly rent checks from Jane Falding, and later, from Jennifer Nevy directly (April-July 2015), neither of whom were named on the lease. (CP 431, 459-462.) Ms. Bergford admitted she recognized the change in February 2014 as to who was paying the rent. (CP 423.) Ms. Bergford did not inquire as to why Jane Falding was paying rent or try to inspect the premises. (CP 424-25, 445-458.) After the accident, Ms. Bergford continued to accept the month-to-month rent payments, never sought to evict them, and attempted to negotiate a new lease at a higher monthly rate with the existing tenants. (CP 430-432.)

In November 2014, appellant Rebecca Fowler was injured due to a fall on an interior staircase in a rental property owned by defendants Patricia and Scott Bergford. (CP 572-73.) Ms. Fowler was the invitee of respondent Brent Swift, who she had known for ten years. *Id.*

Ms. Fowler filed a lawsuit and discovery ensued. Gary Sloan, a human factors expert retained by appellant Fowler, noted nothing about the staircase that would make it appear excessively hazardous to the perception of a reasonably cautious layperson. (CP 200-208.)

Ms. Bergford examined the stairs after the fall and noted they were “in pristine condition.” (CP 426. She said that prior to the accident, “there was no complaints ever about the stairs from anybody in the history of that house.” (CP 429.)

Jessica Jensen, an attorney, had been a previous commercial tenant of the rental property from 2006 through September 2012. (CP 383.) Attorney Jensen said in the almost six years she spent working in that space, she “never experienced any difficulties going up or down the stairs or holding onto the banister, nor did I observe anyone else experiencing any such difficulties. No one ever complained or expressed any concerns to me that the stairs or banister were unsafe, defective, or unreasonably dangerous in any manner whatsoever.” (CP 383-84. Jensen also said: “Based upon my close personal observation and use of the stairs and banister for over five years, I believe that they were perfectly safe in all respects.” (CP 384.)

Ms. Finn said she had no trouble using the handrail or navigating the staircase, which was “an ordinary set of wooden stairs with no defects

or problems. ...I never heard about anyone slipping on the stairs while I was there or at any time prior to Rebecca Fowler's accident." (CP 378.)

Ms. Finn moved for summary judgment dismissal based on: the general lack of any legal duty owed by her to plaintiff Fowler (proximate cause); or alternatively, the absence of evidence that Finn had actual or constructive knowledge of any unreasonably hazardous condition that would have created a legal duty for her to request repair or remediation of the staircase by the owners. (CP 366-376.)

On April 13, 2018, after oral argument, the trial court granted summary judgment dismissal to Ms. Finn, dismissing all claims against her with prejudice. Plaintiff Fowler moved for reconsideration, which was denied on May 10, 2018. Ms. Fowler has appealed both orders.

SUMMARY OF ARGUMENT

It is undisputed that plaintiff Fowler was injured in a fall on the staircase of the premises in question. However, for Ms. Fowler to possess a survivable claim of negligence against prior tenant Ms. Finn, she must show that Ms. Finn owed her a duty, breached that duty to her, and that the breach of Ms. Finn's duty was the proximate cause of her injury. *Petersen v. State*, 100 Wash.2d 421, 435, 671 P.2d 230 (1983).

Respondent Rosanne Finn's sole connection to plaintiff Fowler's injuries is that the accident occurred inside of a rental property Ms. Finn had vacated nine months earlier. There was nothing detectably wrong with the staircase, so under the lease, Ms. Finn had no obligation to notify the owners/landlords of any hazardous condition to repair. Later, the assignment of her entire month-to-month interest in the rental property was never voided by the Bergford defendants, who freely accepted rent from the new occupants, so it was valid. And there was no connection between Mr. Swift's occupancy of the rental and Ms. Finn, as it was the Ms. Nevy who had found and rented to Mr. Swift.²

Since there was no evidence of any applicable duty, or breach thereof, the order granting summary judgment dismissal of Ms. Finn should be affirmed.

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² Assuming *arguendo* there actually was some act of negligence by Ms. Finn regarding the staircase, the interval of eight months between Ms. Finn's tenancy and Ms. Fowler's accident rendered any possible action or inaction by Ms. Finn while a tenant too tenuous and remote to be a proximate cause of Ms. Fowler's damages. Perhaps this is better characterized as a lack of legal cause, but nevertheless, it would be against public policy to find such prior tenants liable as a matter of law.

ARGUMENT

A. Review of an Order granting Summary Judgment is De Novo.

The appellate court reviews a trial court's order granting summary judgment dismissal *de novo*, engaging in the same inquiry as the trial court. *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, 180 Wn. App. 689, 698, 324 P.3d 743, *review denied*, 181 Wn.2d 1008 (2014). Additionally, this Court may affirm an order granting summary judgment on any grounds supported by the record. *Blue Diamond Grp., Inc. v. KB Seattle I, Inc.*, 163 Wn. App. 449, 453, 266 P.3d 881 (2011).

A defendant moving for summary judgment meets her initial burden by showing that an absence of evidence to support the plaintiff's case as to one or more elements. *Dania, Inc. v. Skanska USA Bldg. Inc.*, 185 Wash.App. 359, 340 P.3d 984, 987 (2014). Then, the burden shifts to plaintiff to present specific facts demonstrating there is a genuine issue of material fact as to the disputed element or elements for trial. *Id.* "To avoid summary judgment in a negligence case, the plaintiff must show a genuine issue of material fact on each element of negligence—duty, breach, causation and damage." *Clark County Fire*, 180 Wn. App. at 699.

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B. There was nothing unreasonably dangerous about the staircase, and no prior accidents, that might have created a legal duty for Ms. Finn to warn or give notice to invitees.

Here, as the nonmoving party, Ms. Fowler failed to establish a genuine issue of material fact as to whether Ms. Finn owed a legal duty to her as an invitee of Mr. Swift, a subsequent tenant, or because of a known, but unreported, unreasonably dangerous condition as to the staircase. The lack of the preconditions to create an actual duty to warn is the condition most clearly related to the grant of summary judgment dismissal to respondent Swift; therefore, the absence of the latter will be addressed first.

The duty of reasonable care is not breached if the possessor could reasonably expect its invitees to realize an obvious risk to themselves. *Restatement Second, Torts* § 343 (1965). “It is well established in the decisional law of this state that something more than a slip and a fall is required to establish either the existence of a dangerous condition, or the knowledge that a dangerous condition exists on the part of the owner or the person in control of the [premises].” *Brant v. Market Basket Stores, Inc.*, 72 Wn.2d 446, 448, 433 P.2d 863 (1967). Dangerousness cannot be inferred from a fall alone. *Merrick v. Sears, Roebuck & Co.*, 67 Wn.2d 426, 429, 407 P.2d 960 (1965).

As previously noted, plaintiff Fowler’s “human factors” expert could bring up nothing self-evident about the staircase that would make it appear

excessively hazardous to the perception of a reasonable layperson. Only that would have created an actual duty to notify the owners (the Bergford defendants) that repairs or remedial measures were needed. They were ordinary wooden stairs. Where an alleged unsafe condition is both obvious and known to the plaintiff, the defendants owe no duty to warn of this condition. *Mele v. Turner*, 106 Wn.2d 73, 80, 720 P.2d 787 (1986); *Seiber v. Poulsbo Marine Center, Inc.*, 136 Wn. App. 731, 740, 150 P.3d 633 (2007).

Accordingly, even if respondent Finn had been a legal possessor of the rental property at the time of plaintiff's accident, and appellant Fowler had been her personal invitee, there would have been no breach of the duty of reasonable care because the danger of slipping and falling down a staircase while wearing only socks (a staircase that plaintiff had just ascended in socks minutes earlier!) is open and obvious even to children. It is reasonable to expect adult invitees, like Ms. Fowler, to realize that risk.

C. Since Ms. Finn had assigned her leasehold interest months earlier, as a prior tenant she had no more duty to Ms. Fowler than prior tenant Ms. Jensen did.

An assignment or sublease in violation of the original lease is effective until the landlord opts to void it. *Bellevue Square Managers., Inc. v. GRS Clothing., Inc.*, 124 Wn. App. 238, 243, 98 P.3d 498, 501 (2004) (quoting *Morrison v. Nelson*, 38 Wn. 2d 649, 659, 231 P.2d 335, 340 (1951) ("An

assignment in violation of a restriction is not void, but voidable at the option of the lessor. Such an assignment is good as between the assignor and assignee, subject to whatever rights the lessor may have.").

Ms. Finn assigned her entire month-to-month interest in the rental property to Jennifer Nevy. "When a tenant absolutely assigns its rights to an assignee and thus no longer possesses the premises, a court has no jurisdiction over that tenant." *Id.* The Bergford defendants could have, but did not, exercise their option to void the assignment of the month-to-month tenancy. From March 2014 through August 2015, they accepted checks from Nevy's mother Jane Falding, then from Jennifer Nevy herself, not Rosie Finn, whose name was not on the original lease. (CP 313-14, 445. Patricia Bergfords found that state of affairs acceptable, as she deposited the checks from persons not named in the lease monthly, and did not seek to evict the remaining tenants. (CP 423-25, 431, 445-462.

In her brief, appellant Fowler appears to argue that the relationship between Ms. Finn, the original lessee, and Mr. Swift (and Ms. Nevy) is one of a lessee and a sublessee. This is incorrect as a matter of law. Even if the parties themselves characterize it as a "sublease," if there is no reversionary interest in occupancy left, then it is an assignment, not a sublease, and the new occupants stand in the shoes of the former tenant:

It is upon this principle that a subletting for the entire or remainder of a term is held to be an assignment, giving the owner a right to maintain an action of unlawful detainer as against one claiming as a sublessee, is sustained. There is another principle – and we deem it to be decisive of this case. It is that in order to sustain a sublease there must be a reversionary interest in the premises, however small it may be.

Sheridan v. O. E. Doherty, Inc., 106 Wash. 561, 181 P. 16, at 17 (1919).

In other words, there is no sublease between Ms. Finn and any of the remaining tenants, because Finn held back no reversionary interest (right of return to finish out the lease) when she transferred the entire month-to-month tenancy to Ms. Nevy.

Plaintiff Fowler's accident happened in November 2014, well after defendant Rosie Finn assigned her interest in the premises to Jennifer Nevy in February 2014. Ms. Finn's effective assignment of her tenancy eliminated her from any conceivable chain of causation by extinguishing her duty to future invitees upon the transfer of the month-to-month to Jennifer Nevy. Therefore, Ms. Finn, as a prior tenant, had no more duty towards the plaintiff than did prior tenant Jessica Jensen.

D. Assuming arguendo a breach of duty, Ms. Finn's acts eight months or more prior to Fowler's injury are too attenuated to be the proximate cause of said injury.

Finally, Ms. Fowler failed to produce evidence that any actions by Ms. Finn were the proximate cause of Fowler's injury eight months later. Ms. Finn's hypothetical breach of duty (if any alternate legal theory might

be imagined) before she vacated the rental premises would be too remote and attenuated to be considered a legal cause of the accident eight months later, as she had no control over the either the rental itself, or the persons therein, for that substantial length of time. *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985).

CONCLUSION

There was no error by the trial court in granting summary judgment. Previous tenant Ms. Finn did not owe the plaintiff any legal duty with respect to her former rental property, or have actual or constructive knowledge of an unreasonably hazardous condition regarding the staircase. Plaintiff was unable to present any issue of material fact indicating otherwise. Accordingly, Ms. Finn respectfully requests that the panel affirm the grant of summary judgment dismissal.

DATED this 26th day of November, 2018, at Olympia, Washington.

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November 26, 2018 - 8:09 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51366-8
Appellate Court Case Title: Rebecca Fowler, Appellant v. Brent Swift, et al., Respondents
Superior Court Case Number: 16-2-04431-7

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