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No. 75161-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DIANA PAINTER, an individual,
Appellant,

vs.

PATRICIA L. SULLIVAN and "JOHN DOE" SULLIVAN, husband and
wife and the marital community composed thereof,

Respondents.

BRIEF OF RESPONDENT

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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

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I. INTRODUCTION

After seven months of living and tending horses on Ms. Sullivan's property, Ms. Painter fell and broke her leg when she stepped on a molehill in the pasture area surrounding a horse corral. She admits both that she was aware of the presence of molehills on the property, CP 36:6-16, and that she was not looking down and watching where she was stepping at the time she fell. CP 54:16-21. Nonetheless, she claims that her fall was the result of negligence by her landlord, Ms. Sullivan, in failing to grade the "lumpy areas and uneven grounds" in the livestock pasture. CP 5:1-3. She also finds fault with the presence of long grass in the horse pasture, and contends that the pasture grass should be trimmed or otherwise landscaped. CP 64:5-11. Alternatively, she proposes that Ms. Sullivan should have posted "BEWARE OF MOLE" signs throughout the area. CP 64:8. Because uneven ground and tall grass in an area meant for livestock is not an unreasonably dangerous condition, and because these conditions were open and obvious, Ms. Sullivan respectfully requests that the court affirm the trial court's order granting summary judgment dismissal of Ms. Painter's claims.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should the trial court's order granting summary judgment affirmed because the presence of molehills and tall grass in a livestock

area is not an unreasonably dangerous condition?

2. Should the trial court's order granting summary judgment affirmed when the molehills and tall grass were open and obvious?

3. Should the trial court's order granting summary judgment affirmed because Ms. Painter has presented no evidence to suggest that Ms. Sullivan knew of unreasonably dangerous molehills in the area near the water spigot?

III. STATEMENT OF THE CASE

A. Statement of facts.

Ms. Painter leased a unit in a duplex owned by defendant. CP 26:6-24. She had two different tenancies. CP 27:5-6. The first tenancy started in 2006 and lasted approximately one year. CP 27:8-11. The second tenancy started in December 2011. CP 26:6-7. She chose to rent Ms. Sullivan's duplex because there was a corral on the property where she could keep her two horses. CP 28:11. The entire grounds consisted of approximately 40 acres. CP 28:21-22. Ms. Painter had use of the entire property except for the barn, which was leased separately to a horse trainer. CP 30:13-20.

The pasture and corral area contained visible molehills, of which Ms. Painter was well aware. CP 36:6-16. According to Ms. Painter, there

were “[m]ole hills everywhere,” including in the pasture, corral area, and around the duplex. CP 37:13-18.

On July 26, 2012, the plaintiff walked out to the corral in the backyard in order to fill a trough of water for her horses. CP 2:23-3:3. The plaintiff testified that in July of 2012 she filled the water trough “a couple times a week.” CP 34:24-35:1. Ms. Sullivan was walking toward the water spigot near the corral when she stepped on a molehill, rolled her ankle, and fell. CP 35:12-36:5; 38:12-15. The fall caused the plaintiff to fracture her ankle. CP3:3.

The grass around the water spigot “was mid-calf long.” CP 45:9-10. Ms. Sullivan supposes that if the grass had been short she would have been able to see the molehill and would have walked around it. CP 46:25-47:2. However, she admits that she was not “looking down and watching” where she was stepping, but was just “[k]ind of look[ing] around.” CP 38:18-21.

While Ms. Painter had not previously observed mole hills in the area around the water spigot, she concedes that there were “moles everywhere.” CP 36:6-18. Ms. Painter never complained about the molehills before she fell, CP 37:22-25, nor did she complain about the height of the grass near the water spigot. CP 48:22-24.

B. Statement of procedural history.

Ms. Painter brought suit in tort for common law negligence. CP 4:11-17. She did not allege any claims under the Residential Landlord Tenant Act, nor has she made any claims under the lease agreement. *Id.*

Ms. Sullivan moved for summary judgment on liability. CP 13-20. Ms. Painter opposed the motion, CP 55-67, but the court entered an order granting summary in Ms. Sullivan's favor on April 8, 2016. CP 85-86. Ms. Painter appeals.

IV. ARGUMENT

A. Standard of review.

Summary judgment orders are reviewed de novo, viewing all facts and reasonable inferences in the light most favorable to the nonmoving party. *Seiber v. Poulsbo Marine Ctr., Inc.*, 136 Wn. App. 731, 736, 150 P.3d 633, 635 (2007). Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Seiber*, 136 Wn. App. at 736.

B. Ms. Sullivan had no duty to abate or warn of the molehills because they were not a dangerous condition on the property.

Because the molehills in the pasture were not a dangerous condition, Ms. Sullivan had no duty to abate or warn of them. Without a duty, Ms. Painter's claim for negligence fails.

To make a prima facie negligence claim, Ms. Painter must show: (1) the existence of a duty, (2) breach of that duty, (3) injury, and (4) proximate cause between the breach and the injury. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 127–28, 875 P.2d 621 (1994). The existence of a duty is a question of law. *Id.* at 128.

A landlord's duty to address conditions on land is set forth in the Restatement (Second) of Torts §§ 343, which was adopted by the Washington State Supreme Court in *Iwai v. State*, 129 Wn.2d 84, 915 P.2d 1089 (1996). The Restatement provides:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, **but only if**, he

(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.

As explicitly and repeated set forth in §343, the condition must present a danger or an unreasonable risk of harm before a duty to address it will arise. A landowner is not a guarantor of safety—even to an invitee. *Mucsi v. Graoch Associates Ltd. P'ship No. 12*, 144 Wn.2d 847, 860, 31

P.3d 684 (2001). Generally, a landowner is not liable to an invitee for dangers that are obvious. *Id.*

Ms. Painter operates from the assumption that the existence of molehills and tall grass in a horse pasture is a dangerous condition. She thus skips over any analysis as to whether the molehills present a dangerous or defective condition, and proceeds directly to the issue of notice. She provides no analysis or case law to support the idea that uneven ground in a pasture intended for livestock is actually dangerous. In fact, case law holds that uneven ground in areas intended for vegetation or landscaping is not, as a matter of law, dangerous.

For example, in *Hoffstatter v. City of Seattle*, 105 Wn. App. 596, 20 P.3d 1003 (2001), the court held that uneven and dislodged bricks in a parking strip were not dangerous, even though it was foreseeable that pedestrians would walk across the bricks. In *Hoffstatter*, the plaintiff tripped and fell on uneven bricks in a planting strip adjacent to a city sidewalk. The bricks had become uneven and dislodged as the result of tree roots. The plaintiff sued both the City of Seattle and the abutting property owner to recover for injuries she sustained when she fell. The trial court dismissed the plaintiff's claims on summary judgment. The Court of Appeals, Division I, affirmed, holding:

[A] reasonably safe condition is not the same for a parking strip as it is for a sidewalk because their purposes are different. In contrast to a sidewalk, which is devoted almost exclusively to pedestrian use, parking strips frequently contain such objects as power and communication poles, utility meters and fire hydrants. As in this case, parking strips frequently are used for beautification, such as grass shrubbery, trees or other ornamentation. It is certainly true that pedestrian use of parking strips must be anticipated. But they are not sidewalks and cannot be expected to be maintained in the same condition.

Id. at 600. The court analyzed the condition of the parking strip and the corresponding duty of the abutting property owner under landlord tenant law. The court recognized that a landlord can be liable under certain circumstances for latent defects in the leasehold, but found no liability because “the condition of the bricks was neither hidden nor defective in light of the intended use of the parking strip.” *Id.* at 603.

Similarly, the court in *McDonald v. Cove to Clover*, 180 Wn. App. 1, 321 P.3d 259 (2014), dismissed a claim by a plaintiff who fell on wet grass. In *McDonald*, the plaintiff slipped on a wet grass slope as he was walking toward a parking lot. Affirming the trial court’s order granting summary judgment for the defendant, the Court of Appeals, Division I, held:

As acknowledged by McDonald at oral argument, no published case has held that wet grass is a dangerous condition that a landlord should expect an invitee to fail to protect themselves against.

Id. at 6-7. Wet grass was not, as a matter of law, dangerous, and the defendant had no duty to warn or cordon off the area to protect invitees.

Per *Hoffstatter* and *McDonald*, the condition of areas designed for pedestrian use is held to a higher standard than the condition of areas set apart for vegetation. Areas not designated for pedestrian travel do not need to be maintained for pedestrian travel. This makes sense because it would be onerous and unreasonable to require a landowner to maintain every area of his property as if it were a sidewalk. When a pedestrian departs from an established sidewalk or right of way, it is reasonable to expect that the pedestrian “will pay closer attention to surface conditions...” *Hoffstatter*, 105 Wn. App. at 601.

Ms. Painter argues that the court should impose upon Ms. Sullivan a duty to trim the grass in the pasture and to ensure that the ground surface is even. A pasture is, by definition, an open and often untended area of land. These conditions make it ideal for raising livestock such as horses, who can graze on the vegetation. To require the pasture to be landscaped for safe pedestrian travel would frustrate these purposes.

Ms. Painter seems to imply that there was an established walkway between the pasture and the faucet, that the molehill was located within the walkway, and that there was no alternative route to the faucet except

the walkway. She provides no evidence to support these contentions, and the record belies them. Photographs of the corral and water faucet show a grassy area with no apparent walkway. CP 53, 54. By Ms. Painter's own account, she fell in tall grass. CP 37:1-3. There is no testimony or other evidence of a walkway.

C. Case law related to ice and snow on sidewalks does not apply because a pasture is not a sidewalk.

Ms. Painter relies exclusively on case law regarding a landlord's duty to abate snow and ice on sidewalks and in parking lots. But pursuant to *Hoffstatter* and *McDonald*, none of the cases cited by Ms. Painter apply. The cases Ms. Painter cites address the condition of areas specifically designed for travel, not areas set aside for vegetation. Those cases also involve accumulations of snow and ice, which is a presumptively dangerous condition. See *Geise v. Lee*, 84 Wn.2d 866, 869, 529 P.2d 1054 (1975). Here, there is no such presumption that tall grass or uneven ground caused by moles in a livestock area is dangerous.

As both *Hoffstatter* and *McDonald* recognize, areas specifically designated for travel are held to a higher standard of maintenance than other areas of the property grounds, even when it is foreseeable that pedestrians might cross them. A pasture is not a sidewalk, and there is no duty to maintain it as such.

D. The trial court properly granted summary judgment dismissal because the molehills and tall grass were open and obvious.

In addition to the fact that the molehill was not a dangerous condition, the existence of molehills in the general area was open and obvious. Ms. Painter admits that she was aware of the molehills, and that she had noticed them in various different areas of the property. Therefore, there was no duty by Ms. Sullivan to either abate the molehills or warn of their presence.

The standard of care for known or obvious conditions on land is set forth in Restatement (Second) of Torts § 343A(1), which states:

A possessor of land is not liable to ... invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Tincani v. Inland Empire Zoological Soc., 124 Wn.2d 121, 138–39, 875 P.2d 621 (1994). Here, as already established, the existence of molehills in an area set aside for livestock was not dangerous, but even if they were, their existence was well known to Ms. Painter. There is no reason to expect that any alleged danger posed by a molehill is so profound that it warrants imposing liability regardless of Ms. Painter's knowledge. Ms. Painter has made no argument to the effect that she could not appropriately guard herself against the uneven ground surface, or that the

harm was somehow inevitable in spite of her knowledge. Because Ms. Painter was well aware of the conditions in the pasture and corral area, there was no duty by Ms. Sullivan to warn or remedy them.

E. The trial court properly granted summary judgment dismissal because there is no evidence that Ms. Sullivan had notice of unreasonably dangerous molehills in the area surrounding the water faucet.

Notice of a molehill alone is not enough, because molehills are not presumptively dangerous. In order for liability to attach, therefore, Ms. Painter must show that Ms. Sullivan had notice not just of the existence of a molehill, but of one that was of such substantial size and density that it created an unreasonably dangerous condition. Because she has presented no evidence to support either contention, her claim fails.

Ms. Painter concedes at the outset that the molehill upon which she stumbled was concealed by tall grass. Brief of Appellant, p. 1. She has offered no evidence to suggest that the Ms. Sullivan either knew or by the exercise of reasonable care should have discovered the molehill in the pasture near the water faucet. It is common knowledge that molehills can spring up overnight. If the offending mole in this case had recently created the molehill, there would have been no time for Ms. Sullivan to discover it and either correct it or warn Ms. Painter of its presence. Because Ms. Painter cannot prove that Ms. Sullivan knew or should have known that

there was a mole activity in the vicinity of the water spigot, the inquiry ends there.

In an analogous case, *Charlton v. Toys R Us--Delaware, Inc.*, 158 Wn. App. 906, 915, 246 P.3d 199 (2010), the court found no liability for a store owner when a customer slipped and fell in a puddle of water inside the store entrance that accumulated as the result of snowfall the previous day. The plaintiff in *Charlton* argued that the presence of water on the floor was a presumptively dangerous condition, and because it had snowed the night before, the store owner was on notice that the floor was likely to become wet. The trial court rejected both of these arguments and granted summary judgment in the store owner's favor. The Court of Appeals affirmed, holding:

Washington cases make it clear that the mere presence of water on a floor where the plaintiff slipped is not enough to prove negligence on the part of the owner or occupier of the building. To prove negligence, the plaintiff must prove that water makes the floor dangerously slippery and that the owner knew or should have known both that water would make the floor slippery and that there was water on the floor at the time the plaintiff slipped.

The existence of a rug inside a door alone is not enough to establish that an owner or occupier knows the floor might be dangerous. The same is true of the fact that it is wet outside.

Id. at 915. The court refused to find constructive notice even though the store owner knew of the snowfall and knew that the floor was at risk of becoming wet. Because the plaintiff in *Charlton* produced no evidence

that the store owner had notice of water on the floor at the time of the fall, nor did she prove that the water created a dangerously slippery condition, her negligence claim was dismissed.

Here, there is no evidence at all that Ms. Sullivan knew of the molehill at issue or knew that it was of such size and density as to create a hazard. If the store owner's knowledge in *Charlton* that it was wet outside was insufficient to imply notice that the floor might become wet, then Ms. Sullivan's knowledge that there was mole activity elsewhere on the property is insufficient to imply knowledge of a molehill in the area traveled by Ms. Painter. Moreover, if water on the floor of a store is not presumptively slippery or dangerous, then a molehill is not a presumptively dangerous trip hazard.

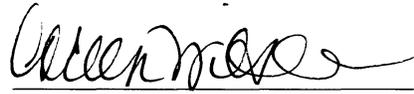
F. Ms. Sullivan is entitled to an award of attorney fees and costs.

As the prevailing parties on appeal, Ms. Sullivan is entitled to an award of fees and costs under RAP 14.2.

V. CONCLUSION

Therefore, for the reasons set forth above, this court should affirm the trial court's decision.

RESPECTFULLY SUBMITTED this 12 day of October,
2016.



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Respondent.

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DECLARATION OF
SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I am over the age of 18, competent to testify, not a party to this action, and employed by the firm of Wieck Wilson, PLLC. I certify that on October 19, 2016, I caused to be delivered, via the method indicated below, a copy of Brief of Respondent to the parties listed below, at their addresses of record on the date listed below.

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DIVISION ONE

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this declaration was executed at Bellevue, Washington.

DATED this 19th day of October, 2016.


MACHELE BRODIE