

COURT OF APPEALS

SEP 27 1987

STATE OF WASHINGTON

BY *SW*

NO. 34121-2-II

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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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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REPLY BRIEF OF APPELLANTS

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## PRELIMINARY STATEMENT

The Respondents have filed a brief, (denominated as a “REPLY BRIEF”) which contains a number of troubling and unfounded statements.

- The Respondents assert that the primary case cited by the Appellants “did not discuss” **Restatement (Second) of Torts**, Section 353 (1965).
- The Respondents assert that the **Restatement (Second) of Torts**, Section 353 (1965), is a “...narrow exception to the common law rule...”
- The Respondents assert that the Appellants did not submit evidence to the trial court which would have been cognizable under Civil Rule 56.

- The Respondents assert that the *Restatement* rule cannot apply because of the “constructive knowledge” that the purchaser of the property had. This allegation is based on a pleading alleging that the purchasers “should have known” of the dangerous condition.
- The Respondents assert that they are entitled to a dismissal because of a trapdoor-style rule; namely, that when one of two parties is liable, allegations of negligence against one somehow become factually binding as to the liability of the other.

## ARGUMENT

### *The Seattle-First National Bank Case*

We cited *Seattle-First National Bank v State*, 14 Wn. App. 166, 540 P.2d 443 (1975) for the proposition that **Restatement (Second) of Torts**, Section 353 (1965) is now the established law of the State of Washington, and has been since at least 1964, when it was first recognized by our Supreme Court.

Amazingly, the Respondents argue that the *Seattle-First* case does not discuss the Restatement rule! Not only does the case discuss the applicability of the rule, the decision notes that the width and breadth of the rule remains an open question, but it identifies the section in question as “...a guide for determining those criteria...” under which a vendor remains responsible for

injuries after transfer of his property. Of course, that is the essence of this case.

***The Restatement is a “narrow exception to the common law rule”***

If the common law rule is “caveat emptor” (as the Respondents state), then this rule stands the common law on its head by holding that there are a variety of situations where the vendor remains liable. All of the cases that the Respondents cite discuss the applicability of the Restatement rule. The cases point out that the rule has been accepted in Washington since 1964 (that’s 42 years!). The name of the rule is “Undisclosed Dangerous Conditions Known to Vendor.” The rule itself speaks to the exact conditions existing in this very lawsuit.

The Restatement rule is a piece of substantive law that has changed the landscape of vendor/vendee liability for over 42 years. To refer to it as a “narrow exception” is at odds with reality.

*No evidence?*

The Respondents claim that we “...presented no admissible evidence to allow the trial court to treat the...CR 12(b)(6) motion as a summary judgment”

We provided the Trial Court with the depositions of Shirley Rollins (the prior owner). In both depositions, she said she knew about the hole and that she notified the subsequent owners of the existence of this dangerous condition.

In sharp contrast, the subsequent owners claimed vehemently in their depositions that they did not know of the hole and had never been warned about the hole. This is not denied (in fact, it was the cornerstone of the subsequent owners’ defense).

The disparity in the two positions was clear, stark and well-documented. The claim that no evidence was supplied to the Trial Court is frivolous.

***“Constructive Knowledge” of Purchasers.***

The Respondents say that the subsequent owners had “constructive knowledge” of the hole and its danger. How do they support this allegation? Answer: It must be true because we (the appellants) *alleged* that the subsequent owner knew. In other words, because we claimed that they knew, it became a fact that they knew (even though they denied it at all stages of the lawsuit and never admitted it, even while settling out).

***The Trap Door***

The Respondents argue that we are stuck with our allegation that the subsequent owner of the property knew of the hole and its danger. So, even though two parties disagree vehemently about whether one knew, and even though they are the only ones who have the knowledge, an innocent plaintiff is deprived of the opportunity to plead the knowledge of both? The law could not countenance such a patently ridiculous result. The *evidence* is

conflicting. The only way the evidence can be worked out is by a jury. If the jury decides that the subsequent owners had no knowledge, then the law allows this action against the former owner. On the other hand, if the jury decides that the subsequent owner was told or did know of the hole and its danger, then the old common law rule may apply, unaffected by Restatement, Section 353. No matter what else, the evidentiary conflict cannot be decided by looking at the pleadings and turning allegations against both into some sort of estoppel against pursuing the responsible party.

## CONCLUSION

This case is clearly governed by the *Seattle-First National Bank* case and its progeny, which adopt and enforce the clear meaning of *Restatement (Second) of Torts*, Section 353 (1964), to the effect that – under certain circumstances – a vendor of real estate can bear liability for a dangerous condition of the property she sold.

The *Restatement* rule is not a narrow exception to the ancient rule of *caveat emptor*; it is a modern, evolutionary rule that reflects the intricacies of the factual situations that accompany real estate transfers and the factual situations that surround dangerous conditions on real estate.

The evidence before the Trial Court certainly took the case out of the purview of CR12(b)(6). The Court was supplied with ample evidence to establish that there was a genuine issue of material fact.

Allegations in pleadings are not established facts sufficient to preclude a party from proceeding on a bona fide claim, by incorporating those allegations in a Summary Judgment motion or a CR 12(b)(6) motion, and pointing to them as if they constituted an estoppel of some sort.

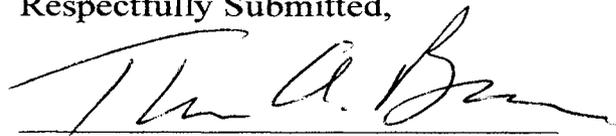
If two defendants disagree on a central, controlling fact that only they know the truth of; a plaintiff cannot lose his claim by alleging both versions of the disputed fact and claiming that one

of the two parties is wrong and therefore liable. A jury, not a pleading, will determine which version of the critical fact is true.

The order appealed from should be reversed, and this case should be returned to the Superior Court for trial.

Dated: November 10, 2006.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Thomas A. Brown", written over a horizontal line.

Thomas A. Brown

WSB # 4160

Attorney for Appellants