IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD ROBERT MITCHELL; RONDA KAY MITCHELL; AND DAWN ARIES COLLVINS MITCHELL, A MINOR, AND JOHNATHAN ROBERT HADLEY MCKELVY, A MINOR, BY AND THROUGH THEIR GUARDIANS AD LITEM, DONALD ROBERT MITCHELL AND RONDA KAY MITCHELL,
Appellants,
vs.
SPRING CREEK ASSOCIATION, A NEVADA CORPORATION; AND AL PARK PETROLEUM, A NEVADA CORPORATION,
Respondents.

No. 42841

DONALD ROBERT MITCHELL; RONDA KAY MITCHELL; AND DAWN ARIES COLLVINS MITCHELL, A MINOR, AND JOHNATHAN ROBERT HADLEY MCKELVY, A MINOR, BY AND THROUGH THEIR GUARDIANS AD LITEM, DONALD ROBERT MITCHELL AND RONDA KAY MITCHELL,
Appellants,
vs.
SPRING CREEK ASSOCIATION, A NEVADA CORPORATION; AND AL PARK PETROLEUM, A NEVADA CORPORATION,
Respondents.

No. 43583

FILED

DEC 26 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART

06-26354

These are consolidated appeals from a district court summary judgment in a negligence action and a post-judgment award of attorney fees. Fourth Judicial District Court, Elko County; Dan L. Papez, Judge.

This case arises out of the contamination of property (the Oakshire Property) owned by appellants Donald and Ronda Mitchell. The contamination was the result of petroleum leakage from storage tanks located underneath an adjacent maintenance yard owned by respondent Spring Creek Association (SCA). Respondent Al Park Petroleum (APP) delivered fuel to the storage tanks until they were taken out of service sometime in the early 1990s.

Pending tests and cleanup of the contamination, SCA moved the Mitchells to a temporary residence in January 2000 on the condition that the Mitchells would pay for the utilities and continue to make mortgage payments on the Oakshire Property. Following a dispute over the payment of utility bills, however, SCA issued to the Mitchells a notice to vacate the temporary residence by August 2000. At the time this notice was issued, the Oakshire Property was safe for habitation given that April 14, 2000 marked the last time any of the test wells showed contamination over the regulatory limit. Nevertheless, the Mitchells refused to return to the Oakshire Property, electing instead to purchase, a house in Kittridge Canyon.[1] After moving to Kittridge Canyon, the Mitchells stopped making

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[1]Specifically, Ronda Mitchell stated that she did not want to return since the contamination could never be completely cleaned up. Donald Mitchell expressed similar sentiment, testifying that he refused to return since SCA could not "give a [one] hundred percent guarantee" that the Oakshire Property was clean. However, in the proceedings below, the Mitchells failed to submit any admissible evidence to support these claims.

mortgage payments on the Oakshire Property, made no attempts to sell the property, and eventually permitted the property to go into foreclosure.

In their complaint, filed in March 2000, the Mitchells alleged five claims against SCA and APP for negligence, fraudulent concealment, intentional and negligent infliction of emotional distress, and intentional trespass to land. The district court granted summary judgment on all claims and awarded costs and attorney fees in favor of SCA and APP.[2] The Mitchells now appeal. Because the parties are familiar with the facts, we do not relate them further except as necessary for our disposition.

Summary judgment

On appeal, the Mitchells contend that the district court erred in granting summary judgment because there remain genuine issues of material fact to each of their claims. Summary judgment is proper when, after an examination of the record viewed in a light most favorable to the non-moving party, no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law.[3] Here, upon de novo review, we conclude that summary judgment was warranted.[4]

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[2]In the proceedings below, the Honorable Andrew J. Puccinelli initially granted summary judgment in favor of SCA and APP. However, upon a subsequent motion for relief, Judge Puccinelli recused himself from the case, which was then reassigned to the Honorable Dan Papez. After a separate evaluation of the evidence, Judge Papez also granted summary judgment and awarded costs and attorney fees in favor of SCA and APP.

[3]Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

[4]Id. (holding that the standard of review for a summary judgment order is de novo).

First, as to the negligence cause of action, we conclude that there is insufficient evidence to raise a genuine factual issue with respect to proximate causation and damages.[5] Absent expert testimony, there is no admissible evidence to establish a casual connection between the contamination and the exacerbation of Ronda Mitchell's alleged obsessive compulsive disorder.[6] Likewise, there is no admissible evidence to show that the contamination proximately caused either the loss of use or the foreclosure of the Oakshire Property. Instead, the Mitchells elected to move to Kittridge Canyon in spite of environmental tests indicating that the Oakshire Property was safe for habitation. Finally, while we have previously held that an owner may testify as to the value of his or her property,[7] the Mitchells' conclusory averment that they lost all equity in their house fails to present specific facts to permit a jury to ascertain an amount of economic loss or the proximate cause of such loss. For this same reason, the Mitchells' remaining evidence—the affidavit of the Elko County Assessor, the opinion of the real estate appraiser, the proffered testimony of Douglas Buchan, the presence of test wells and remediation equipment, and the existence of local newspaper coverage—does not

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[5]See Perez v. Las Vegas Medical Center, 107 Nev. 1, 4, 805 P.2d 589, 590-91 (1991) (holding that to prevail on a negligence claim, the plaintiff must generally show the defendant's duty, breach of the duty, actual and proximate causation, and damages).

[6]See NRS 50.275 (stating that a witness is qualified as an expert based on "special knowledge, skill, experience, training or education").

[7]City of Elko v. Zillich, 100 Nev. 366, 371, 683 P.2d 5, 8 (1984).

preclude summary judgment as any award of damages would have been based on "the gossamer threads of whimsy, speculation and conjecture."[8]

Second, we have held that recovery for negligent infliction of emotional distress is available only upon proof that the claimant suffered severe physical injury or illness as a result of the alleged distress.[9] Here, because the Mitchells proffered no such evidence, we conclude that there is no genuine issue of material fact with respect to this claim.

Third, a cause of action for intentional infliction of emotional distress will not lie absent evidence that SCA or APP allowed the storage tanks to leak with "the intention of, or reckless disregard for, causing emotional distress."[10] As the Mitchells failed to establish this element in the proceedings below, we conclude that summary judgment as to this claim was appropriate.

Lastly, with respect to the claims for fraudulent concealment and intentional trespass to land, we conclude that the district court did not err in granting summary judgment as the record, viewed in the light most favorable to the Mitchells, does not indicate that the SCA or APP acted to conceal the contamination or to intentionally cause the storage

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[8]Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 713-14, 57 P.3d 82, 87 (internal quotation marks omitted).

[9]Barmettler v. Reno Air, Inc., 114 Nev. 441, 448, 956 P.2d 1382, 1387 (1998) (citing Star v. Rabello, 97 Nev. 124, 125, 625 P.2d 90, 91-92 (1981)).

[10]Id. at 447, 956 P.2d at 1386.

tanks to leak and trespass onto the Oakshire Property. Based on the foregoing, we conclude that summary judgment was warranted.

Attorney fees

The Mitchells also argue on appeal that the district court erred in awarding attorney fees pursuant to NRS 18.010(2). We agree.

Amended in 2003, NRS 18.010(2) authorizes a court to award attorney fees to a prevailing party if a claim "was brought or maintained without reasonable ground or to harass the prevailing party." Contrary to the Mitchells' contention, we initially note that the district court did not err in retroactively applying the amended statute to the present case. As we have previously recognized, the term "maintain"—absent language to the contrary—implies the existence of a cause of action, which could incorporate any statutory changes or amendments to actions already brought or filed, but not yet resolved or reduced to judgment.[11]

Nevertheless, we conclude that the district court erred in awarding attorney fees to SCA and APP under the statute. Although the proffered evidence was insufficient to raise a triable issue of material fact, the record reflects that the Mitchells may have possessed a cognizable claim for diminished property value and therefore maintained their suit with reasonable ground. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART as to the order granting summary judgment in favor of respondents

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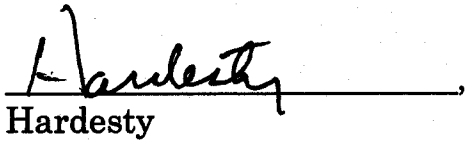
[11]Madera v. SIIS, 114 Nev. 253, 258-59 & n.3, 956 P.2d 117, 120-21 & n.3 (1998) (noting that "use of the word 'maintained' in NRS 616D.030 is an unmistakable indication that the legislature intended retroactive application).

AND REVERSED IN PART as to the order awarding respondents attorney fees.


, J.
Becker


, J.
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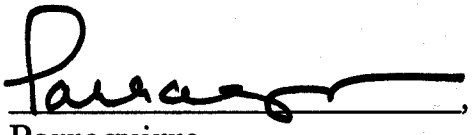
, J.
Parraguirre

cc: Hon. Andrew J. Puccinelli, District Judge
Hon. Dan L. Papez, District Judge
Carolyn Worrell, Settlement Judge
Lemons Grundy & Eisenberg
James M. Copenhaver
Goicoechea, Di Grazia, Coyle & Stanton, Ltd.
Elko County Clerk