IN THE SUPREME COURT OF THE STATE OF NEVADA

ROGER ANDERSON, Appellant, vs. PHIL FALAPPINO AND ROSE FALAPPINO, HUSBAND AND WIFE, Respondents.	No. 43776
PHIL FALAPPINO AND ROSE FALAPPINO, HUSBAND AND WIFE, Appellants, vs. ROGER ANDERSON, Respondent.	No. 43872

FILED

DEC 26 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

These are consolidated appeals from a district court judgment in a real property dispute and post-judgment orders denying motions for attorney fees and a new trial. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

This case involves a dispute over leases between appellant Roger Anderson and respondents Phil and Rose Falappino concerning a piece of property located at 4525 North Rancho Drive, Las Vegas, Nevada (the property). Before entering the leases, Anderson represented the Falappinos as their real estate agent in the sale of a condominium. Sometime thereafter, the Falappinos purchased the property for $400,000 and leased it to Anderson to operate a Blimpie's sandwich shop on it. The Falappinos wanted to earn a ten-percent annual return on their investment.

Anderson and the Falappinos entered into a lease agreement in 1996 for the property (Blimpie's lease), whereby Anderson agreed to pay

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the Falappinos $40,000 per year for a term of five years. The Falappinos agreed to pay the property taxes. The Blimpie's lease also allowed Anderson to sublease the property upon written consent of the Falappinos.

Anderson eventually sold the Blimpie's business and obtained from the Falappinos an addendum to the Blimpie's lease allowing Anderson to sublease the property to the new owner of the Blimpie's franchise. The Falappinos knew that Anderson would earn a profit from the sublease, which they did not disagree with so long as they were paid the agreed-upon rent.

For several months in 1998, the Blimpie's subleasee failed to pay rent to Anderson, and Anderson did not pay rent to the Falappinos. The Falappinos did not take legal action against Anderson, but, according to Mr. Falappino's trial testimony, they relied on Anderson to find a new subleasee. Anderson testified that he was acting on his own behalf and on the Falappinos' behalf in locating a new tenant and negotiating a new sublease.

Anderson found a new subleasee: Fatburger. According to Anderson, Fatburger required certain provisions in its sublease, which necessitated a new lease between Anderson and the Falappinos. On May 12, 1998, the Falappinos signed a new lease with Anderson individually (the ten-year lease). Under the ten-year lease, the amount of rent that Anderson would pay to the Falappinos was the same, $40,000 per year, but the lease term was for ten years, as opposed to five years under the Blimpie's lease. The ten-year lease also provided for assignment and subleasing without prior approval from the Falappinos. It further provided for a seven-percent rent increase upon renewal of the lease after ten years, rather than after the five-year term of the Blimpie's lease.

Similar to the Blimpie's lease, the ten-year lease provided that the Falappinos would pay the property taxes. But unlike the Blimpie's lease, the ten-year lease gave Anderson a ten-year option to purchase the property for $450,000, less 25% of all rents paid, which would be applied toward a down payment. Anderson gave the Falappinos no separate consideration for the option.

Anderson orally informed the Falappinos that he would be receiving a profit from his sublease with Fatburger, but he did not disclose the details of the sublease. Anderson also did not alert the Falappinos to any of the differences between the ten-year lease and the Blimpie's lease before the Falappinos signed the ten-year lease without reading it.

Upon returning home later that day, the Falappinos read the ten-year lease and were unhappy with its terms. They telephoned Anderson and requested that he change certain provisions. Specifically, the Falappinos wanted a five-year term, and they did not want the option-to-purchase clause in the lease. Anderson redrafted the lease with these new terms (the five-year lease).[1]

On the same day that Anderson and the Falappinos signed the ten-year lease, May 12, 1998, Anderson entered into a sublease with Fatburger (the Fatburger sublease). The Fatburger sublease provided for a term of ten years with a monthly rent of $4,800 ($57,600 per year). It also provided for annual increases in rent of three percent and that Fatburger would pay the property taxes to Anderson, even though the

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[1]Because the district court did not admit the five-year lease into evidence as proof of its contents, we do not address whether the five-year lease was properly executed.

Falappinos were already paying the property taxes and would continue to do so under the terms of their lease with Anderson.

After learning that Fatburger was paying Anderson substantially more than Anderson was paying the Falappinos, and because they were concerned that the ten-year lease was still in effect with the option provision, the Falappinos filed suit against Anderson. The Falappinos proceeded to trial against Anderson on claims of breach of fiduciary duty, constructive fraud, and tortious interference with prospective economic advantage.[2] They sought rescission of all of the leases they had with Anderson, imposition of a constructive trust, quiet title, and punitive damages.

Following trial, the district court found in favor of the Falappinos. The district court found that Anderson, as a real estate licensee and statutory agent of the Falappinos, had breached a fiduciary duty owed to the Falappinos with regard to his leases with them. The district court ordered rescission of the ten-year and five-year leases, that Anderson disgorge to the Falappinos all profits made on the Fatburger sublease, and that Anderson pay to the Falappinos all property taxes collected by Anderson from Fatburger, but not paid to the Falappinos.[3]

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[2]It is unclear from the district court's order whether the court ruled on the tortious interference claim. Nevertheless, we conclude that there is insufficient evidence to find that the Falappinos could prove the first element of the claim: that they had a prospective contractual relationship with Fatburger with which Anderson interfered.

[3]The district court also denied the Falappinos' motion for attorney fees. We affirm the district court's decision on this point because, under NRS 18.010(1) and the lease agreements, the Falappinos could only be

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We conclude that substantial evidence[4] supports the district court's finding that Anderson owed the Falappinos a fiduciary duty as a real estate licensee and agent when he undertook the job of finding a replacement subtenant for Blimpie's and that Anderson breached this duty.[5] Although the Falappinos failed to read the ten-year lease before signing it, Anderson, as the Falappinos' agent, had a duty to disclose material facts related to the ten-year lease and to disclose material facts related to the new sublease with Fatburger.[6] Normally, those material facts would include (1) the amount of profit Anderson was going to make by subleasing to Fatburger, (2) the option to purchase, (3) the lease term being ten years instead of five years, (4) that Fatburger was paying Anderson for the property taxes even though Falappino agreed to pay the property taxes for Anderson, and (5) the percentage increases in rent at

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. . . continued

awarded attorney fees if the litigation ensued because of default by Anderson, which did not occur here.

[4]"'Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion.'" Bongiovi v. Sullivan, 122 Nev. ___, ___, 138 P.3d 433, 451 (2006) (quoting First Interstate Bank v. Jafbros Auto Body, 106 Nev. 54, 56, 787 P.2d 765, 767 (1990)).

[5]See Holland Rlty. v. Nev. Real Est. Comm'n, 84 Nev. 91, 96-99, 436 P.2d 422, 425-27 (1968); see also NRS 645.030(1)(a); NRS 645.260. Whether Anderson was an inactive licensee does not relieve him of his duties as a licensee. The statutes do not distinguish between active and inactive licensees.

[6]NRS 645.252(1).

the end of the lease terms of the ten-year lease as opposed to the annual increases in the Fatburger lease.

We conclude, however, that Anderson was relieved from his disclosure duty with respect to the details of Fatburger as a subtenant when the Falappinos repeatedly indicated to him that they did not care about those details so long as they continued to receive their ten-percent annual return on their initial investment.[7] Given the Falappinos' lack of interest in the details of the Fatburger sublease, Anderson's duty was limited to disclosing the material changes in the ten-year lease, namely, (1) the option to purchase, (2) the ten-year term, and (3) the property tax issue. Because Anderson failed to disclose these material changes in the ten-year lease, we conclude that the district court correctly found that Anderson breached his fiduciary duty to the Falappinos.[8]

We disagree, however, with the district court's remedy of rescission and disgorgement of Anderson's profits. The record indicates the Falappinos' clear intention to enter into a new lease agreement with

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[7]"A principal may manifest a lack of interest in receiving some or all information from the agent. If so, and if the agent complies with the principal's manifested desire not to receive information, the principal bears the risk that action taken by the agent will not represent the course of conduct that the principal would have wished, had the principal received the information from the agent." Restatement (Third) of Agency § 8.11 cmt. b (2006).

[8]Because the district court found an agency relationship and breach of fiduciary duty, it necessarily could not have found constructive fraud. Further, the Falappinos did not argue constructive fraud in the context of Perry v. Jordan, 111 Nev. 943, 947, 900 P.2d 335, 337 (1995). We therefore do not address the constructive fraud issue.

Anderson for a five-year term with no option for Anderson to purchase the property. We therefore conclude that the district court abused its discretion in rescinding the ten-year lease. Rather than rescinding the lease, the district court should have reformed the lease to comport with the Falappinos' understanding of what they were signing on May 12, 1998, i.e., an instrument similar to the five-year lease.[9]

We also conclude that the district court erred in imposing a constructive trust on the profits Anderson earned from his sublease with Fatburger. The record is clear that the Falappinos were aware that Anderson would profit from the sublease and that they intended those profits to be Anderson's compensation as the Falappinos' agent in finding Fatburger as a new subtenant. Because Anderson did not breach his fiduciary duty to the Falappinos with respect to earning a profit on the Fatburger sublease, the district court erred in requiring Anderson to disgorge those profits.

The district court, however, did not err in requiring Anderson to disgorge the amount of property taxes paid by Fatburger to Anderson, which Anderson kept as a profit because the Falappinos paid the property taxes. Anderson conceded this point during oral argument, and we therefore affirm this portion of the district court's remedy.

Based on the foregoing, we ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND

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[9]See Graber v. Comstock Bank, 111 Nev. 1421, 1428, 905 P.2d 1112, 1116 (1995); Helms Constr. v. State ex rel. Dep't Hwys., 97 Nev. 500, 503, 634 P.2d 1224, 1225 (1981).

REMAND this matter to the district court for proceedings consistent with this order.

Becker, J.
Becker

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

cc: Hon. Mark R. Denton, District Judge
Lester H. Berkson, Settlement Judge
Beckley Singleton, Chtd./Las Vegas
Darrell Lincoln Clark
Kelly & Sullivan, Ltd.
Beckley Singleton, Chtd./Las Vegas
Darrell Lincoln Clark
Kelly & Sullivan, Ltd.
Clark County Clerk

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

06-26352

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.

Becker, J.

Hardesty, J.

Parraguirre, J.

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