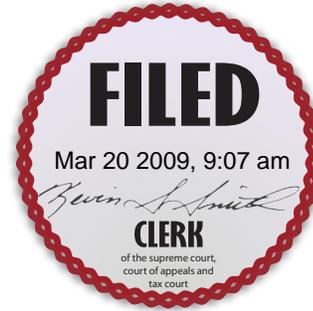


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

TIMOTHY MCFADDEN,)
)
Appellant,)
)
vs.)
)
KURT NESS, STEPHEN A. NESS,)
STEPHEN NESS and KURT NESS d/b/a)
DOUBLE SS d/b/a NESS BROTHERS REALTY)
)
Appellees.)

No. 35A02-0808-CV-690

APPEAL FROM THE HUNTINGTON SUPERIOR COURT
The Honorable Jeffrey R. Heffelfinger, Judge
Cause No. 35D01-0505-CT-595

March 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Timothy McFadden appeals the trial court's grant of summary judgment in favor of Kurt and Stephen Ness individually, and Kurt and Stephen Ness d/b/a Double SS d/b/a Ness Brothers Realty (collectively, Ness Realty unless otherwise indicated) in his negligence claim against Ness Realty. He presents the following restated issue for review: Did the trial court improperly grant summary judgment in favor of Ness Realty?

We affirm.

The facts favorable to McFadden, the non-moving party, are that McFadden rented a house from Ness Realty. Before executing the lease, McFadden spoke with Ness Realty's property manager, Jim Farlow, about the lease terms. Farlow told McFadden that the tenant was responsible for maintaining the yard and shrubbery, including mowing the lawn. McFadden was aware that there was a steep slope on the property. Farlow affirmed that McFadden was responsible for cutting that hillside. When the two discussed how this could be accomplished, Farlow suggested that McFadden could lower the mower down the slope and pull it up again using an attached rope. McFadden signed the lease on April 28, 2003 and moved into the house shortly thereafter.

On May 29, 2003, McFadden mowed the lawn. When it came time to mow the slope, McFadden attempted to push the mower up the slope, but found that he could not keep his footing, so he abandoned the attempt and did not mow the slope. The second time he mowed the yard, he attempted to mow the slope as Farlow had suggested. He removed the mower's handle and tied a cable to it. As he did so, the mower began to roll down the slope, but McFadden stopped it before it rolled to the bottom. He hauled it up and tried a second time

to attach the cable. Once again, the mower began to roll down the slope. This time, however, McFadden lost his balance as he attempted to stop it, and he tumbled to the foot of the slope, suffering bodily injuries.

On May 26, 2005, McFadden filed a complaint for damages alleging the aforementioned appellees were liable for his damages upon the theory of negligence. According to the complaint, the appellees – referred to as “the Landlord” - were “negligent in requiring that Mr. McFadden mow the hill. The Landlord failed to use reasonable care in his relations with his tenant, knowing of Mr. McFadden’s disabilities,^[1] the difficulties in mowing the hill, and the extremely dangerous nature of attempting to mow the hill.” *Appellant’s Appendix* at 10 (footnote supplied). On February 14, 2008, Ness Realty moved for summary judgment on the basis that it owed no duty to McFadden under the circumstances. The trial court granted Ness Realty’s motion for summary judgment on July 3, 2008.

Our standard of review for a trial court’s grant of a motion for summary judgment is well settled:

Summary judgment is appropriate only where the evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. A party seeking summary judgment bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. A factual issue is “genuine” if it is not capable of being conclusively foreclosed by reference to undisputed facts. Although there may be genuine disputes over certain facts, a fact is “material” when its existence facilitates the resolution of an issue in the case.

When we review a trial court’s entry of summary judgment, we are

¹ McFadden states that he suffers from schizophrenia and bi-polar disorder.

bound by the same standard that binds the trial court. We may not look beyond the evidence that the parties specifically designated for the motion for summary judgment in the trial court. We must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. On appeal, the trial court's order granting or denying a motion for summary judgment is cloaked with a presumption of validity. A party appealing from an order granting summary judgment has the burden of persuading us that the decision was erroneous.

A grant of summary judgment may be affirmed upon any theory supported by the designated evidence.

Van Kirk v. Miller, 869 N.E.2d 534, 539-40 (Ind. Ct. App. 2007) (citations omitted), *trans. denied*. In the instant case, the parties focus their appellate arguments on the element of duty, and rightly so. Ness Realty sought summary judgment on that basis, and on the facts of this case, it is the only basis upon which the ruling can be affirmed.

When the defendant is the moving party, the defendant must show that the undisputed facts negate at least one element of the plaintiff's cause of action. *Dible v. City of Lafayette*, 713 N.E.2d 269 (Ind. 1999). A defendant's duty to the plaintiff to exercise reasonable care is a required element in the tort of negligence. *Id.* "Summary judgment in a negligence case is particularly appropriate when the court determines that no duty exists because, absent a duty, there can be no breach and, therefore, no negligence." *Olds v. Noel*, 857 N.E.2d 1041, 1043 (Ind. Ct. App. 2006) (quoting *Reed v. Beachy Const. Corp.*, 781 N.E.2d 1145, 1148-49 (Ind. Ct. App. 2002), *trans. denied*).

Generally, the question whether a duty is owed with respect to the maintenance and condition of real property depends primarily upon whether the defendant was in control of the premises when the accident occurred. *Olds v. Noel*, 857 N.E.2d 1041. We have

summarized the rule specifically applicable in the landlord-tenant setting as follows: ““As a general rule, in the absence of statute, covenant, fraud or concealment, a landlord who gives a tenant full control and possession of the leased property will not be liable for personal injuries sustained by the tenant or other persons lawfully upon the leased property.”” *Id.* at 1044 (quoting *Pitcock v. Worldwide Recycling, Inc.*, 582 N.E.2d 412, 414 (Ind. Ct. App. 1991)).

McFadden acknowledges the general rule but does not meet this principle head-on to explain why it should not apply here, or should be applied in such a way as to achieve a different result. Instead, he argues that Ness Realty had a duty in the instant landlord-tenant case by citing cases discussing (1) a landowner’s liability for injuries sustained by a subcontractor while on the landlord’s property, and (2) an employer’s liability for injuries suffered by employees when the employer directed the work that created an unreasonable risk. We decline the invitation to reason by analogy considering other circumstances when the law in this particular circumstance, i.e., a landlord’s liability to a tenant when control of the leased premises has been turned over to the tenant, is well settled.

We note that there are exceptions to the general rule of non-liability after a landlord has surrendered control. A landlord may be held liable for injuries caused by latent defects of which the landlord was aware but which were unknown to the tenant and were not disclosed by the landlord. *See Hodge v. Nor-Cen, Inc.*, 527 N.E.2d 1157 (Ind. Ct. App. 1988), *trans. denied*. A tenant in control of the leased premises may recover for injuries stemming from defective premises if the landlord expressly agrees to repair the defect and is

negligent in doing so. *See Houin v. Burger by Burger*, 590 N.E.2d 593 (Ind. Ct. App. 1992).

Other exceptions include: (1) when a landlord assumes to act on behalf of a tenant, *see Vandebosch v. Daily*, 785 N.E.2d 666 (Ind. Ct. App. 2003); (2) the unexcused or unjustified violation of a duty by a landlord that is prescribed by statute or ordinance, *id.*, and (3) a landlord's duty to maintain in a safe condition those parts of the building used in common by tenants and over which the landlord retains control. *Id.* McFadden does not, however, claim that any of these exceptions apply in this case.

Thus, we agree with the trial court that the well-settled principle controls here, i.e., that, based upon a lack of duty, a landlord is not liable for injuries sustained by a tenant on the leased property after the landlord has surrendered control of the property to the tenant. The trial court did not err in granting summary judgment in favor of Ness Realty on this basis.

Judgment affirmed.

MAY, J., and BRADFORD, J., concur