



KeyCite Yellow Flag - Negative Treatment

Distinguished by Poleyeff v. Seville Beach Hotel Corp., Fla.App. 3 Dist., February 21, 2001

696 So.2d 926

District Court of Appeal of Florida,  
Second District.

Felicia LANDRUM, as personal  
representative of the Estate of Anthony  
(Tony) Landrum, deceased, Appellant,

v.

JOHN DOE PIT DIGGER; Otter Lake Development,  
Inc., a Florida corporation; Otter Lake Development,  
a Florida partnership composed of Betty Jane  
Bacon, Theron A. Arnold and Joseph S. Pagliano,  
as partners; Otter Lake Joint Venture, a Florida  
partnership composed of Marilyn F. McIntosh,  
personal representative of the Estate of Craig  
McIntosh, Roger Conley, Earl L. Snyder, II,  
William Dooley, and Sandra Sutton as partners;  
Sutton Group Properties; Richard Sutton and  
Sandra Sutton, individually; and Otter Lake  
Homeowners' Association, Inc., Appellees.

Nos. 95-05194, 96-00252.

July 9, 1997.

Administrator of estate of individual who had drowned  
in man-made lake in subdivision brought negligence  
action against multiple defendants, including subdivision  
owners. The Circuit Court, Sarasota County, Becky A.  
Titus, J., granted owners' motion to dismiss for failure to  
state claim, and plaintiff appealed. The District Court of  
Appeal, Quince, J., held that allegations that eight-foot in  
man-made lake in subdivision was concealed when lake  
was filled with water, and that side of lake were composed  
of crumbly, soft material making it difficult for person  
to get out of lake, so that lake constituted trap, and that  
developers had duty to protect public, were sufficient to  
state negligence claim.

Reversed and remanded.

West Headnotes (4)

[1] Appeal and Error

↔ Extent of Review Dependent on Nature  
of Decision Appealed from

Review on appeal from order dismissing  
complaint or any count of multi-count  
complaint is limited to whether complaint  
states cause of action.

2 Cases that cite this headnote

[2] Appeal and Error

↔ Striking out or dismissal

In considering order dismissing complaint,  
appellate court must take pleaded facts  
as true, and should not concern itself  
with whether plaintiff will ultimately prove  
allegations.

Cases that cite this headnote

[3] Negligence

↔ Elements in general

In order to sufficiently allege cause of action  
for negligence, plaintiff must allege existence  
of duty recognized by law requiring defendant  
to conform to certain standard of conduct  
for protection of others, including plaintiff,  
failure on part of defendant or defendants  
to perform duty, and injury or damage to  
plaintiff proximately caused by such failure.

1 Cases that cite this headnote

[4] Negligence

↔ Bodies of water and beaches

Negligence

↔ Developers and builders

Allegations that eight-foot drop-off in man-  
made lake in subdivision was concealed when  
lake was filled with water, and that sides of  
lake were composed of crumbly, soft material  
making it difficult for person to get out of  
lake, so that lake constituted trap or hidden

trap, and that developers had duty to either fill in lake, erect fence, provide safer slope, put up warning signs, or otherwise protect public, were sufficient to state negligence claim in action brought after drowning in lake.

1 Cases that cite this headnote

### Attorneys and Law Firms

\*926 Patrick Dekle; Robert J. Shapiro; and A. Woodson Isom, Jr., Tampa, for Appellant.

Donald W. Yetter of Yetter & Zaremba, P.A., Bradenton, for Appellee Theron A. Arnold.

\*927 Roger P. Conley of Conley & Cleary, Bradenton, for Appellee Roger Conley.

William A. Dooley and J. Neal Mobley of Nelson & Hesse, Sarasota, for Appellee William Dooley.

David W. Wilcox, Bradenton, for Appellee Marilyn F. McIntosh, personal representative of the Estate of Craig McIntosh.

Alan E. Tannenbaum and Jane M. Kennedy of Levin and Tannenbaum, P.A., Sarasota, for Appellee Otter Lake Homeowners' Association, Inc.

Charles W. Hall, Jeffrey P. Winkler and William A. Kebler of Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., St. Petersburg, for Appellee Joseph S. Pagliano.

Richard R. Garland and A. James Rolfes of Dickinson & Gibbons, P.A., Sarasota, for Appellee Earl L. Snyder, II.

John D. Hawkins and Douglas A. Peebles of Grimes, Goebel, Grimes and Hawkins, P.A., Bradenton, for Appellees Sutton Group Properties, Richard and Sandra Sutton.

### Opinion

QUINCE, Judge.

Felicia Landrum, as personal representative of her son Anthony Landrum's estate (the estate), challenges the trial court's order dismissing several counts of her amended complaint for failure to state a cause of action. We reverse

because the allegations are sufficient to state a cause of action for negligence.

The estate filed a six-count amended complaint alleging causes of action sounding in negligence and breach of warranty against appellees. The amended complaint alleges four counts of negligence, each against different defendants as follows:

John Doe Pit Digger (count I); Otter Lake Development, Inc.<sup>1</sup>, Otter Lake Development and Otter Lake Joint Venture (count II); Sutton Group Properties and Richard Sutton individually (count III); and Otter Lake Homeowners' Association and Marv Silvern<sup>2</sup> (count VI). The remaining counts (counts IV and V) allege breaches of warranty against Sutton Group Properties. Appellees, Joseph S. Pagliano, Craig McIntosh, Marv Silvern, Otter Lake Homeowners' Association, Inc., Roger Conley, William A. Dooley, Sandra Sutton, Richard Sutton, Sutton Group Properties and Earl L. Snyder, II, filed motions to dismiss for failure to state a cause of action.

After a hearing on the motions, the trial court entered several orders dismissing certain counts and defendants from the law suit. The initial order dismissed with prejudice counts II and VI of the amended complaint; thereby, removing Otter Lake Development, Inc., Otter Lake Development, Otter Lake Joint Venture and Otter Lake Homeowners' Association from the litigation. The order also dismissed without prejudice count III against the Sutton Group and Richard Sutton. The dismissal without prejudice was to allow the estate to file, if it could, a cause of action for negligence based on a violation of the Housing and Urban Development regulations.

The estate timely filed a notice of appeal from this order of dismissal. Thereafter, the trial court entered two additional orders dismissing Snyder and Pagliano, individually, from the lawsuit. Timely notices of appeal were filed, and this court consolidated all the pending appeals.

Counts II, III and VI are all negligence counts based on the death of Anthony Landrum, who drowned in a lake/pit, Lake Otter, located on the subdivision known as Otter Lake Villas in Sarasota County, Florida. The complaint alleges that Otter Lake Development, Inc., Otter Lake Development and Otter Lake Joint Venture were, either separately or jointly, the developers of Otter \*928 Lake

Villas. It further alleges that the lake which exists on the property was dug by John Doe Pit Digger, and that the lake has a vertical eight foot drop-off which cannot be seen after the lake is filled with water. Additionally, the estate contends the sides of the lake are composed of a clay-like material that is crumbly and soft, which makes it difficult for a person to get out of the lake. Therefore, the estate contends the lake constitutes a "trap" or a "hidden trap," and that the developers of the property had a duty to either fill in the lake, erect a fence, provide a safer slope, put up warning signs or otherwise protect the public from the dangers of the drop-off. The estate concludes that the defendants breached this duty, and are, therefore, liable in negligence for Anthony Landrum's death. The defendants filed motions to dismiss alleging these facts do not state a cause of action for negligence.

[1] [2] Our review on appeal from an order dismissing a complaint or any count of a multi-count complaint is limited to whether the complaint states a cause of action. We must take the pleaded facts as true and should not concern ourselves with whether the plaintiff will ultimately prove the allegations. *See Cyn-co, Inc. v. Lancto*, 677 So.2d 78 (Fla. 2d DCA 1996); *Troupe v. Redner*, 652 So.2d 394 (Fla. 2d DCA 1995). Thus, if the complaint before us alleges all the essential elements of negligence, it is not subject to dismissal for failure to state a cause of action.

[3] [4] In order to sufficiently allege a cause of action for negligence, the plaintiff must allege the existence of a duty recognized by law requiring the defendant to conform to a certain standard of conduct for the protection of others, including the plaintiff, a failure on the part of the defendant(s) to perform the duty, and injury or damage to the plaintiff proximately caused by such failure. *Cook v. Sheriff of Collier County*, 573 So.2d 406 (Fla. 2d DCA 1991). We agree with the appellant that counts II, III and VI of the complaint sufficiently allege all of the elements of negligence and should not have been dismissed. The trial court in dismissing the negligence counts made the determination that the lake was not a trap. Such a determination is not appropriate on a motion to dismiss. *Holland v. Anheuser Busch, Inc.*, 643 So.2d 621 (Fla. 2d DCA 1994).

We reverse the trial court's dismissal of counts II, III, and VI of the amended complaint and remand for further proceedings.

THREADGILL, A.C.J., and NORTHCUTT, J., concur.

#### All Citations

696 So.2d 926, 22 Fla. L. Weekly D1716

#### Footnotes

- 1 Otter Lake Development, Inc. is a Florida Corporation. Otter Lake Development is a Florida partnership composed of Betty Jane Bacon, Theron A. Arnold and Joseph S. Pagliano. Otter Lake Joint Venture is a Florida partnership composed of Craig McIntosh, Roger Conley, Earl L. Snyder, II, William Dooley and Sandra Sutton.
- 2 By order dated November 21, 1995, the trial court granted the motion to dismiss Marv Silvern. The dismissal was with the reservation that the plaintiff could amend the complaint should it become apparent that Marv Silvern had violated section 617.0834, Florida Statutes. That order was not appealed; therefore, Silvern is not a party to this appeal.