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trust. Upon remand, the court may also consider an award of costs and attorney fees under Neb. Rev. Stat. § 30-3893 (Reissue 2008).

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

ALICE TOLBERT ET AL., APPELLANTS, V. MR. JAMISON AND MRS. JAMISON, DOING BUSINESS AS JAMISON REALTY, APPELLEES.

794 N.W.2d 877

Filed March 11, 2011. No. S-09-687.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.
3. **Negligence: Proof.** In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.
4. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
5. ____. Whether a duty exists is a policy determination. Duty rules are meant to serve as broadly applicable guidelines for public behavior, i.e., rules of law applicable to a category of cases.
6. **Landlord and Tenant: Statutes: Ordinances.** A statute or ordinance may impose a duty on a landlord.
7. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
8. ____: ____. A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.
9. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the

burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

10. **Appeal and Error.** Appellate courts do not consider arguments and theories raised for the first time on appeal.
11. **Landlord and Tenant: Liability.** 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.
12. ____: ____. To hold an owner of leased premises liable for injuries suffered as a result of the condition of the leased premises, it must appear that the landlord had a right to present possession or present control or dominion thereover.
13. **Landlord and Tenant: Contracts.** In the absence of an express agreement to the contrary, a lessor does not warrant the fitness or safety of the premises and the lessee takes them as he or she finds them.

Petition for further review from the Court of Appeals, IRWIN, CARLSON, and MOORE, Judges, on appeal thereto from the District Court for Douglas County, W. RUSSELL BOWIE III, Judge. Judgment of Court of Appeals affirmed.

Sheri E. Long Cotton for appellants.

Daniel P. Chesire, Cathy S. Trent-Vilim, and Maria T. Lighthall, of Lamson, Dugan & Murray, L.L.P., for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

The plaintiffs-appellants in this case are Alice Tolbert and Chaz Tolbert, individually and as personal representatives of the estates of Victoria Lynn Tolbert Burgess (Victoria) and Tisha Cassandra Tolbert (Tisha), and John Tolbert, as guardian ad litem on behalf of Rictavianna Tolbert, a minor child who is the daughter of Tisha. They are referred to collectively as "the Tolberts" herein. The Tolberts were all related to Victoria and Tisha, a mother and daughter who were both killed in a house fire. Clarence and Phyllis Jamison, doing business as Jamison Realty (the Jamisons), owned the house in which Victoria and Tisha were tenants.

The Tolberts filed an action against the Jamisons and the Omaha Housing Authority (OHA), asserting, inter alia, that

the Jamisons were negligent for failing to provide adequate fire safety features, including adequate escape routes from the rental house in the event of a fire. The district court for Douglas County granted summary judgment in favor of the Jamisons and dismissed the action after determining that because the Jamisons did not violate any regulations or codes, they met their duty, and that, even if the Jamisons were negligent, the actions of an arsonist who started the fire were not foreseeable and were an intervening cause of the fire and of Victoria's and Tisha's deaths. The Tolberts appealed, claiming that the district court erred when it failed to apply "notice pleading" principles and the law regarding premises liability. They also complained of certain evidentiary rulings. The Nebraska Court of Appeals affirmed the decision of the district court, based on the intervening cause aspect of the ruling. We granted the Tolberts' petition for further review. Albeit for reasons other than those articulated by the Court of Appeals, we affirm.

STATEMENT OF FACTS

Victoria and Tisha lived in "Section 8" federally subsidized housing owned by the Jamisons. The property at issue is a two-story, single-family dwelling. Victoria and Tisha died in April 2003 as the result of a house fire that was intentionally set by Decabooter Williams. See *State v. Williams*, 269 Neb. 917, 697 N.W.2d 273 (2005). Another occupant of the house escaped through a window. See *id.*

The Tolberts filed this negligence action against the Jamisons, alleging that they were negligent in failing to provide appropriate ingress and egress, working fire alarms, and fire extinguishers or other extinguishing equipment "as required by the laws of the State of Nebraska, the U.S. Department of Housing governing participants in the Section 8 program and the City of Omaha Minimum Dwelling Codes." The Tolberts alleged, inter alia, that the house had one door for ingress and egress and that the fire started by Williams blocked access to the one door.

The Tolberts also named OHA as a defendant. In 2006, the district court sustained OHA's motion to dismiss the suit against OHA. The court found two reasons to dismiss the suit against

OHA: (1) Federal law bars a private right of action against a public housing authority administering Section 8 housing for failure to enforce housing quality standards, and (2) the actions of the arsonist, Williams, were an efficient intervening cause which precluded a finding that any negligence on the part of OHA proximately caused Victoria's and Tisha's deaths. The court certified the order sustaining OHA's motion to dismiss as a final judgment as to all claims against OHA, pursuant to Neb. Rev. Stat. § 25-1315 (Reissue 2008). The Tolberts appealed the dismissal of OHA to the Court of Appeals. The Court of Appeals affirmed the dismissal on the basis that federal law barred the action. Because such conclusion resolved the appeal, the Court of Appeals did not consider other rationale upon which dismissal of OHA had been based. *Tolbert v. Omaha Housing Authority*, 16 Neb. App. 618, 747 N.W.2d 452 (2008). We denied the Tolberts' petition for further review.

After the cause resumed in the district court, the Jamisons moved for summary judgment. The district court conducted an evidentiary hearing. The Jamisons contended they were not negligent. The Jamisons relied in part on various regulations and codes regarding fire safety requirements with which they had complied and which they asserted demonstrated they had met their duty and the standard of care. The district court made certain evidentiary rulings not relevant to our resolution of this case.

In an order filed on April 15, 2009, the court found that there was no evidence that the Jamisons failed to comply with federal Section 8 housing requirements, state law, or city of Omaha building codes with regard to ingress and egress and other fire safety issues. The court further found that Williams' actions in starting the fire "were not foreseeable to the Jamisons and presented an intervening cause which breaks the causal chain of any negligence which may be attributable to the Jamisons" and that Williams' actions were "the proximate cause of the injuries to the Tolberts." The law generally defines "efficient intervening cause" as new and independent conduct of a third person, which itself is a proximate cause of the injury in question and breaks the casual connection between the original conduct and the injury. *Wilke v. Woodhouse Ford*, 278 Neb.

800, 774 N.W.2d 370 (2009). The court sustained the Jamisons' motion for summary judgment.

The Tolberts appealed to the Court of Appeals. In a memorandum opinion filed March 30, 2010, the Court of Appeals summarized the Tolberts' assignments of error as follows: The trial court erred in (1) determining that Williams' actions constituted an efficient intervening cause, cutting off the Jamisons' liability for any negligence; (2) failing to apply notice pleading principles to the Tolberts' complaint and failing to consider premises liability theory; and (3) sustaining the Jamisons' objections to the Tolberts' exhibits and in overruling the Tolberts' objections to the Jamisons' exhibits. In their brief filed in the Court of Appeals, the Tolberts claimed for the first time that the essence of their negligence action was that the Jamisons were liable under the common law regarding premises liability and specifically as such law applied to conditions on the land. The focus of the Tolberts' claim on appeal is that the Jamisons violated their duty to the Tolberts when the Jamisons failed to provide a second door for egress in the event of a fire.

The Court of Appeals affirmed the district court's grant of summary judgment in favor of the Jamisons. The Court of Appeals concluded that "the trial court did not err in finding that Williams' actions were an efficient, intervening cause, and that Williams' actions were not foreseeable to the Jamisons." Given its resolution of such issue, the Court of Appeals determined that it did not need to address the Tolberts' other assignments of error.

We granted the Tolberts' petition for further review.

ASSIGNMENTS OF ERROR

The Tolberts assert that the Court of Appeals erred by failing to properly analyze their claim under Nebraska law as a premises liability claim regarding "conditions on the land." The Tolberts make other assignments of error which we need not discuss, because this assignment of error resolves the appeal.

STANDARD OF REVIEW

[1,2] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is

no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence. *Wilson v. Fieldgrove*, 280 Neb. 548, 787 N.W.2d 707 (2010).

ANALYSIS

In this negligence action as pleaded, the Tolberts alleged that the Jamisons were liable because, as owners of a single-family dwelling with only one door, they failed to comport with various regulations and codes relevant to Section 8 housing. The evidence at the summary judgment hearing was designed to meet these allegations. Because none of the regulations and codes required a second door, the Jamisons met their duty in this regard. The district court granted summary judgment in favor of the Jamisons based on their demonstrated compliance with such regulations and codes. This basis for the grant of summary judgment was correct.

The Jamisons established that they met their duty and that they were not negligent. As explained below, as the case was pleaded and tried, there was no negligence, and therefore, there was no basis for application of a theory of intervening causal negligence. The intervening cause rationale explained by the district court and endorsed by the Court of Appeals was not a correct application of the law and does not support entry of the summary judgment. Nevertheless, because summary judgment was properly entered based on the Jamisons' compliance with regulations and codes, we affirm the decision of the Court of Appeals which affirmed the district court's grant of summary judgment in favor of the Jamisons.

On further review, the Tolberts contend that the proper analysis of their negligence action is under premises liability theory, specifically as it relates to conditions on the land, and that their complaint put the Jamisons on notice that this theory

was at issue. They contend that the Court of Appeals erred by not reviewing the appeal as a "conditions on the land" case. The Jamisons respond that the complaint as pleaded was a claim of negligence based on purported violations of duties established by regulations and codes, that premises liability was not pleaded or argued at the trial level, and that the entry and affirmance of summary judgment in their favor was proper. We agree with the Jamisons in each regard.

In their complaint, the Tolberts alleged that the Jamisons were negligent because they failed to provide safety features in violation of various regulations and codes. Throughout the proceedings, the Tolberts have focused on the fact that the single-family dwelling of which they were tenants had one door, although there is no dispute that there were windows capable of being used for egress and that one occupant of the house exited through a window. See *State v. Williams*, 269 Neb. 917, 697 N.W.2d 273 (2005).

[3-6] In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages. *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010). The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Id.* Whether a duty exists is a policy determination. See *id.* Duty rules are meant to serve as broadly applicable guidelines for public behavior, i.e., rules of law applicable to a category of cases. *Id.* Courts have recognized that a statute or ordinance may impose a duty on a landlord. See *Hodge v. Nor-Cen, Inc.*, 527 N.E.2d 1157 (Ind. App. 1988) (in apartment house fire, city ordinance requiring second means of egress imposed duty on landlord).

In view of the allegations in the complaint, the Jamisons moved for summary judgment on the basis that they had met their duty by complying with relevant housing regulations and codes. The record supported the Jamisons' position. The district court concluded they were entitled to judgment as a matter of law on this basis. We determine that the district court did not err in this regard.

[7-9] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Hofferber v. City of Hastings*, 275 Neb. 503, 747 N.W.2d 389 (2008). A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial. *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010). After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id.* In reviewing a summary judgment, we give the party against whom the judgment was entered all reasonable inferences deducible from the evidence. See *Wilson v. Fieldgrove*, 280 Neb. 548, 787 N.W.2d 707 (2010).

The Tolberts do not dispute that the Jamisons met relevant regulations and codes. They contend, however, that their reference to "the laws of the State of Nebraska" in the complaint encompasses the common law of Nebraska and, in particular, concepts of premises liability which the Tolberts assert imposed additional duties on the Jamisons. The Tolberts suggest that they attempted to meet the Jamisons' summary judgment case by proffering various affidavits from witnesses in the inspection and construction fields which would have shown that it is customary to have more than one door in a single-family dwelling and, therefore, that conditions on the land failed to meet common standards, thus giving rise to premises liability. However, because premises liability theory imposes duties on possessors of land and the Jamisons were not possessors of the land, the Tolberts' reliance on their affiants and the premises liability theory they support is misplaced.

On further review, the Tolberts refer us to *Richards v. Meeske*, 268 Neb. 901, 689 N.W.2d 337 (2004), in which we set forth the framework for premises liability under Nebraska

law which we apply to this case. In *Meeske*, we stated that there are generally three categories of duties that a possessor of land owes to those lawfully on the premises. We described those duties as follows:

> First, the possessor must take reasonable steps to protect the lawful entrant from conditions on the land. . . . Second, the possessor must take reasonable steps to protect the lawful entrant from the possessor's dangerous activities. . . . Finally, the possessor must take reasonable steps to protect the lawful entrant from accidental, negligent, and intentional harmful acts of third parties if those acts are foreseeable.

Id. at 907, 689 N.W.2d 343 (citations omitted).

The duties of a possessor of land described in *Meeske* are taken from the Restatement (Second) of Torts § 341A (1965). The term "possessor" is defined by the Restatement, *supra*, § 328E at 170, as

> (a) a person who is in occupation of the land with intent to control it or
>
> (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
>
> (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

This Restatement definition of "possessor" is applicable to premises liability, and referring to this definition of "possessor," there is nothing in the record from which we can infer that the Jamisons are "possessors" of the land at issue. Because the Jamisons are not possessors of the land, they are not bound by the premises liability duties described in *Meeske*. Thus, neither the first duty in *Meeske* regarding conditions on the land, upon which the Tolberts rely in general, nor the third duty in *Meeske* regarding protecting against intentional harmful acts of third parties, upon which the lower courts relied in their intervening cause analysis, is relevant to establishing the Jamisons' duties.

[10] On further review, the Tolberts seem to suggest that there are other sources of law from which additional duties

may be placed on the Jamisons. In response, the Jamisons correctly note that appellate courts do not consider arguments and theories raised for the first time on appeal. See *Ballard v. Union Pacific RR. Co.*, 279 Neb. 638, 781 N.W.2d 47 (2010). The Tolberts did not advance alternative theories which would create additional duties on the Jamisons in the lower courts, and their general reference to "the laws of the State of Nebraska" does not suggest a compelling alternative source of duty.

In their brief in support of their petition for further review, the Tolberts suggest that the Jamisons, as landlords, had a common-law duty to reasonably guard against the risk of fire. The cases upon which the Tolberts rely, such as *Collins v. Scenic Homes, Inc.*, 38 So. 3d 28 (Ala. 2009), and *Mozer v. Semenza*, 177 So. 2d 880 (Fla. App. 1965), are distinguishable because they involved apartment buildings or hotels where the owner retained control over the premises or common areas. In contrast to the cases referred to by the Tolberts, this case involves owners of a single-family dwelling who were sued by occupants.

[11,12] With reference to a single-family unit, the law may be summarized 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.'" *Olds v. Noel*, 857 N.E.2d 1041, 1044 (Ind. App. 2006). It is well settled in Nebraska common law that to hold an owner of leased premises liable for injuries suffered as a result of the condition of the leased premises, it must appear that the landlord had a right to present possession or present control or dominion thereover. *Tighe v. Cedar Lawn, Inc.*, 11 Neb. App. 250, 649 N.W.2d 520 (2002). See, *Weiss v. Autumn Hills Inv. Co.*, 223 Neb. 885, 395 N.W.2d 481 (1986); *Hiatt v. Tallmage*, 219 Neb. 635, 365 N.W.2d 448 (1985). See, also, 52A C.J.S. *Landlord & Tenant* § 893 (2003).

[13] We recognize that a landlord may be bound to use reasonable care in the maintenance of common areas of which he or she retains control and have not been demised to the

tenants. See *Tighe, supra.* However, we cannot infer from the record that there was a "common area" in this single-family dwelling. See *Olds v. Noel, supra* (common area more likely to be found in apartment complex or other multi-unit properties rather than single-family dwelling). See, generally, 52A C.J.S., *supra*. In the absence of an express agreement to the contrary, a lessor does not warrant the fitness or safety of the premises and the lessee takes them as he or she finds them. *Roan v. Bruckner*, 180 Neb. 399, 143 N.W.2d 108 (1966); *Tighe, supra*. In this case, the Tolberts did not rely on a lease or plead a contractual basis for the Jamisons' alleged duty. Finally, the Uniform Residential Landlord and Tenant Act, as adopted in Nebraska, did not change the common law. Neb. Rev. Stat. § 76-1419(1)(f) (Reissue 2009) (providing that obligations imposed by this section are not intended to change existing tort law in this state). We reject the Tolberts' idea that other sources of duty giving rise to negligence by the Jamisons can be inferred from the complaint.

CONCLUSION

The Jamisons overcame the allegations in the complaint to the effect that they had violated various regulations and codes and demonstrated that they were entitled to judgment as a matter of law. They were not obligated to advance alternative theories upon which duty and liability could be potentially based. The Tolberts did not produce evidence which showed a material fact in dispute that would prevent judgment as a matter of law. The Tolberts' appellate arguments on further review and references to excluded evidence all grounded in conditions on the land under the theory of premises liability are not persuasive; because the Jamisons were not possessors of the land, they had no duty under premises liability theory. Albeit for reasons which differ from those of the Court of Appeals, we affirm the decision of the Court of Appeals which affirmed the district court's entry of summary judgment in favor of the Jamisons.

AFFIRMED.