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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RONALD B. HAGER, a married man, Plaintiff/Appellant, v. M. VISTA INVESTORS, LLC, an Arizona limited liability company, Defendant/Appellee.	2 CA-CV 2010-0175 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CV200700279

Honorable James L. Conlogue, Judge

AFFIRMED

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E C K E R S T R O M, Judge.

¶1 After a trial on the plaintiff/appellant Ronald Hager's negligence claim, the jury returned a verdict in favor of the defendant/appellee, M. Vista Investors, LLC (hereafter "Mountain Vista"). On appeal, Hager argues the trial court erred in refusing his request for an instruction on the mode-of-operation rule relating to premises liability. Finding no error, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to Hager, the party requesting the instruction. *See Anderson v. Nissei ASB Mach. Co.*, 197 Ariz. 168, ¶ 39, 3 P.3d 1088, 1098 (App. 1999). In 2006, Hager was a resident at an apartment complex owned by Mountain Vista. He lived in a second story apartment that, like the others in the complex, was accessible only by an exterior stairway. Each stairway was composed of separate concrete steps. On June 21, when he began to ascend a staircase while carrying bags of groceries, the first step partially broke off under his foot, causing him to injure his knee and shoulder.

¶3 At trial, Hager presented evidence the stairs at Mountain Vista frequently cracked and were replaced.[1] Deposition testimony from the former manager of the complex established that there were about forty-nine stairways there. Mountain Vista's personnel were advised to look for and report any problems with the stairs, and full inspections of the stairways occurred nearly every month. These inspections consisted of

[1]Some of the deposition evidence introduced at trial was not transcribed in the court reporter's transcript, but the parties have included the deposition transcripts in the record on appeal and have referred to them in their briefs.

the manager walking up and under the stairways and looking for any cracks. Because the first step from the ground was not visible from underneath, it was not inspected in this fashion. Mountain Vista replaced a total of approximately ten to twelve cracked steps each month.

¶4 Mountain Vista previously had been informed that one step had broken when stepped on by its cleaning person. At the time of Hager's accident, it thus had in place a stair maintenance program that was designed "to replace any stair tread that showed a crack before it broke." A portion of the replacement steps that Mountain Vista ordered had cracks in them when they were delivered and were returned to the seller. The maintenance man for Mountain Vista described these replacement steps as "junk" because they were inadequately reinforced with rebar, leaving a "point [that] is weak between the front of the step and where th[e] rebar is." The apartment manager similarly testified that her examination of concrete steps replaced in the complex revealed the rebar reinforcing them ran primarily through the step's center, with the first piece of rebar being about five inches from the front of the step. The maintenance man testified ninety percent of the cracked stairs that were replaced at Mountain Vista were cracked in the front edge of the step, which is the portion that broke off when Hager stepped on it.

¶5 In his complaint and at trial, Hager maintained Mountain Vista had breached its duty of care by failing to inspect and safely maintain the stairs. On the first day of trial, Hager requested that the jury be given the Revised Arizona Jury Instruction (RAJI) premises liability instruction number two, entitled "Mode of Operation Rule."

The trial court declined to rule on the matter until the evidence had been developed. Later in the trial, Hager filed a memorandum in support of his request.

¶6 The trial court ultimately refused to give the instruction, finding it inapplicable. The court observed that the phrase "mode of operation" would create unnecessary confusion and that the plaintiff's theory—that the defendant was negligent because it did not do "what a reasonable person under the circumstances would do to make the stair[] system safe"—did not require the instruction. The court denied Mountain Vista's motion for a directed verdict and refused its request for an instruction that notice of the specific defect causing the injury was required in order for liability to be imposed. This appeal followed the jury verdict and entry of judgment in favor of Mountain Vista.

Discussion

¶7 Hager's proposed instruction followed the RAJI Mode of Operation Rule and provided as follows:

> Even if you find that Mountain Vista had no notice of the unreasonably dangerous condition that Ron Hager claims caused harm, Mountain Vista was negligent if you find the following:
>
> 1. Mountain Vista adopted a method of operation from which it could reasonably be anticipated that unreasonably dangerous conditions would regularly arise; and
>
> 2. Mountain Vista failed to exercise reasonable care to prevent harm under those circumstances.

See State Bar of Arizona, *Revised Arizona Jury Instructions (Civil)*, p. 101 (4th ed. 2005) (hereafter "RAJI (Civil) 4th").

¶8 We review for an abuse of discretion a trial court's denial of a requested jury instruction. *Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, ¶ 21, 207 P.3d 654, 662 (App. 2008). "The court must give a proposed jury instruction 'if: (1) the evidence presented supports the instruction, (2) the instruction is proper under the law, and (3) the instruction pertains to an important issue, and the gist of the instruction is not given in any other instructions.'" *Id.* ¶ 22, *quoting DeMontiney v. Desert Manor Convalescent Ctr. Inc.*, 144 Ariz. 6, 10, 695 P.2d 255, 259 (1985). "The test for the sufficiency of jury instructions is whether, taken as a whole, they allow the jury to 'gather the proper rules to be applied in arriving at the correct decision.'" *State ex rel. Miller v. J.R. Norton Co.*, 158 Ariz. 50, 52, 760 P.2d 1099, 1101 (App. 1988), *quoting Kauffman v. Schroeder*, 116 Ariz. 104, 106, 568 P.2d 411, 413 (1977). A jury verdict will not be disturbed on appeal "unless there is substantial doubt as to whether the jury was properly guided in its deliberations." *Thompson v. Better-Bilt Aluminum Prods. Co.*, 187 Ariz. 121, 126, 927 P.2d 781, 786 (App. 1996).

¶9 The instruction Hager requested, which was derived from *Chiara v. Fry's Food Stores of Ariz., Inc.*, 152 Ariz. 398, 733 P.2d 283 (1987), was not proper under the law or the facts of the case, and the trial court therefore did not err by refusing to give it. As *Chiara* explained, the mode-of-operation rule is designed to relieve plaintiffs of the difficult burden of proof they carry to show notice of a dangerous condition, which is

necessary to establish a breach of the business proprietor's duty of care "to make and keep his premises reasonably safe for customers," when "transitory hazardous conditions" of unknown origin or created by third parties cause the plaintiff's injuries. *Id.* at 399-400, 733 P.2d at 284-85. The rule is inapplicable here because Hager's case did not involve a dangerous object or substance temporarily on a stair or an unknown person damaging a stairway. *Cf. McGuire v. Valley Nat'l Bank of Phoenix*, 94 Ariz. 50, 53-54, 381 P.2d 588, 590-91 (1963) (affirming directed verdict when plaintiff's evidence could not show failure to remove pebble on stair was negligent). Rather, this case concerned the structural integrity and basic safety of the stairways at Mountain Vista and the landlord's failure to exercise reasonable care in inspecting them and keeping or making them safe for tenants. Thus, as the trial court correctly observed, this was an ordinary negligence case not requiring the proposed instruction.

¶10 The law relevant to the present case is set forth in the Restatement (Second) of Torts § 360 (1965), which Arizona has adopted. *Dolezal v. Carbrey*, 161 Ariz. 365, 371, 778 P.2d 1261, 1267 (App. 1989). Under this provision, a landlord has "a duty to inspect and make safe" for its tenants the common areas within its control. *Siddons v. Bus. Props. Dev. Co.*, 191 Ariz. 158, ¶ 5, 953 P.2d 902, 903 (1998); *accord Martinez v. Woodmar IV Condo. Homeowners Ass'n Inc.*, 189 Ariz. 206, 208-09, 941 P.2d 218, 220-21 (1997). "In other words[,] he is under the duty to take those precautions for the safety of the tenant as would be taken by a reasonably prudent [person] under similar circumstances." *Cummings v. Prater*, 95 Ariz. 20, 26, 386 P.2d 27, 31 (1963).

¶11 A landlord "is not an insurer" of the safety of tenants on his property, *Forbes v. Romo*, 123 Ariz. 548, 550, 601 P.2d 311, 313 (App. 1979), and is not strictly liable for injuries sustained there. *See Cummings*, 95 Ariz. at 26, 386 P.2d at 31. But if a landlord should know, in the exercise of due care, of an unreasonably dangerous condition on his premises, the landlord may be liable for injuries caused by his negligent failure to detect and remedy it. *Siddons*, 191 Ariz. 158, ¶ 5, 953 P.2d at 903. Thus, as we stated in *Haynes v. Syntek Financial Corp.*,

> to prevail on a negligence claim, a plaintiff must prove that the [landlord] had notice of the dangerous condition by showing: (1) that the [landlord] or its agents caused the dangerous condition; or (2) that the [landlord] had actual knowledge of the existence of the dangerous condition; or (3) "that the condition existed for such a length of time that in the exercise of ordinary care the [landlord] should have known of it and taken action to remedy it (i.e., constructive notice)."

184 Ariz. 332, 339, 909 P.2d 399, 406 (App. 1995), *quoting Preuss v. Sambo's of Ariz.*, 130 Ariz. 288, 289, 635 P.2d 1210, 1211 (1981); *see also City of Yuma v. Evans*, 85 Ariz. 229, 234, 336 P.2d 135, 139 (1959).

¶12 Here, the trial court correctly instructed the jury on the elements of negligence. *See McLeod ex rel. Smith v. Newcomer*, 163 Ariz. 6, 8, 785 P.2d 575, 577 (App. 1989) (traditional negligence elements apply to unsafe premises claim). It also gave an instruction based on RAJI Premises Liability 1.[2] *See* RAJI (Civil) 4th, p. 98.

[2]The instruction provided:

> As the owner of a business, Mountain Vista is required to use reasonable care to warn of or remedy an unreasonably

That instruction properly informed jurors that if an unreasonably dangerous condition existed for a sufficient length of time that Mountain Vista, in the exercise of reasonable care, should have known of it, then Mountain Vista would have notice of the unreasonably dangerous condition and would be liable for the damage caused by its "fail[ure] to use reasonable care to prevent harm under the circumstances." We approved the use of this standard instruction in *Haynes*, an analogous case involving sidewalk deterioration at an apartment complex. 184 Ariz. at 340-41 & n.4, 909 P.2d at 407-08 & n.4.

¶13 The trial court's overall instructions here correctly set forth the law as framed by the pleadings and developed by the evidence, *see Davis v. Burington*, 101

> dangerous condition of which Mountain Vista had notice. Ronald Hager claims that Mountain Vista had notice of the unreasonably dangerous conditions that caused harm to Ronald Hager.
>
> Mountain Vista had notice of the unreasonably dangerous condition, if you find any of the following:
>
> 1. Mountain Vista or its employees created a condition; or
>
> 2. Mountain Vista or its employees actually knew of the condition in time to provide a remedy or warning; or
>
> 3. The condition existed for a sufficient length of time so that Mountain Vista or its employe[e]s, in the exercise of reasonable care, should have known of it.
>
> If you find that Mountain Vista had notice of the unreasonably dangerous condition and failed to use reasonable care to prevent harm under the circumstances, then Mountain Vista was negligent.

Ariz. 506, 508, 421 P.2d 525, 527 (1966), and provided the jury with the proper rules for reaching its decision. *See Smedberg v. Simons*, 129 Ariz. 375, 377-78, 631 P.2d 530, 532-33 (1981). Thus, the court did not abuse its discretion in denying the inapplicable and unnecessary mode-of-operation instruction.

¶14 Hager maintains the absence of his proposed instruction left him with the "impossible burden" of proving Mountain Vista "knew or should have known that this particular stair was damaged . . . or was about to fail." We cannot agree. In fact, the trial court denied Mountain Vista's motion for a directed verdict and rejected Mountain Vista's proposed instruction that would have required either specific notice of the defective stair causing the injury or specific notice of the manner in which it would cause the injury in order for liability to be imposed.[3] Furthermore, contrary to Hager's assertion, the evidence presented would legally support a finding of constructive notice of the dangerousness of the stairways, because the frequent cracking and prior breaking of a stair underfoot would suffice to give Mountain Vista notice of the hazard its stairways posed to tenants, as well as "opportunities to discover the condition" of the stairs. *Siddons*, 191 Ariz. 158, ¶ 7, 953 P.2d at 903-04. Ultimately, however, the reasonableness of Mountain Vista's stairway inspection and maintenance was a question for the jury to

[3]In *Haynes*, we rejected a similar specific notice instruction as a misstatement of the law. *See* 184 Ariz. at 341 & n.5, 909 P.2d at 408 & n.5. We also clarified, in our discussions of the sufficiency and admissibility of evidence relating to notice, that constructive notice of the condition causing the injury is all that is required to establish liability, and a plaintiff may prove such notice with evidence showing the generally deteriorated condition of similar common areas and the need for repairs throughout the complex. *Id.* at 340, 909 P.2d at 407.

decide. *See id.* That Hager failed to carry his burden of proof does not demonstrate the trial court's instructions were deficient or inadequate.

¶15 To the extent the trial court's use of the RAJI Premises Liability 1 inaccurately stated the law, as Hager appears to suggest on appeal, he raised no objection to this instruction below in accordance with Rule 51(a), Ariz. R. Civ. P. We therefore need not resolve such issues as whether RAJI Premises Liability 1 or similar premises liability instructions add an unnecessary notice requirement already encompassed by the basic requirement that a landlord must breach the duty of reasonable care in order to be found liable for negligence, or whether the instructions given here adequately conveyed the affirmative nature of a landlord's duty. *Cf. Smedberg*, 129 Ariz. at 378, 631 P.2d at 533 (approving instruction that "landlord has the . . . duty to discover and correct dangerous conditions which constitute unreasonable risk of harm to his tenants").

Disposition

¶16 For the foregoing reasons, the judgment is affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge