In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-20-00131-CV

JESSICA PENA, APPELLANT

V.

HARP HOLDINGS, LLC, APPELLEE

On Appeal from the 414th District Court
McLennan County, Texas
Trial Court No. 2019-506-5; Honorable Vicki Menard, Presiding

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September 16, 2021

MEMORANDUM OPINION

Before QUINN, C.J., and PIRTLE and DOSS, JJ.

Appellant, Jessica Pena, appeals the trial court's order granting the traditional and no-evidence motions for summary judgment filed by Appellee, Harp Holdings, LLC, in her premises liability claim against Harp arising from injuries she sustained when she fell, allegedly as a result of an unreasonably dangerous condition of the stairs at the Harp House, a residence which was rented as a commercial pursuit by Harp Holdings, where

Pena was an invitee.[1] Pena challenges the trial court's order through four issues. She argues that (1) the trial court erred in granting summary judgment because Harp Holdings failed to conclusively establish that a release agreement between Pena and Airbnb also released all of her claims against Harp Holdings; (2) the trial court erred in granting summary judgment because Harp Holdings failed to conclusively establish that the staircase in its short-term rental property was an open and obvious danger and where Pena demonstrated that there was at least a fact question as to this issue; (3) the trial court erred in granting a no-evidence summary judgment where Pena demonstrated that there is at least a fact question as to whether Harp Holdings knew or should have known of the dangerous condition of the staircase; and (4) alternatively, the trial court erred in refusing to continue the summary judgment hearing to allow Pena additional time to complete discovery. We will affirm.

BACKGROUND

In 2013, Clint Harp purchased a 100-year-old home in Waco, Texas (the "Harp House"). The home was in poor condition and required extensive remodeling.[2] Part of that remodeling included "restoration and slight modifications" to two staircases that allowed access between the first and second floors of the home. One of the staircases was at the front of the home, the other was at the back. The front staircase, which is at

[1] Originally appealed to the Tenth Court of Appeals, sitting in Waco, this appeal was transferred to this court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001. Should a conflict exist between precedent of the Tenth Court of Appeals and this court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. TEX. R. APP. P. 41.3.

[2] In his affidavit, Harp said he and his wife spent more than $100,000 on an "extensive renovation of the Harp House that was showcased in Season 1, Episode 6 of HGTV's *Fixer Upper* series in an episode titled 'Craftsmen Crave Urban Feel.'"

issue in this case, rotated at the top near the second floor and contained steps that were "pie-shaped." The front staircase also had uneven tread and risers throughout and a wide handrail on the left-hand descending side that extended down the length of the staircase. There was no handrail on the right-hand descending side. The back staircase had no handrails at all and had limited accessibility from the second floor. The master bedroom was located on the second floor and, when occupied or locked, could limit or prevent access to the back stairs.

Harp was an experienced carpenter and performed the renovation work on the staircase at issue. He discussed the restoration and modifications of the front staircase with a code inspector. Harp described his work as "restoration and slight modifications" and it included sanding the staircase down, adding new steps and a landing at the bottom of the staircase, replacing some of the treads and risers, and modifying the staircase's single handrail. Harp also repainted the entire staircase with glossy-finish black paint. He did not add any additional handrails or modify the shape of the top steps.

When the renovations were complete in the spring of 2014, the Harp family, including Harp's mother-in-law, Debbie Garrett, moved into the home. At the time, Harp's children were aged six, four, and one. The family "used the staircase on a daily basis—going up and down the front staircase thousands of times." They remained at Harp House for about two years, until July 2016. At that time, Harp listed the home as a short-term vacation rental with Airbnb. Garrett acted as the manager of the Harp House. She was the primary contact for renters and inspected the property between rentals.

Three months after listing the home, a woman rented the Harp House. During her stay, she was injured from a fall on the lower portion of the front staircase. The woman

fractured her ankle and tibia. She filed suit against Harp in 2018, alleging that the stairs were dangerous and proximately caused her damages. Shortly after that suit was filed, Harp formed Harp Holdings, LLC and transferred the property to the limited liability corporation. He did not make any changes to Harp House and continued renting the property through Airbnb. Harp did, however, add a statement to the "House Rules" section of the Airbnb profile advising that "[t]he Harp House has two sets of stairs, so small children as well as older adults will need assistance," and "You also acknowledge: Must climb stairs – there are 2 sets of stairs to the 2nd floor. Front staircase is narrow & a bit steep. The back staircase is wider & has carpet, so a little easier." This information was only provided on the online Airbnb profile and was not posted anywhere in the Harp House.

In November 2017, Pena and her daughter visited Waco for a cheerleading camp. They stayed at the Harp House with a group of women and their children. The Harp House was reserved by another person, so Pena never saw the Airbnb listing or the information regarding the staircases. She and her daughter were at cheerleading camp the entire day before arriving at Harp House late on the evening of November 29, 2017. At around ten o'clock that night, Pena was called to join some of the other women and children downstairs for prayer. At that time, she was upstairs in her room, having accessed her room via the back staircase. However, several of the other occupants of the house were in the master bedroom by the time she was called down at ten o'clock and thus, she did not use the back staircase. She descended the front staircase and as she did, she fell from the top pie-shaped, spiraling steps and suffered significant injuries to her ankle and foot. Those injuries required hospitalization and three surgeries.

Pena initially sued Airbnb seeking compensation for her injuries and resulting damages. She subsequently settled her claims with Airbnb and on June 28, 2018, she signed a release. The release was entitled "Airbnb Payment Agreement and RELEASE OF ALL CLAIMS." The Airbnb Release named Airbnb and "its officers, directors, employees, contractors, and agents" as released parties. It also included the following provision:

> I understand and agree that this release and obligation to hold harmless applies to all claims I may have related to such Host/Guest Actions, whether such claims are now known or unknown, or which become known in the future, and I assume all risks and obligations with respect to any such claims.

After settling her claim with Airbnb, Pena then filed suit against Harp Holdings on February 13, 2019. She alleged negligence and negligence per se and sought compensatory and punitive damages. On December 17, 2019, Harp Holdings moved for traditional and no-evidence summary judgment, alleging Pena had previously released her claims against it, that it owed Pena no duty because the condition of the stairs was "open and obvious," and that there was no evidence to support certain elements of Pena's premises liability and gross negligence claims.[3] Harp Holdings also argued that Pena's then-pleaded negligence and negligence per se claims were improper because Pena's claims sounded in premises liability. Pena timely filed a response and amended her petition to remove her claims against Clint Harp, individually, and to assert only premises liability claims against Harp Holdings. Pena also filed a verified motion for continuance

[3] Around the same time, Harp Holdings filed motions for summary judgment in the suit involving the woman who sustained injuries when she fell on the staircase at Harp House in 2016. That case was in a different court and that judge denied similar summary judgment motions.

asking the trial court to continue the summary judgment hearing to allow for additional discovery.

On February 3, 2020, the trial court granted Harp Holdings's motions for summary judgment and implicitly denied Pena's motion for continuance. Pena timely moved for a new trial and requested the trial court to reconsider its granting of the summary judgment motions. The trial court denied the motions after a hearing in April 2020 and this appeal followed.

ANALYSIS

STANDARD OF REVIEW—TRADITIONAL MOTION FOR SUMMARY JUDGMENT

An appellate court reviews a trial court's ruling on a motion for summary judgment under a *de novo* standard of review. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). A traditional summary judgment is proper only if the movant establishes there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). *Jones Energy, Inc. v. Pima Oil & Gas, L.L.C.*, 601 S.W.3d 400, 405 (Tex. App.—Amarillo 2020, no pet.) (citing *Diversicare General Partner, Inc. v. Rubio*, 185 S.W.3d 842, 846 (Tex. 2003)). In our review of a trial court's grant of summary judgment, we take as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Valence Operating Co.*, 164 S.W.3d at 661; *Provident Life and Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). Moreover, if, as here, a trial court's order granting summary judgment does not specify the basis for the trial court's ruling, the summary judgment must be affirmed if any of the theories advanced by the movant are meritorious.

Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 157 (Tex. 2004); *Am. Zurich Ins. Co. v. Barker Roofing, L.P.*, 387 S.W.3d 54, 60 (Tex. App.—Amarillo 2012, no pet.).

NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT

We also employ a *de novo* standard of review when considering a trial court's ruling on a no-evidence motion for summary judgment. *Messer v. Hereford Logistics & Commodity Co., LLC*, No. 07-20-00007-CV, 2020 Tex. App. LEXIS 4600, at *2-4 (Tex. App.—Amarillo June 19, 2020, no pet.) (mem. op.) (citing *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010)). In our review, we apply the same legal sufficiency standard of review we would apply following a conventional trial on the merits. *Messer*, 2020 Tex. App. LEXIS 4600, at *2 (citing *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 581-82 (Tex. 2006); *City of Keller v. Wilson*, 168 S.W.3d 802, 823, 827 (Tex. 2005)). Rather than viewing evidence in the light most favorable to the verdict, we review the evidence in the light most favorable to the party against whom the no-evidence summary judgment was rendered and we disregard all contrary evidence and inferences. *Messer*, 2020 Tex. App. LEXIS 4600, at *3 (citing *City of Keller*, 168 S.W.3d at 823).

To prevail on a defensive no-evidence motion for summary judgment the movant must prove that there is no evidence of at least one essential element of each of the plaintiff's causes of action. *Messer*, 2020 Tex. App. LEXIS 4600, at *3 (citation omitted). If the party against whom the summary judgment was rendered brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact as to that issue, a no-evidence summary judgment motion cannot properly be granted. *Id.* (citing *Reynosa v. Huff*, 21 S.W.3d 510, 512 (Tex. App.—San Antonio 2000, no pet.) (citations omitted)).

Applying the traditional legal sufficiency standard of review, a no-evidence point will be sustained when (1) there is a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of a vital fact. *Messer*, 2020 Tex. App. LEXIS 4600, at *3 (citing *Cypress Creek EMS v. Dolcefino*, 548 S.W.3d 673, 684 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (citing *City of Keller*, 168 S.W.3d at 810; *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003)). When a movant files a proper no-evidence summary judgment motion, the burden shifts to the nonmovant to defeat the motion by presenting at least a scintilla of probative evidence raising a genuine issue of material fact as to each element challenged in the no-evidence motion. *Messer*, 2020 Tex. App. LEXIS 4600, at *4 (citing *Mack Trucks, Inc.*, 206 S.W.3d at 582).

Because the order granting summary judgment in this matter did not specify the grounds on which the trial court relied, we must affirm the judgment if any of the theories raised in Harp Holdings's motion for summary judgment are meritorious. *Messer*, 2020 Tex. App. LEXIS 4600, at *4 (citing *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex. 1993), *Reynosa*, 21 S.W.3d at 513 (citation omitted)).

APPLICABLE LAW

Unlike a negligent activity claim, a premises liability claim is based on the principle that the property controlled by the tortfeasor is unreasonably unsafe. *Daniels v. Allsup's Convenience Stores, Inc*., 604 S.W.3d 461, 466-67 (Tex. App.—Amarillo 2020, pet. denied). A premises liability claim is, therefore, a special form of negligence claim in

which the duty owed to the injured party depends on that party's status on the premises at the time of the incident. *Id.* (citing *Scott & White Memorial Hosp. v. Fair*, 310 S.W.3d 411, 412 (Tex. 2010)). Generally, a premises owner or occupier owes a duty to keep its premises safe for invitees, such as Pena, against any condition on the premises that poses an unreasonable risk of harm. *Daniels*, 604 S.W.3d at 466 (citing *Brinson Ford, Inc. v. Alger*, 228 S.W.3d 161, 162 (Tex. 2007)). "The duty owed by an owner or occupier of premises to an invitee is not that of an insurer." *Daniels*, 604 S.W.3d at 466 (citing *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 101 (Tex. 2000)). To impose liability on the owner or occupier of the premises, the claimant must establish that, at the time of the incident, the owner or occupier knew of the dangerous condition or, in the exercise of reasonable care, should have known of the condition of the premises. *Daniels,* 604 S.W.3d at 466 (citing *Henkel v. Norman*, 441 S.W.3d 249, 251 (Tex. 2014); *Western Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005)).

An owner's or occupier's knowledge of a dangerous condition can be actual or constructive. *Daniels*, 604 S.W.3d at 466 (citing *Henkel*, 441 S.W.3d at 251). Actual knowledge is knowledge "of the dangerous condition at the time of the incident, not merely the possibility that a dangerous condition could develop over time." *Daniels*, 604 S.W.3d at 466 (citing *City of Corsicana v. Stewart*, 249 S.W.3d 412, 413-14 (Tex. 2008) (per curiam)). "Constructive knowledge is a substitute in the law for actual knowledge." *Daniels,* 604 S.W.3d at 466 (citing *CMH Homes, Inc.*, 15 S.W.3d at 102). In a premises liability case, constructive knowledge can be established by showing that the dangerous condition has existed long enough for the owner or occupier to have discovered it on reasonable inspection. *Daniels*, 604 S.W.3d at 466 (citation omitted).

Several courts, including the Texas Supreme Court and this court, have identified the essential elements of a premises liability cause of action to include the following: (1) the claimant was an invitee, (2) the defendant was a possessor of the premises, (3) a condition on the premises posed an unreasonable risk of harm, (4) the defendant knew or reasonably should have known about the condition, (5) the defendant breached its duty of ordinary care by either (a) failing to make the condition reasonably safe (eliminate the risk) or (b) failing to adequately warn of the premises defect (reduce the risk), and (6) the defendant's breach proximately caused the claimant's injuries. *Daniels*, 604 S.W.3d at 367 (citing *Henkel*, 441 S.W.3d at 251-52 (citing *CMH Homes, Inc.*, 15 S.W.3d at 99); *Raines v. Hale*, No. 17-17-00288-CV, 2018 Tex. App. LEXIS 2232, at *6 (Tex. App.—Amarillo March 28, 2018, no pet.) (mem. op.)).

ISSUE ONE—RELEASE

Via her first issue, Pena contends the trial court erred in granting Harp Holdings's traditional motion for summary judgment because Harp Holdings failed to conclusively establish each element of its affirmative defense of release. Harp Holdings argued in its motion that Pena released all of her claims against it when she signed a release with Airbnb. Pena disagrees, arguing the release pertained to claims against Airbnb only and that release was not intended to encompass her claims against Harp Holdings.

When a defendant moves for summary judgment based on an affirmative defense, the defendant must conclusively establish each essential element of the affirmative defense. *Thom v. Rebel's Honky Tonk*, No. 03-11-00700-CV, 2013 Tex. App. LEXIS 4777, at *4 (Tex. App.—Austin April 17, 2013, no pet.) (mem. op.) (citing *Ryland Grp., Inc. v. Hood*, 924 S.W.2d 120, 121 (Tex. 1996) (per curiam). *See* TEX. R. CIV. P. 166a(c)).

A release is an agreement or contract in which one party agrees that a legal right or obligation owed by the other party is knowingly surrendered. *D.R. Horton - Tex., Ltd. v. Savannah Props. Assocs.,* 416 S.W.3d 217, 226 (citing *Dresser Indus., Inc. v. Page Petroleum, Inc*., 853 S.W.2d 505, 508 (Tex. 1993)). As such, it is subject to the normal rules of contract construction, including the rules pertaining to the construction of an ambiguity. *D.R. Horton - Tex., Ltd.*, 416 S.W.3d at 226 (citing *Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. Ins. Co. of N. Am*., 955 S.W.2d 120, 127 (Tex. App.—Houston [14th Dist.] 1997), *aff'd*, 20 S.W.3d 692 (Tex. 2000). A release extinguishes a claim or cause of action and is an absolute bar to any right of action on the released matter. *D.R. Horton - Tex., Ltd.*, 416 S.W.3d at 226 (citing *Dresser Indus*., 853 S.W.2d at 508).

To release a claim effectively, the releasing instrument must "mention" the claim to be released. *D.R. Horton - Tex., Ltd*., 416 S.W.3d at 226 (citing *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 938 (Tex. 1991); *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa*., 20 S.W.3d 692, 698 (Tex. 2000)). Claims not clearly within the subject matter of the release are not discharged, even if those claims exist when the release is executed. *D.R. Horton - Tex., Ltd*., 416 S.W.3d at 226 (citing *Keck*, 20 S.W.3d at 698). However, it is not necessary for the parties to anticipate and explicitly identify every potential cause of action relating to the subject matter of the release. *D.R. Horton - Tex., Ltd*., 416 S.W.3d at 226 (citation omitted). Although releases include claims existing at the time of execution, they may also include unknown claims and damages that develop in the future. *Id.* (citation omitted).

In construing a release, as with other contracts, the primary effort is to ascertain and give effect to the intention of the parties to the release, considering the instrument as

a whole. *Id.* (citing *Stafford v. Allstate Life Ins. Co*., 175 S.W.3d 537, 541 (Tex. App.—Texarkana 2005, no pet.) (reasoning that a contract must be read as a whole rather than isolating a certain phrase, sentence, or section of the agreement)). The contract's language is to be given its plain grammatical meaning unless doing so would defeat the parties' intent. *D.R. Horton - Tex., Ltd*., 416 S.W.3d at 226 (citation omitted). In determining intent, we must look to the express terms of the contract, not what the parties allegedly meant. *Id.* (citing *Union Pacific R.R. v. Novus Int'l, Inc*., 113 S.W.3d 418, 421 (Tex. App.—Houston [1st Dist.] 2003, pet. denied)). *An unambiguous contract will be enforced as written*. *D.R. Horton - Tex., Ltd*., 416 S.W.3d at 226 (citing *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008)). Parol evidence may not be introduced to create an ambiguity or to alter the intent of the parties as expressed by the terms of the instrument. *Id.* (citation omitted).

The release between Airbnb and Pena provides in relevant part:

> 4. On my own behalf and on behalf of any other person having an interest in my personal property, including but not limited to any heirs, executors, agents, administrators, partners, upon my acceptance of payment from Airbnb, I hereby release, acquit, forever discharge and hold harmless Airbnb and all officers, directors, employees, contractors, and agents of Airbnb, from any further costs, liabilities or obligations with respect to the facts and circumstances related to reservation **HMXMQBCSHS** and this Airbnb Payment Agreement approved by Airbnb, and any costs and liabilities for or relating to any and all rights, claims and causes of action whatsoever that I may have or which may arise against Airbnb for any injuries, liability, loss or damage of any kind arising in whole or in part, directly or indirectly, from acts or omissions by a Host/Guest or other party during a stay at the Accommodation which is the subject of this Airbnb Payment Agreement ("Host/Guest Actions"). I understand and agree that this release and obligation to hold harmless applies to all claims I may have related to such Host/Guest Actions, whether such claims are now known or unknown, or which become known in the future, and I assume all risks and obligations with respect to any such claims. I hereby waive any right I might have to dispute the scope of this

release on the grounds that it is a general release and/or release of unknown claims, and expressly waive all rights I might have under any applicable law that is intended to protect me from waiving unknown claims.

5. I agree to refund Airbnb any amounts that are deemed by Airbnb to have been erroneously paid by Airbnb to me with respect [to] this Airbnb Payment Agreement approved by Airbnb, including, but not limited to, any amounts that I may have in my possession or subsequently collect from any other person or entity who is obligated to compensate me for losses or damages, such as: (i) an insurance carrier; or (ii) the Host/Guest or another party.

Pena was paid $70,000 by Airbnb following execution of the Airbnb Release.

As Pena notes, it is undisputed that Harp Holdings was not a signatory to the Airbnb Release nor was Harp Holdings mentioned by name anywhere in the release. Pena argues Harp Holdings is thus required to prove it is a third-party beneficiary to the Release. Harp Holdings argues that while it was not mentioned by name in the Release, it was sufficiently identified such that Pena released her claims against it as well as those she had against Airbnb. We disagree.

The plain language of the Release indicates it was intended to release Airbnb, not Harp Holdings, from all claims associated with the identified reservation. While the Release does indeed include the statement, "I understand and agree that this release and obligation to hold harmless applies to all claims I may have related to such Host/Guest Actions, whether such claims are now known or unknown, or which become known in the future, and I assume all risks and obligations with respect to any such claims[,]" that statement clearly refers to Pena's release of Airbnb from any claims she may have related to host or guest *actions*, not premises liability claims. And, taking the entire Release into consideration as we must, other language contained in the agreement

indicates the Release did not pertain to any claims Pena may have had against Harp Holdings. The Release even referenced that with the provision stating that Pena would be required to refund amounts deemed to be erroneously paid by Airbnb should she recover from an insurance policy or a host/guest. If the host, here Harp Holdings, was intended to be absolved by the Release between Pena and Airbnb, that language would be superfluous. Accordingly, we decline to read the Release as broadly as Harp Holdings has argued.

As such, we find Harp Holdings has not conclusively proven its affirmative defense of release as a matter of law and the trial court erred in granting summary judgment on this ground. We sustain Pena's first issue.

We find, however, that summary judgment was proper on other grounds and thus, we turn to our analysis to the remaining issues.

ISSUE TWO—OPEN AND OBVIOUS DANGER AND KNOWLEDGE OF DANGEROUS CONDITION

Through her second issue, Pena asserts the trial court erred in granting Harp Holdings's traditional motion for summary judgment on the basis that it did not owe a duty to Pena to warn or protect her against the dangerous condition of the staircase because it was "open and obvious." In its defense, Harp Holdings argues that the state and condition of the staircase was an "open and obvious" condition because anyone, including Pena, could see the absence of handrails, the different shapes of the steps, and the overall steep and narrow appearance of the staircase.

Duty is a question of law. *Allen Keller Co. v. Foreman*, 343 S.W.3d 420, 425 (Tex. 2011). As noted above, a landowner's duty to an invitee is to exercise reasonable care

to make the premises reasonably safe. *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193, 202 (Tex. 2015). When an invitee is aware of a dangerous premises condition, whether due to the open and obvious nature of the danger or due to an adequate warning from the landowner, the condition will generally no longer pose an unreasonable risk and the law presumes an invitee will take reasonable measures to protect himself or herself against known risks. *Id.* at 204. Therefore, a dangerous condition that an invitee reasonably should be aware of is one that is open and obvious. *Id.* Thus, there is no duty to make a condition reasonably safe when the invitee is aware of the hazard. *Brookshire Grocery Co. v. Goss,* 262 S.W.3d 793, 795 (Tex. 2008). Whether a condition qualifies as "open and obvious" presents a question of law for the court.

Here, the record[4] before us indicates Pena was aware that the front staircase had pie-shaped steps at the top,[5] that the stairs were painted black,[6] and that the stairs lacked full handrails down both sides.[7] Pena stated her awareness during her deposition. However, she argued, based on her expert's conclusions, that while she was aware of those conditions, she did not perceive the unreasonable risk or harm of those conditions

[4] Pena included in the record the affidavit of Gary S. Nelson, a technical consultant in the fields of safety engineering, safety management, human factors engineering, and occupational health engineering.

[5] Nelson, Pena's expert, averred that his measurement of the subject stairs "revealed inconsistent depths for the stair steps and inconsistent heights of the risers. The area where Mrs. Pena fell had three steps that were different from the rest of the stairs as these steps were of a different shape and size having non-uniform tread/riser dimensions." He said the top turn of the stairs which is "comprised of three uneven triangular steps, to the *trained eye* (Harp Holdings), it should have been clear that that there are no handrails for Mrs. Pena to use and assist in her descension."

[6] Nelson averred that the paint color of the front staircase, black, made the leading edge of the steps difficult to discern one from another while descending, increasing the likelihood of missing a step. He concluded that "[s]uch danger is not obvious to an average person who has never used the stairs before. The paint used is moderately slippery and did not provide sufficient traction . . . ."

[7] Nelson averred that there was no handrail on the entire right side of the subject stairs.

until she was descending the stairs. Thus, she contends the danger was not sufficiently open and obvious to preclude Harp Holdings's duty to her.

The photographs in the record show the staircase in question. The steps are clearly painted black and the shape of each step is obvious. It is a spiral staircase, thus necessitating the pie-shape of the upper stairs. The handrail on one side can also be plainly seen. While Pena argues the handrail was too big to allow for a "power grip" as described by her expert, the size of the handrail is also very clear to any observer. Furthermore, the lack of any other handrail is also an open and obvious condition. *General Elec. Co. v. Moritz,* 257 S.W.3d 211, 215-16 (Tex. 2008) (absence of handrails was clearly not a concealed defect); *Martin v. Gehan Homes Ltd.*, No. 03-06-00584-CV, 2008 Tex. App. LEXIS 4111, at *7-8 (Tex. App.—Austin June 4, 2008, no pet.) (mem. op.) (general contractor had no duty to warn of lack of guardrails on second-story landing where, although plaintiff did not know about lack of guardrails, anyone could have seen it before walking upstairs). The record does not indicate that the staircase was in any way concealed or improperly lighted. While Pena argued, supported by Nelson's affidavit, that the combined conditions created an unreasonable risk of harm, we cannot find that the trial court abused its discretion in finding the staircase was an open and obvious condition of the Harp House which was objectively observable to a reasonable person exercising ordinary care. *See Culotta v. Double Tree Hotels LLC*, No. 01-18-00267-CV, 2019 Tex. App. LEXIS 5272, at *10 (Tex. App.—Houston [1st Dist.] June 25, 2019, pet. denied) (mem. op.) (finding water fountains were an open and obvious condition and objectively observable to a reasonable person exercising ordinary care in traversing the restaurant).

Because the staircase was an open and obvious condition on the premises of Harp House, we find Harp Holdings had no duty, as a matter of law, to warn Pena against it. Accordingly, the trial court did not err in granting summary judgment in favor of Harp Holdings on Pena's premises liability claim. Pena's second issue is overruled.

Pena further argues that even if the condition of the staircase was open and obvious, the "necessary use" exception applies here. The necessary use exception is a "limited exception" to the general no duty rule which "applies when the facts demonstrate that (1) it was necessary that the invitee use the unreasonably dangerous premises and (2) the landowner should have anticipated that the invitee was unable to avoid the unreasonable risks despite the invitee's awareness of them." *Austin v. Kroger Texas, L.P.,* 465 S.W.3d 193, 207 (Tex. 2015); *Stirrup v. Anschutz Tex., LP*, No. 05-17-00613-CV, 2018 Tex. App. LEXIS 5853, at *8 (Tex. App.—Dallas July 30, 2018, no pet.) (mem. op.). The necessary use exception preserves the duty of the premises owner to protect or warn an invitee of an open and obvious condition that presents an unreasonable danger. In cases involving the "necessary use" exception, "the obviousness of the danger and the invitee's appreciation of it may be relevant to a landowner's defense based on the invitee's proportionate responsibility, but they do not relieve the landowner of its duty to make the premises reasonably safe." *Austin,* 465 S.W.3d at 204.

In response to this argument, Harp Holdings first notes that Pena did not raise this exception in her response to its summary judgment motions. As such, this exception was never placed at issue before the trial court. Furthermore, Harp Holdings insists Pena has not shown that this exception applies to the facts of this case.

Based on the record, we do not find the necessary use exception to be appropriate here. Pena argues it was necessary for her to use the front staircase because other guests were in the master bedroom at the time she descended the front stairs, keeping her from using the back staircase that she had originally used to get to her room. Harp Holdings contends this is not the type of necessity contemplated by this narrow exception to the general rule. While inconvenient, the back staircase was still available for Pena's use. It was not a situation in which the back staircase had become unusable, truly necessitating the use of the front staircase. Pena simply did not want to inconvenience the guests in the master bedroom. These circumstances are clearly distinguishable from the facts in *Stirrup*, 2018 Tex. App. LEXIS 5853, at *14, in which a woman was injured on theater stairs when an usher guided her down the same steps she had determined were unsafe to descend on her own. The usher led her down the first few steps but then the woman's only alternatives were to ascend back the dark stairs or continue down them. Under those circumstances, the court determined the woman was unable to take any measures that would have avoided the risk. *Id.* Here, we are not faced with such a Hobson's choice. As such, we find the necessary use exception to be inapplicable to the facts of this case.

ISSUE THREE—NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT

By her third issue, Pena argues the trial court should not have granted Harp Holdings's no-evidence motion for summary judgment because she offered more than a scintilla of evidence to support each element of her premises liability claim.

The parties do not dispute that Harp Holdings owned the premises in question, nor do they dispute that Pena was an invitee to that property. Thus, what is in dispute is

whether (1) a condition of the premises created an unreasonable risk of harm to Pena; (2) Harp Holdings knew or reasonably should have known of a unreasonably dangerous condition; (3) Harp Holdings failed to exercise ordinary care to protect Pena from that danger; and (4) Harp Holdings's failure was a proximate cause of injury to Pena. Harp Holdings contends Pena failed to present evidence as to two elements: (1) that there was "no evidence that Defendant had actual or constructive knowledge of an unreasonably dangerous condition on the premises" and (2) that "[t]here is no evidence of an unreasonably dangerous condition."

In determining whether a premises owner has actual knowledge of an unreasonably dangerous condition, courts typically consider whether the premises owner has received reports of prior injuries or reports of potential danger presented by the condition in question. *Galvan v. Camden Prop. Tr*., No. 03-19-00774-CV, 2020 Tex. App. LEXIS 5116, at *8 (Tex. App.—Austin July 10, 2020, no pet.) (mem. op.) (citing *City of Dallas v. Reed*, 258 S.W.3d 620, 622 (Tex. 2008) (quoting *The Univ. of Tex.-Pan Am. v. Aguilar*, 251 S.W.3d 511, 513 (Tex. 2008) (per curiam)). If actual knowledge was not present at the time of the incident, but there is evidence to show that the unreasonably dangerous condition has existed long enough for the defendant to discover it on reasonable inspection, constructive knowledge can be established. *Galvan*, 2020 Tex. App. LEXIS 5116, at *8 (hole in the ground for an unknown period of time (citing *CMH Homes, Inc.*, 15 S.W.3d at 102-03).

Pena points to the injury of the woman in 2016 when she fell down the lower portion of the front staircase at Harp House as proof of Harp Holdings's actual knowledge of the unreasonably dangerous condition of the staircase. She also points to the fact that the

staircase has been in the same condition since Harp purchased the home in 2014 and to the fact that he has worked on renovating the staircase, thus providing ample time for him to be constructively aware of the danger. While this is true, the record also shows the staircase was approved by a Waco city inspector and that the Harp family lived in the home for over two years after the staircase was renovated. Despite some concerns from Garrett, no one fell on the stairs during that time they lived in the home. While one person did fall on the stairs before Pena did, that person fell from and an entirely different portion of the staircase, which is shaped differently from the upper portion from which Pena fell. As such, it does not necessarily follow, and the trial court was not required to find, that a fall on the lower portion of the staircase had any bearing on whether an unreasonably dangerous condition existed at the top or the staircase or whether Harp Holdings had actual knowledge of any unreasonably dangerous condition relating to the area of the staircase where Pena fell. Furthermore, the trial court was not required to find any constructive knowledge by Harp, particularly given that Harp's own family had resided in the home for over two years, with the staircase in the same condition as it was when Pena fell without incident.

Based on this record, we cannot find the trial court erred in granting summary judgment when Pena failed to meet her burden to set forth more than a scintilla of probative evidence as to either the existence of an unreasonably dangerous condition or Harp Holdings's actual or constructive knowledge of one. Accordingly, we resolve Pena's third issue against her.

ISSUE FOUR—REFUSAL TO GRANT MOTION FOR CONTINUANCE

By her fourth and final issue, Pena advances the alternative argument that the trial court erred in refusing to grant her motion for continuance to allow for additional time for discovery. Harp Holdings disagrees, noting that the case had been on file for more than ten months by the time it filed its motions for summary judgment, providing Pena sufficient time in which to conduct discovery, including depositions.

Rule 166a(g) permits a trial court to deny a motion for summary judgment or grant a continuance to the party opposing summary judgment if the party opposing summary judgment files an affidavit setting forth the reasons the party cannot present the facts necessary to respond to the motion. *D.R. Horton - Tex., Ltd.*, 416 S.W.3d at 222-23 (citing TEX. R. CIV. P. 166a(g); *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 662 (Tex. 2009)). A motion for continuance seeking time for discovery must be supported by an affidavit that describes the evidence sought, explains its materiality, and shows that the party requesting the continuance has used due diligence to timely obtain the evidence. *D.R. Horton-Tex., Ltd.*, 416 S.W.3d at 222-23 (citing TEX. R. CIV. P. 251, 252; *Landers v. State Farm Lloyds*, 257 S.W.3d 740, 747 (Tex. App.—Houston [1st Dist.] 2008, no pet.)). However, a litigant who fails to diligently use the rules of civil procedure for discovery purposes is not entitled to a continuance. *D.R. Horton-Tex., Ltd.*, 416 S.W.3d at 223 (citing *State v. Wood Oil Distrib., Inc*., 751 S.W.2d 863, 865 (Tex. 1988)). In deciding whether a trial court abused its discretion in denying a motion for continuance seeking additional time to conduct discovery, we consider factors such as the length of time the case has been on file, the materiality and purpose of the discovery sought, and whether the party seeking the continuance has exercised due diligence to obtain the discovery

sought. *D.R. Horton – Tex., Ltd.*, at 222-23 (citing *Two Thirty Nine Joint Venture*, 145 S.W.3d at 161).

Under Rule 166a(i), there is no specific minimum amount of time that a case must be pending before a trial court may entertain a no-evidence motion for summary judgment; the rule only requires an "adequate time for discovery." *See* TEX. R. CIV. P. 166a(i). In considering whether the trial court permitted an adequate time for discovery, we consider the following factors: (1) the nature of the case, (2) the nature of the evidence necessary to controvert the no-evidence motion, (3) the length of time the case was active, (4) the amount of time the no-evidence motion was on file, (5) whether the movant had requested stricter deadlines for discovery, (6) the amount of discovery that already had taken place, and (7) whether the discovery deadlines in place were specific or vague. *D.R. Horton-Tex., Ltd.*, 416 S.W.3d at 222-23 (citing *McInnis v. Mallia*, 261 S.W.3d 197, 201 (Tex. App.—Houston [14th Dist.] 2008, no pet.)).

First, Pena argued Harp Holdings's motion for summary judgment was premature. Pena filed the lawsuit on February 13, 2019, and Harp Holdings filed its motions for summary judgment on December 17, 2019, some ten months later. At that time, the discovery period had not ended, and no trial date had been set. Second, Pena argued that Debbie Garrett's deposition was important to her, and that Harp Holdings was aware of the significance of it. Pena had first requested to depose Garrett in August 2019. However, that deposition was placed on hold at that time because the parties were interested in an out-of-court resolution of the case. Third, Pena contended she demonstrated to the trial court that other fact witness depositions were important to her case. She said she needed additional time for discovery to fully respond to Harp

Holdings's motions and to show that genuine issues of material fact existed precluding summary judgment.

Harp Holdings argues the trial court did not abuse its discretion in implicitly denying Pena's motion for continuance. The lawsuit had been pending for more than ten months by the time it filed its motions for summary judgment. Rule 166(g) does not preclude filing a motion for summary judgment before the discovery period expires. It only requires that a *reasonable* period of time for discovery has passed. Ten months is a reasonable period under the facts of this case. Further, the affidavit Pena submitted in support of her motion for continuance stated her need for additional depositions of "crucial fact witnesses" but specifically identified only Garrett. She did not explain how Garrett's testimony would be material to the pertinent questions in this matter.

We agree with Harp Holdings that its motions for summary judgment were not premature. Ten months was sufficient time in which to conduct relevant discovery, particularly given that some of the depositions had been taken seven months prior to the filing of the motions. Furthermore, we agree with Harp Holdings that Pena's affidavit was insufficient because it failed to explain the nature and materiality of the testimony she expected to elicit from Garrett. Even if she intended to question Garrett concerning her knowledge or awareness of the condition of the front staircase, we have already found the trial court did not abuse its discretion in finding the staircase did not present an unreasonably dangerous condition. Pena also failed to identify the other witnesses from whom she sought depositions and failed to explain the nature, extent, and materiality of the testimony she expected to elicit from those unidentified witnesses. Thus, we find the trial court did not abuse its discretion in implicitly denying Pena's motion for continuance.

See D.R. Horton - Tex., Ltd., 416 S.W.3d at 224; *Cardenas v. Bilfinger TEPSCO, Inc.*, 527 S.W.3d 391, 403 (Tex. App.—Houston [1st Dist.] 2017, no pet). As such, we overrule Pena's final appellate issue.

CONCLUSION

While we do agree with Pena that Harp Holdings failed to prove its affirmative defense of release, we find the trial court's ruling was supported by other meritorious grounds. We thus affirm the trial court's orders granting Harp Holdings's motions for summary judgment.

Patrick A. Pirtle
Justice

Doss, J., concurring in part and dissenting in part.