IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARILYN DENISE SMITH, Appellant, v. WINTHER PROPERTIES, LLC, a Washington corporation; ROBERT A. MATTSON and CATHERINE M. MATTSON, individually, as husband and wife, and the marital community thereof; and DOES 1-4 inclusive, Respondents.	No. 39562-2-II UNPUBLISHED OPINION

Armstrong, J. — Marilyn D. Smith appeals the trial court's summary judgment dismissal of her personal injury claim against Winther Properties LLC and Robert and Catherine Mattson. Smith alleges she was injured when she fell down a staircase at an office building owned by Winther and managed by the Mattsons. Smith argues Winther and the Mattsons (1) had constructive notice of the condition of the staircase and (2) breached a duty of care by not providing a handrail consistent with building codes. She also argues the Mattsons are individually liable for her damages. We agree that issues of material fact exist as to whether Winther and the Mattsons breached a duty of care to Smith and, therefore, reverse summary judgment and remand for trial.

FACTS

Winther is the owner of an office building in Tacoma, Washington. Winther is a limited liability company owned by the RA & CM Mattson living trust. The trust is the sole member of the LLC. The Mattsons are the sole trustees of the trust and acted as property managers on

behalf of Winther.

Smith was employed by Independent Capital Mortgage, Inc. (INDCap), a tenant on the second floor of the office building. The only means of accessing the second floor was an exterior concrete staircase of approximately 20 steps supported by bolts and metal beams. A six-inch wide "banister" or "handrail" ran the length of the staircase on one side.[1] There was no other handrail.

According to Smith, the third step from the top of the staircase moved under her feet as she descended the staircase on August 23, 2005, causing her to slip and fall. As she fell, Smith placed her right hand onto the railing, but could not adequately grip the railing because it was approximately six inches wide. Smith hit her head and rib cage as she fell, causing her to black out. Prior to her fall, Smith had never noticed the third step was loose and had never heard others complain about the condition of the third step. In the month before her fall, however, Smith noticed that steps lower on the staircase were loose and had informed her employer. Suzanne Kline, another employee at INDCap, had also observed several of the lower steps were loose in the month before Smith fell.

According to Robert Mattson, he visited the office building almost daily and routinely walked up and down each stairway in the building. Before Smith's fall, Mattson never felt any instability in any of the steps that gave him cause for concern, and he had never received any complaints about the staircase. Additionally, the City of Tacoma conducted a fire and safety inspection in 2005 or 2006 and did not find any safety violations related to the stairway. In the hours following Smith's fall, Mattson inspected the stairway and discovered that three of the top

[1] The parties dispute whether the railing on the side of the staircase constituted a banister or a handrail.

steps were loose. He tightened the bolts supporting each loose step and replaced the entire staircase the following weekend.

Smith brought a negligence claim against Winther and against the Mattsons in their individual capacity. Winther and the Mattsons moved for summary judgment, arguing that Smith failed to produce evidence that they had actual or constructive notice of the defective staircase, or that the handrail alongside the stairs violated applicable building codes. The trial court agreed and granted the motion.

ANALYSIS

I. Standard of Review

We review a summary judgment order de novo. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is proper only where:

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

CR 56(c). We consider all facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Where there is a genuine issue of material fact, a trial is "absolutely necessary." *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977).

II. Constructive Notice of the Dangerous Condition

Smith contends that she presented sufficient evidence for a jury to reasonably infer that Winther and the Mattsons breached a duty of care. To establish the elements of her negligence

claim, Smith had to show: "(1) duty . . . , (2) breach of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the injury." *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994). A property owner's legal duty to a person entering his property depends on whether the person is a trespasser, licensee, or invitee. *See Younce v. Ferguson*, 106 Wn.2d 658, 661-62, 724 P.2d 991 (1986). The parties agree that Smith was an invitee. A property owner is liable to an invitee for an unsafe condition of the land if the owner has actual or constructive notice of the unsafe condition. *Smith v. Manning's, Inc*., 13 Wn.2d 573, 580, 126 P.2d 44 (1942).

The property owner must inspect for unsafe conditions and "'repair, safeguard[], or warn[] as may be reasonably necessary for [the invitee's] protection under the circumstances.'" *Tincani*, 124 Wn.2d at 139 (quoting Restatement (Second) of Torts § 343 cmt. b (1965)). The property owner has constructive notice where the condition "has existed for such time as would have afforded [the owner] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger." *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652, 869 P.2d 1014 (1994). Determining whether a defective condition has existed long enough for a property owner exercising reasonable care to discover it is ordinarily a question of fact for the jury. *Coleman v. Ernst Home Ctr., Inc.*, 70 Wn. App. 213, 220, 853 P.2d 473 (1993).

Winther and the Mattsons do not dispute that a property owner has a duty to maintain the premises in a reasonably safe condition for the protection of an invitee. Winther and the

Mattsons contend, however, that Smith did not present sufficient evidence showing that they had actual or constructive notice of the existing danger, triggering a duty to fix the staircase. When viewed in the light most favorable to Smith, the nonmoving party, the evidence shows both Smith and Kline noticed that several steps in the staircase were loose a month before Smith's accident. Robert Mattson visited the building and walked up and down the staircase in question "nearly every day." Clerk's Papers at 20. Finally, Mattson inspected the staircase immediately after Smith's accident, noticed several steps were loose, and replaced the entire staircase. A jury could reasonably infer from these facts that the staircase had been deteriorating for at least a month prior to Smith's accident, and that Robert Mattson had sufficient time and opportunity to discover the dangerous condition of the staircase during his daily visits to the office building. *See Vallandigham*, 154 Wn.2d at 26; *Ingersoll*, 123 Wn.2d at 652; *Coleman*, 70 Wn. App. at 220.

Winther and the Mattsons contend that they had no notice that the step that actually caused Smith's injury, the third step from the top of the staircase, was either dangerous or unsafe prior to Smith's accident. But Smith presented evidence that several of the lower steps were loose for at least a month before her fall, and Robert Mattson admitted that the top three steps were unstable when he inspected the staircase immediately following the accident. A jury could reasonably infer from this evidence that the entire staircase, including the third step from the top, was deteriorating throughout the month before Smith's accident. Accordingly, we reverse the summary judgment order and remand for a jury to determine the ultimate issue of whether Winther and the Mattsons breached a duty of care to Smith that proximately caused an injury. *See Tincani*, 124 Wn.2d at 139; *Ingersoll*, 123 Wn.2d at 652; *Coleman*, 70 Wn. App. at 220.

III. Inadequate Handrail

Smith next contends that Winther and the Mattsons violated a building code requiring, in pertinent part, that (1) all exterior stairwells shall have handrails on each side and (2) the handgrip areas of the handrail shall not be less than 1.25 inches nor more than 2 inches in outside dimension, and shall be "basically oval in shape." Former WAC 51-10-3305 (1976).[2] Smith argues that the handrail at the office building was too wide and the wrong shape,[3] and this violation proximately caused her injury because she was unable to secure a proper grip on the handrail when she began to fall. The trial court ruled that Smith provided insufficient evidence to prove that the office building lacked a proper handrail. We disagree.

In *Pettit v. Dwoskin*, 116 Wn. App. 466, 469, 68 P.3d 1088 (2003), the appellant produced evidence showing that a deck that collapsed during a party failed to satisfy building code requirements. The appellant's evidence included the building permit and applicable Uniform Building Code sections. The *Pettit* court remanded for a new trial because the jury instructions did not make it clear that "[i]t was for the jury to decide whether the code was violated, and, if so, whether that violation was evidence of negligence." *Pettit*, 116 Wn. App. at 475.

Similarly, in *Short v. Hoge*, 58 Wn.2d 50, 52, 360 P.2d 565 (1961), the appellant brought a personal injury action against building owners following a stairway injury, alleging the owners were negligent by failing to provide a proper handrail as required by city ordinance. Our Supreme

[2] Smith alleges that former WAC 51-10-3305 (1976) was effective at the time the office building was built.

[3] Smith does not raise the absence of required handrails on both sides of an exterior staircase, therefore we do not specifically address the issue.

Court held:

> The fact that the city inspectors, whose duty it was to examine the structure and determine if it met the requirements of the building code, had approved it is some evidence of compliance. Such evidence is not conclusive. It was the province of the jury to determine from all of the evidence relative thereto whether, in fact, the structure did constitute a handrail as contemplated by the ordinance.

Short, 58 Wn.2d at 55-56.

Here, Smith produced evidence including: (1) photos of the staircase handrail, including photos comparing the width of the handrail to the size of her hand; (2) detailed building plan specifications from the Tacoma Public Works Permitting Department, which include instructions that the handrail "shall be between 30 [inches] and 34 [inches] above the nosing of treads and conform with all requirements of UBC [Uniform Building Code] Sec. 3505(j)"; and (3) regulations from the State of Washington Building Code Advisory Council establishing handrail requirements for exterior stairwells. CP at 51-52, 83-86, 95-96. As in *Pettit*, a jury must determine whether the building code was violated and, if so, whether the violation is evidence of negligence. *See Pettit*, 116 Wn. App. at 475. As in *Short*, the fact that the City of Tacoma did not note any safety issues with the staircase during its 2005 or 2006 safety inspection is not conclusive evidence that the handrail complied with the building code. *See Short*, 58 Wn.2d at 55-56.

Finally, Winther and the Mattsons assert that Smith failed to cite controlling authority or offer any qualified testimony, such as that of an expert, to support her allegation regarding the inadequate handrail. However, the record is not that thin. Smith testified to the width and shape of the handrail in her declaration, provided photographs of the stairway, and provided excerpts

from the building code. A jury could reasonably find from this evidence that the handrail violated the building code and the violation is evidence of negligence. Therefore, we reverse the summary judgment order on this issue as well.

IV. Personal Liability

Finally, Smith argues that there is a genuine issue of material fact regarding whether the Mattsons are members of Winther Properties LLC and, therefore, shielded from personal liability under RCW 25.15.125. RCW 25.15.125(1) protects a member or manager of a limited liability company from personal liability "solely by reason of being a member or manager of the limited liability company." The parties dispute whether the Mattsons are members or managers of Winther. But RCW 25.15.125(2) provides: "A member or manager of a limited liability company is personally liable for his or her own torts." To the extent that Smith's claims turn on the conduct of Robert or Catherine Mattson personally, or on behalf of the Mattson marital community, the Mattsons are not protected by RCW 25.15.125.

In sum, when considering all evidence and reasonable inferences drawn from that evidence in the light most favorable to Smith, as we must, we find that Smith presented sufficient evidence to raise genuine issues of material fact regarding whether Winther and the Mattsons had constructive notice of the unstable staircase, and whether the staircase handrail violated applicable building codes. Furthermore, to the extent that Smith's claims depend on the Mattsons' personal conduct, RCW 25.15.125 does not shield them from personal liability.

Therefore, we reverse the summary judgment order and remand for a jury to resolve these questions of fact.

Reversed and remanded.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Penoyar, C.J.

Worswick, J.