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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

DAVID B. VOGEL,

Appellant,

v.

CORNERSTONE DOCTORS CONDOMINIUM ASSOCIATION, INC., a Florida corporation,

Appellee.

Case No. 2D19-1084

Opinion filed July 8, 2020.

Appeal from the Circuit Court for Pinellas County; Patricia A. Muscarella, Judge.

Stuart C. Markman, Robert W. Ritsch, and Kristin A. Norse, of Kynes, Markman & Felman, P.A., Tampa, for Appellant.

Phillip S. Howell, Maggie E. Potter, and David T. Burr of Galloway, Johnson, Tompkins, Burr & Smith, PLC, Tampa, for Appellee.

VILLANTI, Judge.

David Vogel appeals the final summary judgment entered in favor of Cornerstone Doctors Condominium Association in this premises liability case. Because the record before the trial court reflected genuine issues of material fact concerning

whether Cornerstone acted reasonably in relation to its elevator, we reverse and remand for further proceedings.

Background

Cornerstone owns a two-story building in Palm Harbor that houses four doctors' offices—two on the ground floor and two on the second floor. There is one elevator that goes to the second floor. Vogel was a patient of one of the doctors on the second floor.

On August 22, 2013, Vogel went to his doctor's office to provide them with his new insurance card. He rode up to the second floor in the elevator without incident. When he was leaving the office, he had to call for the elevator again. When it arrived and the doors opened, Vogel stepped in. However, as he soon discovered, the elevator had failed to properly level, and the floor of the elevator was eighteen to twenty-four inches below the landing. Unfortunately, Vogel failed to notice this before stepping into the elevator, and he fell, injuring his back and neck.

Vogel sued Cornerstone in a three-count complaint. The first count alleged negligence. The second count alleged negligence per se based on a violation of section 399.02(5)(b), Florida Statutes (2013), which is part of Florida's Elevator Safety Act. The third count alleged liability under the doctrine of res ipsa loquitur. Cornerstone raised general defenses, primarily arguing that it was not negligent, that Vogel was comparatively negligent, and that the incident was not the proximate cause of his injuries.

During discovery, Cornerstone produced documents showing that it had a maintenance contract for the elevator with ThyssenKrupp Elevator that provided for

monthly inspections. Cornerstone also produced inspection reports from ThyssenKrupp showing that the elevator was, in fact, being inspected each month. The documents from ThyssenKrupp showed that it repaired a sensor in the elevator in April 2013, but there were no other repair tickets for the elevator before Vogel's injury (although there were tickets for the regular monthly inspections).

Vogel deposed Cornerstone's property manager, Thomas Connor, and he testified that the doctors were supposed to contact him about any problems with the Cornerstone building and that he would then contact the proper repair company. Connor testified that he had not received any calls about the elevator since April 2013. Vogel also deposed the ThyssenKrupp technician who repaired the elevator in April 2013, and he testified that a leveling issue can arise either over time or abruptly. He also testified that he did not remember what sensor he had to repair in the elevator in April 2013.

Vogel then deposed Dr. Kerry Robson, who was the president of Cornerstone and who occupied one of the offices on the second floor. Dr. Robson testified that patients of one of the other doctors—Dr. Schlau—had made repeated complaints about the elevator not working properly back in the 2012-2014 time period. When a patient made a complaint, someone from Dr. Schlau's office would tape an "Out of Order" sign on the elevator. When Dr. Robson saw the sign, or when one of his patients complained about the lack of an elevator, Dr. Robson would go and ride up and down in the elevator. If the elevator worked when he operated it, he would simply remove the "Out of Order" sign from the door. He did not call either Connor or ThyssenKrupp to report these problems, even though by his own testimony the

problems were happening frequently during that time period. Dr. Robson testified that since his patients never reported any problems and since he never experienced them, he thought that Dr. Schlau's patients simply did not know how to work an elevator. Therefore, despite repeated postings of an "Out of Order" sign on the elevator, Dr. Robson never alerted Connor to the intermittent problems or asked ThyssenKrupp to troubleshoot the elevator. Apparently, no one from Dr. Schlau's office notified Connor or ThyssenKrupp about the intermittent problems either.

After the close of discovery, Cornerstone moved for summary judgment, arguing that there was no evidence that it was negligent in its maintenance of the elevator. It pointed primarily to the ThyssenKrupp maintenance records, which did not show any problems with the elevator, and it contended that these records proved that Cornerstone was properly maintaining the elevator and that the levelling problem must have arisen abruptly. In response, Vogel argued that Dr. Robson's deposition provided evidence of negligence and that, based on his testimony, there were genuine issues of material fact concerning whether Cornerstone acted reasonably in dealing with the intermittent problem with the elevator. Vogel argued that it was for a jury to determine whether Dr. Robson's response to the "Out of Order" signs, and specifically his failure to ever notify Connor or ThyssenKrupp of the intermittent problem, was reasonable. Nevertheless, the trial court granted the motion for summary judgment and entered final summary judgment in favor of Cornerstone.

Vogel now seeks review of that final summary judgment, contending that it was improper in light of the disputed issues of material fact. In his appellate brief, Vogel does not raise any issues relating to the final summary judgment on count three, which

alleged liability under the doctrine of res ipsa loquitur. Therefore, any issue regarding that claim has been abandoned, and we affirm the summary judgment as to that count without further comment. See Fla. R. App. P. 9.210(b)(5) (requiring parties to brief each appellate issue); see also In re Guardianship of Beck, 204 So. 3d 143, 147 (Fla. 2d DCA 2016) (considering abandoned an issue not briefed by the appellant); Weaver v. Weaver, 95 So. 3d 1029, 1030 (Fla. 2d DCA 2012) (deeming unbriefed issues abandoned for purposes of appellate review). As to the other two counts, however, we agree with Vogel that summary judgment was improper.

Summary Judgment Standard

"A movant is entitled to summary judgment 'if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file 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.' " Estate of Githens ex rel. Seaman v. Bon Secours-Maria Manor Nursing Care Ctr., Inc., 928 So. 2d 1272, 1274 (Fla. 2d DCA 2006) (quoting Fla. R. Civ. P. 1.510(c)); see also Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000). The party moving for summary judgment has the burden to establish irrefutably that the nonmoving party cannot prevail. See Hervey v. Alfonso, 650 So. 2d 644, 645-46 (Fla. 2d DCA 1995). Every possible inference must be drawn in favor of the party against whom summary judgment is sought, and "[i]f the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury." Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985).

Here, the underlying facts concerning Vogel's fall and the events leading up to it were not directly in dispute. What was in dispute is whether Cornerstone's response to the intermittent elevator problem was reasonable and "whether and to what extent [Cornerstone's] conduct foreseeably and substantially caused the specific injury that actually occurred," i.e., the issue of proximate cause. Goldberg v. Fla. Power & Light Co., 899 So. 2d 1105, 1116 (Fla. 2005) (quoting McCain v. Fla. Power Corp., 593 So. 2d 500, 502 (Fla. 1992)). That issue is one that generally must be resolved by the jury. Id. With this background in mind, we turn to the counts at issue in this appeal.

Count One—Negligence

Vogel first contends that the trial court erred by entering final summary judgment in favor of Cornerstone on the negligence count because there were genuine issues of material fact concerning whether Cornerstone's response to the intermittent elevator problems was reasonable. The record supports this argument.

The parties agree that Cornerstone, as the property owner, had a duty to use reasonable care in maintaining its property, including the elevator, in a reasonably safe condition. See, e.g., Wolford v. Ostenbridge, 861 So. 2d 455, 456-57 (Fla. 2d DCA 2003). Cornerstone's duties as owner have been explained as follows:

> An entity in the actual possession and control of a premises, . . . to which members of the public are invited, is not an insurer of the safety of such persons, nor is the possessor strictly liable, or liable per se without fault, for injuries resulting to invitees from dangerous conditions on the premises; nevertheless, such a possessor basically has two legal duties to protect invitees from the harmful effects of dangerous premises conditions. First, such a premises possessor has a legal duty to ascertain that the premises are reasonably safe for invitees. This duty equates into a legal

> duty to use reasonable care to learn of (i.e., to acquire actual knowledge as to) the existence of any dangerous conditions on the premises. Secondly, the premises possessor has a second, entirely different, legal duty to use reasonable care to protect invitees from dangerous conditions of which the possessor has actual knowledge. This second duty is usually breached when the possessor fails to take reasonable care (a) to eliminate the known danger, (b) to protect invitees from the known danger by excluding them from the area of danger, (by fences, gates, walls, door, barricades, etc.), or by providing protective devices (safety glasses, ear muffs, breathing devices, hard hats, guardrails, covers on machinery, etc.), (c) to provide warnings as to the danger, or (d) to take some combination of these protective actions.

Winn-Dixie Stores, Inc. v. Marcotte, 553 So. 2d 213, 214 (Fla. 5th DCA 1989) (emphasis added) (footnotes omitted). A property owner who fails to take reasonable steps to learn of dangerous conditions on the premises may be found negligent. Moreover, the property owner's duty to maintain its property in a reasonably safe condition is nondelegable. See Armiger v. Associated Outdoor Clubs, Inc., 48 So. 3d 864, 874-75 (Fla. 2d DCA 2010) ("The duty of maintaining safe premises . . . cannot be delegated to another." (quoting Goldin v. Lipkind, 49 So. 2d 539, 541 (Fla. 1950))).

In an illustrative case from the Third District, the plaintiff was injured when an escalator stopped short, causing her to fall. See Greenberg v. Schlinder Elevator Corp., 47 So. 3d 901 (Fla. 3d DCA 2010). There was evidence that the escalator had stopped working earlier in the day, that the owner had called Schlinder, and that Schlinder had inspected the escalator but made no repair. Id. at 903. In reversing a directed verdict entered in favor of the owner, the Third District held:

> [T]he jury could reasonably infer that the [owner] and Schindler negligently failed to examine the escalator to determine what was causing it to stop running, and to correct the problem. Greenberg's fall was a direct result of the

> escalator's sudden stop. Thus, since Greenberg presented evidence of negligence, the trial court erred in entering a directed verdict in favor of the [owner] and Schindler.

Id. Notably, the owner was not relieved of liability simply because it had called the repair company to inspect and repair any problem.

Here, the evidence shows that Cornerstone, through its president Dr. Robson, had information in the months leading up to Vogel's fall that the elevator was having an intermittent problem. Rather than contacting either Cooper or ThyssenKrupp to address the problem, Dr. Robson—a dentist—took it upon himself to determine whether the elevator was actually malfunctioning by riding in it when he saw an "Out of Order" sign. If the elevator did not obviously malfunction while he was in it, he would simply remove the sign. No one with elevator repair experience ever checked the elevator to ensure that it was functioning properly.

In light of this evidence, it was for a jury, rather than the trial court, to determine whether Cornerstone had used reasonable care to learn of the existence—or lack thereof—of a dangerous condition on its premises. As in Greenberg, a jury could reasonably infer that Cornerstone negligently failed to examine the elevator—or to have it examined by an experienced technician—to determine what was causing the intermittent problem and correct it. It is possible that a jury could reasonably determine that Dr. Robson's check of the elevator—uneducated as it was—was a reasonable response to the "Out of Order" signs. However, it is also possible that a jury could determine that a reasonable owner would have contacted ThyssenKrupp to have the elevator checked rather than taking the matter into its own hands. Therefore, Dr. Robson's testimony creates a genuine issue of material fact as to whether

Cornerstone's response to the patient complaints of an intermittent elevator problem was reasonable.

Moreover, ThyssenKrupp's failure to find and correct the intermittent problem during its regular monthly visits is not a basis for excusing Cornerstone from liability. As noted above, Cornerstone's duty was nondelegable, so the existence of its contract with ThyssenKrupp does not absolve it from potential liability. Moreover, since no one from Cornerstone ever told ThyssenKrupp about the intermittent problem, ThyssenKrupp had no reason to attempt to troubleshoot the elevator or to look for malfunctioning parts. Therefore, because there were genuine issues of material fact as to whether Cornerstone breached its duty to maintain its premises in a reasonably safe condition, the trial court erred by granting summary judgment in favor of Cornerstone on the negligence count.

Vogel also contends that summary judgment on this count was improper because there were genuine issues of material fact concerning whether Cornerstone breached its duty to warn him of the intermittent problem with the elevator. Vogel is correct on this point as well. At deposition, Dr. Robson testified that Dr. Schlau's patients had been reporting an intermittent problem with the elevator for several weeks or months before Vogel's visit. Hence, Cornerstone knew that the elevator was experiencing an intermittent problem, yet it did nothing to warn patients of this. Based on Dr. Robson's testimony, a jury could reasonably determine that Cornerstone breached its duty to warn invitees to its premises of a known danger.[1]

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[1]We decline to address Vogel's argument, made for the first time on appeal, that summary judgment was improper because there was evidence that Cornerstone actually created the dangerous condition. See Aills v. Boemi, 29 So. 3d

Because the undisputed evidence before the trial court was susceptible to two alternative interpretations, one of which would have supported Vogel's claim that Cornerstone was negligent, the trial court improperly entered final summary judgment in favor of Cornerstone on count one.

Count Two—Violation of § 399.02(5)(b)

Next, Vogel contends that the trial court erred by granting summary judgment on his claim based on Cornerstone's violation of section 399.02(5)(b). This argument is also supported by the record and requires reversal.

Section 399.02(5)(b) provides:

> The elevator owner is responsible for the safe operation, proper maintenance, and inspection and correction of code deficiencies of the elevator after a certificate of operation has been issued by the department. The responsibilities of the elevator owner may be assigned by lease.

Notably absent from this statute is any language permitting the responsibilities of the owner to be assigned or delegated to a service provider. Therefore, an owner who has not assigned its responsibility for an elevator by a lease is responsible for the elevator's safe operation. Period.

In the trial court, Cornerstone argued that section 399.02(5)(b) did not create a private right of action by an injured party against a property owner; however, this court has held to the contrary. In Golden Shoreline Limited Partnership v. McGowan, 787 So. 2d 109 (Fla. 2d DCA 2001), this court addressed a situation in

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1105, 1109 (Fla. 2010) ("[T]o be preserved for appeal, 'the specific legal ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on appeal.' " (alternation in original) (quoting Chamberlain v. State, 881 So. 2d 1087, 1100 (Fla. 2004))).

which an elevator passenger was injured when the elevator bounced and then rebounded. In addressing the applicability of section 399.02(5) to the plaintiff's action against the property owner, Golden Shoreline, we said:

> This statute undoubtedly imposed a duty upon Golden Shoreline, but the law recognizes two different types of negligence per se. The first involves statutes that impose strict liability upon its violators, usually in those circumstances where the statute is designed to protect a particular class of persons from their inability to protect themselves. The second type of negligence per se results from the violation of a statute that seeks to protect a particular class of persons from a particular injury by establishing the duty to take precautions to avoid that injury. deJesus v. Seaboard Coast Line R. Co., 281 So. 2d 198 (Fla. 1973).
>
> We conclude that section 399.02(5)(b) established this second type of duty—to protect those using elevators from injury resulting from poor maintenance of the elevator. In reviewing whether a violation of the precursor statute to section 399.02(5)(b) would require a negligence per se instruction, the Fourth District held:
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> > Elevators are commonplace. Indeed, in many buildings they provide the only reasonable mode of conveyance. Yet the passengers—the class of individuals for whom the statute was enacted—have no say in questions of maintenance, repair and other safety precautions. Thus, the task of making elevators safe necessarily falls upon the owner or agent who is in a position to undertake proper maintenance. The proper execution of this duty is of paramount importance. Consequently, it is consistent with the body of law cited above to hold that a violation of this statute constitutes negligence per se.
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> Reliance Elec. Co. v. Humphrey, 427 So. 2d 214, 214-15 (Fla. 4th DCA 1983).
>
> We, too, conclude that a violation of section 399.02(5)(b) constitutes negligence per se but not of the type that imposes strict liability. The mere fact that the elevator fell does not, of itself, establish negligence on the

> part of Golden Shoreline. Szilagyi v. North Florida Hotel Corp., 610 So. 2d 1319 (Fla. 1st DCA 1992). In the first place, the plaintiffs must establish that Golden Shoreline actually violated the statute. See id. at 1321. Furthermore, as pointed out by the deJesus court, it would also remain for the plaintiffs to prove that they were "of the class the statute was intended to protect, that [they] suffered injury of the type the statute was designed to prevent, and that the violation of the statute was the proximate cause of [their] injury." 281 So. 2d at 201.

Id. at 111.

As is clear from that discussion, a violation of section 399.02(5)(b) by Cornerstone could support a finding of liability under the doctrine of negligence per se. And, as noted above, there were genuine issues of material fact as to whether Cornerstone provided for the "safe operation, proper maintenance, and inspection and correction of code deficiencies of the elevator." Therefore, summary judgment in favor of Cornerstone on this count was improper as well.

Defenses

In its answer brief, Cornerstone argues that some of the evidence relied upon by Vogel to oppose Cornerstone's motion for summary judgment constitutes inadmissible hearsay, specifically Vogel's testimony that an unknown employee of one of the doctor's offices told him that the elevator had been "fixed" and that the "Out of Order" sign that had been on the door earlier in the day had been removed. Cornerstone also argues that Vogel relies on an improper stacking of inferences when arguing that there were prior leveling issues with the elevator. However, regardless of the merits of these arguments, the undisputed evidence before the trial court from Cornerstone's own witness—Dr. Robson—established that there was an intermittent problem with the elevator in the months prior to Vogel's injury. The undisputed

evidence from Dr. Robson also showed that no one ever attempted to determine the nature of the intermittent problem or repair it because Dr. Robson—a dentist—addressed the problem by simply riding in the elevator himself rather than by calling ThyssenKrupp or the property manager. If Dr. Robson did not experience a problem, he simply removed the "Out of Order" sign from the door, leaving patients vulnerable to future malfunctions.

In light of this undisputed testimony, it was for the jury, not the trial court, to determine whether Cornerstone's self-help measures were reasonable or whether Cornerstone breached its duty to maintain the elevator in a reasonably safe condition for its business invitees. See Belden v. Lynch, 126 So. 2d 578, 580 (Fla. 2d DCA 1961) ("When the question of negligence depends upon a disputed state of facts, *or when the facts, though not disputed, are such that different minds may reasonably draw different conclusions from them, the question is for the jury*." (quoting Cobb v. Twitchell, 108 So. 186, 188 (Fla. 1926))). Therefore, the trial court should not have entered final summary judgment in favor of Cornerstone, and we reverse the final summary judgment and remand for further proceedings.

Reversed and remanded for further proceedings.

NORTHCUTT and LUCAS, JJ., Concur.