MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Tessa McCormick,
Appellant-Plaintiff

v.

Univerbal, LLC and Pearl Realty, LLC,
Appellees-Defendants

April 9, 2024

Court of Appeals Case No.
23A-CT-1373

Appeal from the Lake Superior Court

The Honorable Kristina C. Kantar, Judge

Trial Court Cause No.
45D04-2103-CT-292

Memorandum Decision by Judge Foley
Judges Pyle and Tavitas concur.

Foley, Judge.

[1] Tessa McCormick ("Tenant") stepped through a damaged deck board at her rental home ("the Property") and brought this negligence action against Univerbal, LLC ("Univerbal"), the current owner of the Property, and Pearl Realty, LLC ("Pearl"), the property manager (collectively, "Landlord"). Landlord sought summary judgment, alleging that Tenant could recover for negligence only if Landlord had actual knowledge of a hidden defect on the Property. Landlord designated evidence indicating that it lacked actual knowledge of any issue with the deck. Tenant then designated evidence indicating that Landlord had ample access to the Property, there was nothing obscuring access to the area below the deck, and—had Landlord inspected the underside of the deck—Landlord would have seen the damaged decking. The trial court granted summary judgment for Landlord. Tenant appeals, arguing that there was a genuine issue of material fact as to whether Landlord actually knew of a hidden defect. We affirm the order granting summary judgment to Landlord, concluding that—at most—the designated evidence indicates that Landlord *should have* known of the damaged decking, but the evidence does not support a reasonable inference that Landlord *actually* knew of a hidden defect.[1]

[1] Resolving the case on this basis, we do not reach Landlord's alternative argument that, even if Landlord had known of a hidden defect, Tenant was precluded from recovery based on the terms of a written lease.

Facts and Procedural History

[2] On March 26, 2021, Tenant filed this lawsuit alleging she "stepped through a faulty and damaged board on the porch" of the Property on March 31, 2019, "falling through the deck" and resulting in serious injury. Appellant's App. Vol. 2 p. 37. Tenant sued Univerbal and Pearl. She also sued Shawn He Yuxun ("Yuxun"), the sole owner of Univerbal, along with Yuxun's wife, Wendy B. St. Jean ("St. Jean"), who at one point co-owned the Property with Yuxun.[2] Tenant alleged that the "deck was inspected by [Landlord] prior to occupancy and [Landlord] knew . . . of the defect in the deck." *Id.* at 38 (as to Univerbal), 41–42 (as to Pearl); *see id.* at 38 & 42 ("The [deck] conditions were known . . . and an effort should have been made to rectify such conditions."). Tenant ultimately alleged that she was injured "[a]s a direct and proximate result" of Landlord's "negligent acts and/or omissions[.]" *Id.* at 38 & 42.

[3] The defendants moved for summary judgment. In a supporting memorandum, Landlord pointed out that an Indiana landlord "may be held liable for injuries caused by a defective or dangerous condition on the land, *but only if the dangerous or defective condition was known to the landlord and unknown to the tenant*." *Id.* at 59 (emphasis added). Landlord designated evidence indicating that Landlord was not aware of any hidden defect affecting the stability of the deck,

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[2] The trial court entered summary judgment in favor of Yuxun and St. Jean. However, Tenant does not seek to disturb the entry of summary judgment as to these parties, who do not actively participate on appeal. *See, e.g.*, Appellant's Br. p. 15 (requesting only that we "reverse the trial court's order granting summary judgment in favor of . . . Univerbal and Pearl"); *see also id.* at 9 (directing argument toward only Univerbal and Pearl).

which was constructed in 2008—approximately ten years before Tenant took control of the Property on March 1, 2017. Landlord specifically designated affidavits indicating that "[t]he alleged defect in the wooden porch was hidden from view and was not known to . . . [Yuxun, Univerbal, or Pearl] at any time prior to [Tenant's] alleged fall." *Id.* at 76, 89. Landlord also designated evidence indicating that, before the fall, Tenant was also unaware of any hidden defect. That is, Tenant made the following remarks in an e-mail about the fall:

> First[,] let me start by saying that this is not a letter to discredit the homeowner. It was not negligence on their part. I believe that i[t] was strictly w[ear] and tear. It did not appear to look weak, yet it was. The owner [and] property manager are very responsible in taking care of the [P]roperty.

Id. at 91. Landlord's designated evidence also included Tenant's deposition testimony regarding the generally stable appearance of the deck: "The deck looked like it was sturdy. I wouldn't know the true condition of it because we hardly used it. But . . . appearance[-]wise, it looked like it could hold its weight." *Id.* at 134. Landlord ultimately argued that it was entitled to summary judgment because "[t]he undisputed facts establish that any defect in the wooden deck was unknown to all parties prior to [Tenant's] alleged fall." *Id.* In so arguing, Landlord specifically cited the affidavits indicating that Yuxun, Univerbal, and Pearl lacked actual knowledge of a hidden defect.

[4] In response to Landlord's motion for summary judgment, Tenant suggested that, had Landlord inspected the underside of the deck, Landlord would have seen the damaged decking. As for the position of the deck, there was

designated evidence indicating that Tenant could access the deck from the residence. *See, e.g.*, *id.* at 249 ("[I]t's attached and open into the home. . . . [T]he deck is part of a deck platform that the porch sits on."). There was also evidence indicating that there was no obstruction "preventing people from accessing under the deck." Appellant's App. Vol. 3 p. 2. However, no evidence established the height of the deck itself—i.e., whether the deck was installed at ground level or there was clearance below the deck. Furthermore, although there was designated evidence regarding the general accessibility of the deck, there was no designated evidence indicating that Landlord had ever gone under the deck. To the contrary, when Yuxun was asked whether he ever inspected the deck after its construction, Yuxun—who lived at the Property for several years after the deck was constructed—provided the following testimony:

> [W]ith . . . such intimate knowledge of everything, I would have no reason to inspect anything, you know, because I had confidence in the quality and durability of all the structures. So I did not – no, I did not have to go in [sic] there and inspect because it was as solid as it could be. So there was no reason for me to go under there to inspect anything.

Id. at 4. Yuxun also testified that he did not instruct anyone to conduct an inspection under the deck. He noted that the Property was a rental and he "let the property manager take over." *Id.* at 3. Yuxun said he "let the pros do their job," adding: "I would never attempt to do anything like that myself." *Id.* at 4.

[5] As for Pearl, there was deposition testimony from Pearl's sole owner, Zhenshu Xie ("Xie"), indicating that Pearl facilitated a "walk-through" with Tenant

before Tenant moved into the Property. *Id.* at 10. Regarding the portion of the walk-through concerning the deck, Xie explained: "Well, we just walk on there and I look there. And that's what we just do, visual inspection." *Id.* Xie was then asked: "During that walk-through, did you go under the deck to inspect the condition of the parts of the deck underneath the flooring?" *Id.* Xie responded: "No." *Id.* Xie also confirmed that, after Tenant's fall, there was no deck repair "other than the one flooring piece being replaced[.]" *Id.* at 14.

[6] In challenging summary judgment, Tenant argued that there were "more than sufficient facts in the record to allow a jury to reasonably conclude [that Landlord] had actual knowledge of the dangerous and defective condition of the deck," which would "thereby impos[e] a duty on [Landlord] to warn [Tenant] of the condition or repair the condition before leasing" the Property. Appellant's App. Vol. 2 p. 219. Tenant focused on designated evidence that:

> (1) Univerbal's owner, Yuxun[,] . . . lived in the home with the deck . . . before he leased [the Property] to [Tenant], (2) . . . Yuxun knew the wood on the deck would deteriorate over time, (3) . . . Yuxun did not apply any treatment to protect the surface of the deck from water or decay after it was first constructed, and (4) . . . Yux[u]n had full access to the surface and underside of the deck during the time he lived at the home and after he leased [the Property] to [Tenant].

Id. Tenant argued: "Based on these facts, a jury could certainly infer [that Landlord] had knowledge of the deck's dangerous and defective condition." *Id.*

[7] The trial court held a hearing and issued a written order granting Landlord's motion for summary judgment. In its written order, the trial court referred to liability clauses in the Lease, but the court ultimately resolved the case by focusing on the elements of negligence. *See* Appellant's App. Vol. 3 pp. 41–44.

[8] Addressing viable theories of negligence, the trial court determined that the case hinged on whether Landlord owed any duty to Tenant regarding the condition of the Property. The trial court observed that, in general, "a landlord who gives a tenant full control and possession of the leased property will not be liable for personal injuries sustained by the tenant or other persons lawfully upon the leased property." *Id.* at 42 (quoting *Pitcock v. Worldwide Recycling, Inc.*, 582 N.E.2d 412, 414 (Ind. Ct. App. 1991)). The trial court went on to identify an exception for hidden defects, pointing out that a landlord "has a duty to warn the tenant of hidden defects known to the landlord but unknown to the tenant." *Id.* at 43. The trial court noted that, under Indiana law, "[i]t is not enough that the landlord should have known of the defect." *Id.* Rather, "liability accrues" only if the landlord had "actual knowledge of the latent defect." *Id.* Looking to the designated evidence, the trial court concluded that "no person or party was actually aware of the damaged board on the deck prior to [Tenant's] fall." *Id.* Thus, according to the court, summary judgment was proper because Tenant "failed to show that there [was] a genuine issue of material fact sufficient to survive [s]ummary [j]udgment as to the issue of duty, or breach[.]" *Id.* at 44. Tenant now appeals the order granting summary judgment to Landlord.

Discussion and Decision

[9] On appeal, Tenant argues that the trial court erred in granting summary judgment to Landlord because there was a genuine issue of material fact as to whether Landlord had actual knowledge of a hidden defect on the Property.

[10] Under Trial Rule 56(C), summary judgment is appropriate only if "the designated evidentiary matter shows 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." As our Supreme Court has explained, "[t]he 'initial burden' is on the movant to demonstrate the absence of an issue for trial." *Zaragoza v. Wexford of Ind., LLC*, 225 N.E.3d 146, 151 (Ind. 2024) (quoting *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014)). That is, the moving party must designate evidence that "'affirmatively negates a required element' of the non-movant's claim or defense." *Id.* (quoting *Cmty. Health Network, Inc. v. McKenzie*, 185 N.E.3d 368, 377 (Ind. 2022)). If the movant satisfies this initial burden, "the burden then shifts to the non-movant to 'come forward with contrary evidence showing an issue for the trier of fact.'" *Id.* (quoting *Hughley*, 15 N.E.3d at 1003). All in all, summary judgment is improper if (1) "there is 'contrary evidence showing differing accounts of the truth,'" or (2) "'conflicting reasonable inferences' may be drawn from the parties' consistent accounts and resolution of that conflict will affect the outcome of a claim." *Z.D. v. Cmty. Health Network, Inc.*, 217 N.E.3d 527, 532 (Ind. 2023) (quoting *Wilkes v. Celadon Grp., Inc.*, 177 N.E.3d 786, 789 (Ind. 2021)).

[11] We review summary judgment decisions de novo. *Id*. In conducting our review, we "consider only the evidentiary matter 'specifically designated to the trial court.'" *Zaragoza*, 225 N.E.3d at 151 (quoting *Reed v. Reid*, 980 N.E.2d 277, 285 (Ind. 2012)). Furthermore, we construe the designated evidence in a light most favorable to the non-moving party. *G&G Oil Co. of Ind., Inc. v. Continental W. Ins. Co.*, 165 N.E.3d 82, 86 (Ind. 2021). "To the extent we 'have any doubts concerning the existence of a genuine issue of material fact, we must resolve those doubts in favor of the nonmoving party.'" *Z.D.*, 217 N.E.3d at 532 (quoting *Reed*, 980 N.E.2d at 303).

[12] Here, Tenant sought to recover for Landlord's alleged negligence, claiming that Landlord breached a duty to Tenant by failing to warn of a hidden defect on the Property. To prevail on a negligence claim, a plaintiff generally must establish that the defendant owed a duty to the plaintiff, the defendant breached the duty, and the plaintiff suffered damages that were proximately caused by that breach. *See generally, e.g.*, *WEOC, Inc. v. Niebauer*, 226 N.E.3d 771, 778 (Ind. 2024). Moreover, where—as here—a theory of liability hinges on the knowledge of a business organization, principles of agency generally apply such that the organization is deemed to have the knowledge of its agents. *See generally, e.g.*, *Cantrell v. Putnam Cnty. Sheriff's Dep't*, 894 N.E.2d 1081, 1086–87 (Ind. Ct. App. 2008) (collecting cases and discussing the principles of imputed knowledge).

[13] In *Dickison v. Hargitt*, we summarized the scope of a landlord's duty to a tenant, explaining that Indiana generally recognizes the principle of "caveat lessee," which means "let the lessee beware." 611 N.E.2d 691, 694 (Ind. Ct. App.

1993). Indeed, under the common law, a "tenant who had the opportunity to inspect the premises before accepting [the premises] was considered to have accepted the [property] in [its] existing condition, and having done so, usually could not later complain about a defect." *Id.* Thus, in general, if a landlord "gives a tenant full control and possession of the leased property," the landlord "generally will not be liable for personal injuries sustained by the tenant or other persons lawfully upon the leased property." *Id.* But we explained in *Dickison* that "[t]he law makes allowances for those circumstances [that] render strict adherence to th[is] general rule . . . unduly harsh[.]" *Id.* One exception is if "a landlord knows of a hidden defect unknown to the tenant[.]" *Id.* Indeed, under this exception to the general rule, "the landlord may incur liability if by reason of his failure to warn of the hidden defect a tenant suffers an injury." *Id.*

[14] In discussing the "hidden defect" exception in *Dickison*, we noted that there must be "*actual* knowledge of the hidden defect on the landlord's part before a duty to warn of the defect arises." *Id.* at 695. In other words, "[i]t is not enough that the landlord should have known of the hidden defect." *Id.* Indeed, what the landlord "should have known" is "irrelevant to the . . . inquiry." *Id.* at 695 n.2. Rather, "[t]he only issue is whether [the landlord] *actually* knew of the hidden defect." *Id.* Regarding a landlord's duty, we also observed in *Dickison* that "[w]hether a defendant owes a plaintiff a duty" is generally a "question of law," but that there were sometimes "questions of fact . . . interwoven into this determination." *Id.* at 694. As for hidden defects, if the evidence supports a reasonable inference that the landlord had actual knowledge of the hidden

defect, the landlord's knowledge "is plainly a question of fact for the jury's determination." *Id.* at 695. But if the evidence does not support a reasonable inference that the landlord actually knew of the hidden defect, then—as a matter of law—the landlord lacked a duty to warn. *See id.* "An inference is not reasonable when it rests on no more than speculation or conjecture." *Estate of Sullivan v. Allstate Ins. Co.*, 841 N.E.2d 1220, 1225 (Ind. Ct. App. 2006).

[15] In applying the foregoing standard in *Dickison*, we ultimately reversed the trial court's determination that, as a matter of law, the landlord was not liable. *See Dickison*, 611 N.E.2d at 696–97 (reversing the trial court's order granting the landlord's motion for judgment on the evidence). In that case, a guest of the tenant slipped on a balcony, clutched the wooden railing to brace himself, and "[t]he rail failed." *Id.* at 693. In reversing, we noted that the record disclosed "enough facts and reasonable inferences to allow [a] jury fairly to find 1) a hidden defect existed, and 2) [the landlord] had actual knowledge of the hidden defect." *Id.* at 695. In our discussion, we referred to designated evidence that the landlord "was familiar with [the rental property]," having "inspected it twice"—i.e., "once when he bought it the previous year and once with [the tenant] when she became a tenant." *Id.*

[16] On appeal, Tenant argues that this case is similar to *Dickison* because Yuxun was intimately familiar with the Property and had the opportunity to inspect the deck. Yet, *Dickison* involved additional evidence that supported a reasonable inference of actual knowledge, and our decision was based on the collective effect of that evidence. *See id.* at 696 (referring to a range of evidence when

determining that "the[] circumstances g[a]ve rise to a reasonable inference" of actual knowledge). That is, when we identified a genuine issue of material fact regarding actual knowledge, we also referred to designated evidence that, "[a]lthough the railing appeared safe on the whole, parts of it were discolored," and the landlord "acknowledged he possessed a trained eye in matters of the condition of wood." *Id.* at 695–96. In contrast, here, there is no indication that Yuxun had a similar level of training. To the contrary, the evidence indicated that Yuxun relied on the experience of professionals, noting that, when it came to property inspections, he would "let . . . the property manager do that," and "let the pros do their job." Appellant's App. Vol. 3 p. 4; *cf.* Appellant's App. Vol. 2 p. 245 ("I'm not a pro. I would have the pro[s] do . . . what they're best at."). Indeed, Yuxun added that he "would never attempt to do anything like that [him]self." Appellant's App. Vol. 3 p. 4. Yuxun gave a similar response when asked about deck sealant: "I never attempt to do anything myself." Appellant's App. Vol. 2 p. 245. Furthermore, in *Dickison*, there was evidence that the landlord told the tenant to "be careful while she was on the balcony." 611 N.E.2d at 696. But the instant case involved no similar warning. Furthermore, *Dickison* involved evidence that the plaintiff sought to inspect the wooden railings—which the landlord had been storing in his garage—but "the railings remains vanished" and were unavailable for inspection. *Id.* There, we noted that "[t]he failure to produce available evidence raises an inference that the evidence would have been unfavorable had it been produced." *Id.*

[17] All in all, the outcome in *Dickison* turned on a constellation of evidence that——when considered together—"g[a]ve rise to a reasonable inference (but by no means the only one) that [the landlord] actually knew the hidden defect existed." *Id.* But this case does not involve the same range of evidence.

[18] As for the case at hand, Tenant's position is that the evidence disclosed "more than enough facts for a jury to infer [that Landlord] had actual knowledge of the defective condition of the back deck." Appellant's Br. p. 11. Tenant generally focuses on evidence that Yuxun—the sole owner of Univerbal—"lived in the home as his primary residence for [many] years before leasing the home to [Tenant]." *Id.* Tenant also directs us to evidence that "the deck was constructed in 2008" and Yuxun "took no steps while he lived at the house to preserve the wood on the surface or underside of the deck and repair any rotted/deteriorated wood." *Id.* at 11–12. Tenant further asserts that "[t]he record is clear there is nothing that would have obstructed [the] view of the underside of the deck" while Yuxun "lived at the [Property]," and that "the underside of the deck was easy to access and walk under." *Id.* Citing to *Dickison*, Tenant argues that Yuxun's "self-serving testimony that he was not aware of the defective condition of the deck" was "not sufficient to justify summary judgment on this issue." *Id.* Indeed, Tenant asserts that "[a]t a minimum, the record creates a genuine issue of fact . . . concerning whether [Yuxun], and by extension," Univerbal and Pearl, "acquired actual knowledge of the poor condition of the deck[.]" *Id.*

[19] We disagree with Tenant. All in all, when Landlord designated evidence that Landlord lacked actual knowledge of the hidden defect, Landlord negated an element of Tenant's claim. At that point, the burden shifted to Tenant to designate evidence disclosing a genuine issue of material fact as to whether Landlord had a duty to Tenant, i.e., whether Landlord had actual knowledge of a hidden defect. As to Landlord's duty to Tenant, we emphasize—as our colleagues also emphasized in *Dickison*—that what Landlord "should have known . . . is irrelevant to the hidden defect inquiry." *Dickison*, 611 N.E.2d at 695 n.2. Here, in attempting to avoid summary judgment, Tenant relies on the following evidence to support an inference that Landlord had actual knowledge of a hidden defect: Landlord resided at the residence for a number of years; Landlord did not treat the deck; the area under the deck was accessible and—despite evidence that Landlord did not go under the deck—accessing the area under the deck would have revealed the defect. We conclude that, based on the designated evidence, the inference that Landlord had actual knowledge of the defect rests on mere speculation and, therefore, is not a reasonable inference.

[20] As our Supreme Court has explained, "[t]hough summary judgment is rarely appropriate in negligence cases, it is appropriate when the undisputed facts negate one of the required elements." *McKenzie*, 185 N.E.3d at 379. Indeed, for a negligence claim to survive summary judgment, "[a]ll of the elements of [the] negligence action must be supported by specific facts designated to the trial court or reasonable inferences that might be drawn from those facts." *Miller v. Monsanto Co.*, 626 N.E.2d 538, 541 (Ind. Ct. App. 1993). In this case, the

designated evidence does not support a reasonable inference that Landlord had actual knowledge of a defect in the deck, thereby posing a risk to Tenant. Therefore, we must affirm the order granting summary judgment to Landlord.

[21] Affirmed.

Pyle, J., and Tavitas, J., concur.

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