STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY BOUCHARD and CARRIE BOUCHARD,

Plaintiffs-Appellants,

v

LLB, INC.,

Defendant-Appellee,

and

TROGANS PARTY STORE, INC.,

Defendant.

UNPUBLISHED
December 20, 2002

No. 232639
Saginaw Circuit Court
LC No. 97-019367-NO

Before: Whitbeck, C.J., and Hood and Kelly, JJ.

PER CURIAM.

In this premises liability case involving a fall from an apartment balcony, plaintiffs Timothy and Carrie Bouchard appeal as of right an order granting a new trial and an order granting summary disposition for defendant LLB, Inc.[1] We affirm.

I. Basic Facts And Procedural History

On November 13, 1996, Timothy Bouchard visited his sister's apartment in Saginaw to help her rearrange furniture. LLB owns the apartment, which is one of two units located above a party store. Frank Bathos, one of the three LLB partners, maintains the apartment. The apartment's balcony is approximately fifteen to twenty feet above the ground. The balcony has a railing that is 37-7/8 inches high and is supported by spindles.

According to Bouchard, he walked onto the balcony to talk to his wife, who was in the parking lot below the apartment. He then tripped over box springs and a mattress. As Bouchard

[1] Carrie Bouchard's claim in this case is purely derivative. Unless otherwise indicated, we refer to Timothy Bouchard as "Bouchard." Additionally, the trial court dismissed defendant Trogans Party Store, Inc., pursuant to a stipulation, and Trogans is not a party to this appeal.

flipped over the railing, he grabbed a spindle, which broke. He then fell onto the cement below the balcony. Although the railing looked "rickety," it did not break under Bouchard's weight. Bouchard, however, reportedly told an emergency room intake nurse who saw him later that night that he had been drinking, was fighting with his wife, and was backing away from her when he flipped over the rail.

Bouchard sued LLB for failing to maintain the railing. At trial, Bouchard alleged that LLB knew or should have known that the railing was unsafe even if the railing complied with the applicable building code and despite the fact that the property had passed inspection at least twice. Bouchard's argument was that an average person's center of gravity is forty-two inches from the floor, so railings should be at least that high.

The parties disagreed regarding whether the railing complied with the building code. Bouchard's expert, engineer Curt Egerer, explained that the building code in place at the time of the incident mandated railings forty-two inches high, but had three exceptions. The pertinent exception was that a railing need only be thirty-six inches high for a group R, division 3 structure. Group R refers to occupancy, and division 3 refers to a dwelling and lodging house. Because the building has apartments, a store, and a warehouse, Egerer asserted that the building does not fall into group R, division 3. Rather, in his opinion, the building has a mixed use, so the railing must be forty-two inches high.

Additionally, Egerer explained why the current building code's "grandfather" clause, which states that structures built to code can remain unchanged even when the code is revised to have stricter standards, did not apply in this case. Neither Egerer nor the testifying city inspectors knew whether any building code was in place in 1933, the year the structure at issue was built. Nevertheless, Egerer maintained that the rail was not originally constructed according to the national building code that would have been in effect and would have required forty-two-inch-high railings. Further, Egerer asserted, the grandfather clause in the current building code has an exclusion for conditions that are "dangerous to life, health, safety or the public welfare," which must always be upgraded to comply with stricter codes. In Egerer's opinion, the low railing at the apartment was dangerous to life, so it should have been made to comply with subsequently-enacted stricter codes.

LLB's experts, two city inspectors, testified that the building in question complied with the building code. John Young, the deputy chief inspector for the City of Saginaw, testified that the building fell within the group R, division 3 exception permitting railings that are only thirty-six inches high because the commercial portion was separated from the residential portion so that there were no common areas. Young added that, even if the apartment were not classified as group R, division 3, the grandfather clause applied, and the height of the railing was sufficient. Young also explained that if a building code was not in place at the time the building was constructed, the housing inspector would apply the first code that the city adopted after the structure was built. That would have been a code from 1952 that called for thirty-six-inch-high railings. Scott Nizinski, the housing inspector who inspected the unit, testified that housing training manual required the railing to be thirty-six inches high. He found no code violation when he inspected the railing.

The parties also debated whether the whole railing should have brought into compliance with the current building code because LLB had fixed a spindle supporting the railing before

Bouchard's accident. Bouchard's expert, Egerer, explained that when an owner repairs an item that has been subject to the grandfather clause, the new work has to comply with the current code. Egerer believed that when LLB replaced a spindle, that triggered the disputed repair provision and LLB should have replaced the entire railing so that it was at least forty-two inches high. LLB's expert, Young, disagreed, saying that replacing a spindle would qualify as maintenance under the code, and therefore would not require LLB to replace the entire railing.

The jury returned a verdict for Bouchard in the amount of $78,216.32, but found him seventy-five percent comparatively negligent. LLB then moved for a new trial. Among other things, LLB contended that the jury's verdict was against the great weight of the evidence. After a hearing, the trial court found that, regardless of whether the railing complied with the code, the critical legal question was whether LLB knew or should have known that the railing was unsafe. The trial court, considering SJI 19.03, reasoned that complying with the building code does not absolve a landowner of premises liability if the owner knew or should have known of a dangerous condition. The trial court found that there was no evidence showing LLB knew that having railing that was 37-7/8 inches high was dangerous to life, leaving only one remaining question: whether LLB should have known the railing was dangerous. The trial court concluded that this question had not been answered at trial, and so granted LLB's motion for a new trial. The trial court also suggested that LLB might win a new motion for summary disposition if the defense deposed Egerer again and he testified that a landowner would have no reason to know that the railing was dangerous.

Accordingly, LLB deposed Egerer a second time. In its subsequent motion for summary disposition, LLB explained that Egerer, who had special knowledge as an engineer, had not been able to say definitively that a landowner should have known that the railing was dangerous. To the contrary, an ordinary landowner would know only what the city inspector told him, which, in this case, was that the railing was safe. The trial court then concluded that there was no genuine issue of material fact in dispute and granted LLB's motion for summary disposition.

II. New Trial

A. Standard Of Review

Bouchard claims the trial court abused its discretion by granting a new trial.[2] This Court will not reverse a trial court's ruling on a motion for new trial absent an abuse of discretion.[3]

B. Premises Liability

In Michigan, a landowner has a duty to "maintain his or her property in a reasonably safe condition and has a duty to exercise due care to protect invitees from conditions that might result in injury."[4] A landowner is liable for harm to an invitee caused by a dangerous condition of

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[2] See MCR 2.611(A)(1).

[3] *Kelly v Builders Square*, 465 Mich 29, 34; 632 NW2d 912 (2001).

[4] *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 90; 485 NW2d 676 (1992).

which the landowner knew or should have known, but from which the landowner failed to protect the invitee.[5] The parties correctly stipulated that Bouchard was LLB's invitee.[6]

When it granted LLB's motion for new trial, the trial court reasoned that for Bouchard to have prevailed at trial, the facts had to show that LLB knew or should have known that a balcony railing measuring 37-7/8 inches high was a dangerous condition. The trial court correctly concluded that the evidence, which showed that the railing passed a code inspection, did not show actual knowledge. The trial court also correctly held that there was no evidence presented regarding whether LLB should have known the railing was dangerous. Because that was a necessary element of LLB's liability, the jury's verdict was "contrary to law."[7] Thus, the trial court did not abuse its discretion by granting a new trial.

III. Summary Disposition

A. Standard Of Review

Bouchard also claims the trial court erred in granting summary disposition because he presented a genuine issue of material fact. This Court reviews de novo a trial court's decision to grant summary disposition.[8]

B. LLB's Knowledge

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim.[9] When deciding a motion for summary disposition under MCR 2.116(C)(10), "the trial court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant a trial.[10] The nonmoving party cannot simply rest on allegations or denials, but must present evidence showing that a material issue of fact is in dispute requiring resolution at trial.[11] In the end analysis, summary disposition is appropriate if the documentary evidence establishes "that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law."[12]

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[5] *Id.* at 93, citing Restatement Torts, 2d, § 343, pp 215-216.

[6] See *Petraszewsky v Keeth*, 201 Mich App 535, 540; 506 NW2d 890 (1993).

[7] See MCR 2.611(A)(1)(e).

[8] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[9] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[10] *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); see also MCR 2.116(G)(5).

[11] *Smith v Globe Life Ins Co*, 460 Mich 446, 455, n 2; 597 NW2d 28 (1999), citing MCR 2.116(G)(4).

[12] *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

In the second motion for summary disposition, LLB argued that Bouchard lacked any evidence that it should have known that the railing height was unsafe. When it granted LLB's motion for summary disposition, the trial court relied on Egerer's new deposition testimony. Egerer stated that LLB – as a nonexpert – would not have known that the railing could be dangerous. Bouchard produced no other evidence. Thus, the trial court did not err in granting LLB's motion for summary disposition.

Bouchard's other issues on appeal relate only to the ultimate issue whether LLB knew or should have known of a dangerous condition. Because that issue has been resolved, we need not consider these other issues.

Affirmed.

/s/ William C. Whitbeck
/s/ Harold Hood
/s/ Kirsten Frank Kelly