NUMBER 13-18-00439-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

AMANDA MAURICIO, **Appellant,**

v.

DENNIS YAKLIN D/B/A JACOB'S APARTMENTS AND YAKLIN RENTALS, LLC., **Appellees.**

On appeal from the 105th District Court of Kleberg County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Benavides and Longoria
Memorandum Opinion by Justice Longoria

Appellant Amanda Mauricio appeals from the trial court's granting of a motion for summary judgment in favor of appellees Dennis Yaklin d/b/a Jacob's Apartments and

Yaklin Rentals. Mauricio argues that summary judgment was improper and that the trial court erred in admitting a defective affidavit. We affirm.

I. Background

On May 29, 2014, Mauricio fell from her apartment balcony. On April 12, 2016, she filed suit against Yaklin, the owner of the property, alleging negligence, negligence per se, premises liability, and gross negligence, stating that her fall was caused when she "lost her footing on the wet surface and fell over the second-story railing . . . ." Mauricio further alleged that the railing on the balcony was too low.

Yaklin filed a traditional and no-evidence motion for summary judgment. Mauricio amended her petition several times and at the time of the hearing on Yaklin's summary judgment motion, Mauricio's live pleading was her fourth amended petition which no longer alleged a "wet surface" and also limited her claims against Yaklin to negligence per se and premises liability. Mauricio then filed her objections to Yaklin's summary judgment evidence and her response to Yaklin's traditional and no-evidence summary judgment motion.

Yaklin also filed his objections to and motion to strike Mauricio's summary judgment evidence, including, inter alia, an objection to the affidavit of Mauricio's expert, Janis Fox, as a late designated expert witness. The trial court granted Yaklin's motion to strike as to the testimony and affidavit of Janis Fox.

The trial court held a hearing on Yaklin's traditional and no evidence summary judgment motion. After hearing argument and reviewing the summary judgment evidence, the trial court granted Yaklin's traditional summary judgment motion. This appeal followed.

II. TRADITIONAL MOTION FOR SUMMARY JUDGMENT

We review the grant of summary judgment de novo. *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 79 (Tex. 2015). In a traditional motion for summary judgment, if the movant's motion and summary judgment evidence facially establish its right to judgment as a matter of law, the burden shifts to the nonmovant to raise a genuine, material fact issue sufficient to defeat summary judgment. TEX. R. CIV. P. 166a(c); *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002). A defendant seeking traditional summary judgment must either disprove at least one element of each of the plaintiff's causes of action or plead and conclusively establish each essential element of an affirmative defense. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995) (per curiam); *Sanchez v. Matagorda County*, 124 S.W.3d 350, 352 (Tex. App.—Corpus Christi–Edinburg 2003, no pet.).

We consider all the evidence in the light most favorable to the nonmovant, crediting favorable evidence to the nonmovant if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). The evidence raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam). When, as in this case, the trial court does not specify in the order granting summary judgment the grounds upon which the trial court relied, we must affirm the summary judgment if any of the independent summary judgment grounds is meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).

A. Premises Liability

The extent of the duty owed by an owner or occupier of land to entrants on the property depends on the status of the entrant as a trespasser (whose presence on the property is unauthorized), a licensee (one who comes onto the property with permission, but for his own purposes rather than a purpose that mutually benefits the owner or occupier and the entrant), or an invitee (who is expressly invited onto the property for the mutual benefit of the owner or occupier and the entrant). *See, e.g.*, *Mellon Mortgage Co. v. Holder*, 5 S.W.3d 654, 655 (Tex. 1999).

Neither party disputes that Mauricio resided in one of the apartments owned by Yaklin, making her an invitee. Under premises liability principles, a property owner generally owes an invitee a duty to make the premises safe or to warn of dangerous conditions as reasonably prudent under the circumstances. *Occidental Chem. Corp. v. Jenkins*, 478 S.W.3d 640, 644 (Tex. 2016).

> In the premises-liability context, a landowner owes an invitee a negligence duty to make safe or warn against any concealed, unreasonably dangerous conditions of which the landowner is, or reasonably should be, aware but the invitee is not. Ordinarily, the landowner need not do both; the landowner can satisfy its duty by providing an adequate warning even if the unreasonably dangerous condition remains. This general rule comports with the rationale for imposing a duty on landowners in the first place. The landowner typically is in a better position than the invitee to know of hidden hazards on the premises, so the law mandates that the landowner take precautions to protect invitees against the hazards, to the extent the landowner knows or should know of them.

Phillips v. Abraham, 517 S.W.3d 355, 360 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (citing *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193, 203 (Tex. 2015)). Thus, when brought by an invitee, the elements of a premises liability action are:

> (1) actual or constructive knowledge of a condition on the premises by the owner or occupier;
>
> (2) that the condition posed an unreasonable risk of harm;

(3) failure by the owner or occupier to use reasonable care to reduce or eliminate the risk; and

(4) that the failure by the owner or occupier to use such care proximately caused the plaintiff's injuries.

United Scaffolding, Inc. v. Levine, 537 S.W.3d 463, 471 (Tex. 2017).

1. Actual or Constructive Knowledge

The threshold issue in a premises defect claim is whether the defendant had actual or constructive knowledge of the allegedly dangerous condition. *Id*.; *Motel 6 G.P., Inc. v. Lopez*, 929 S.W.2d 1, 3 (Tex. 1996). Actual knowledge is what a person actually knows as distinguished from constructive or imputed knowledge—what a person after a reasonable inspection ought to know or have reason to know. *Id*. at 3–4. A premises liability plaintiff satisfies the notice element by establishing that (1) the premises owner created the allegedly dangerous condition; (2) the owner actually knew that the allegedly dangerous condition existed; or (3) it is more likely than not that the condition existed long enough to give the premises owner a reasonable opportunity to discover it. *See Wal–Mart Stores, Inc. v. Reece*, 81 S.W.3d 812, 814 (Tex. 2002); *Duncan v. First Tex. Homes*, 464 S.W.3d 8, 16 (Tex. App.—Fort Worth 2015, pet. denied).

When determining if a premises owner has actual knowledge of a condition that presents an unreasonable risk of harm, courts generally consider whether the owner had received reports of prior injuries or reports of the potential danger presented by the condition. *Tex. S. Univ. v. Gilford*, 277 S.W.3d 65, 70 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (citing *Brinson Ford, Inc. v. Alger*, 228 S.W.3d 161, 163 (Tex. 2007)).

Mauricio asserts that the railing that she fell over was not in compliance with "regulations and requirements." In his motion, Yaklin asserted that Mauricio could not

establish that he had actual or constructive knowledge of the alleged defect. Mauricio argued in her response to Yaklin's motion that Yaklin's "failure to comply with the applicable ordinances and codes directly led to the injuries" she suffered. Mauricio's argument is based on her argument that "a reasonable inspection would have revealed that the guard rails were less than 36 inches above the floor . . ." and that they were required to be a "minimum height of 42 inches."[1]

In his deposition, attached to his motion, Yaklin testified that he checked the guard rails to see if they were loose or rotted. He was unaware of any dangers associated with the railings and had not received any reports of an issue with the railing. He further testified that he could not think of any other injuries occurring on his property, nor had anyone been injured in an incident with the guard rails. There is no testimony or evidence to dispute Yaklin's statements, and therefore, there is no evidence that Yaklin had actual knowledge of the alleged defect.

However, Mauricio argues that Yaklin had constructive knowledge of the dangerous condition because "a landowner is charged with constructive knowledge of a dangerous condition on his property that a reasonable inspection would reveal." *See CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 101 (Tex. 2000). In this case, Yaklin presented evidence that the property and guard rail in question were inspected routinely by the City of Kingsville Housing Authority (Housing Authority). Mauricio argues that the Housing Authority did not specifically inspect the height of the guard rails and that Yaklin

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[1] Mauricio also contends that even if the guard rails were not required to be a minimum height of 42 inches, they were below the 36-inch requirement relied upon by Yaklin. However, the evidence provided and cited to in support of this contention is the stricken affidavit of Janis Fox. Mauricio does not challenge the trial court's striking of Fox's affidavit on appeal and so we do not consider it in our summary judgment analysis. *See Walker v. Schion*, 420 S.W.3d 454, 457–58 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (concluding on appeal of dismissal of police officer's defamation claim, appellate court could not consider affidavit which trial court had struck, where officer did not challenge that ruling).

should not have relied on the inspections. She has not argued that the inspection by the Housing Authority was unreasonable, just that its exterior inspection did not measure the height of the balcony railing. According to the attached deposition testimony of the inspector, as part of its inspection, however, the Housing Authority inspected "all exterior stairs, rails and porches" to determine if they were "sound and free from hazards." Less than a month prior to Mauricio's fall, the property was inspected by the Housing Authority; no hazards were identified, and the property passed inspection.

Mauricio has not presented any evidence demonstrating that a reasonable inspection would have discovered the alleged premises defect. Therefore, we conclude that Yaklin established that Mauricio could not prove that it breached a duty to make safe or warn against any concealed, unreasonably dangerous conditions of which it is, or reasonably should be, aware but she is not. *See E.I. DuPont de Nemours & Co. v. Roye*, 447 S.W.3d 48, 64 (Tex. App.—Houston [14th Dist.] 2014, pet. dism'd) (citing *CMH Homes, Inc.*, 15 S.W.3d at 103 ("To impose constructive knowledge when the owner . . . would not have discovered the dangerous condition from a reasonable inspection is to dramatically alter premise liability law.")). Accordingly, the trial court did not err in granting summary judgment as to Mauricio's premises defect claim.

B. Negligence Per Se

As explained by the Texas Supreme Court, "[n]egligence per se is a tort concept whereby a legislatively imposed standard of conduct is adopted by the civil courts as defining the conduct of a reasonably prudent person." *Carter v. William Sommerville & Son, Inc.*, 584 S.W.2d 274, 278 (Tex. 1979). Accordingly, a plaintiff asserting negligence per se is not required to prove that the defendant failed to act as a reasonably prudent

person would have acted under the same or similar circumstances. *Id*. Instead, the plaintiff must prove that:

> (1) the defendant violated a statute or ordinance setting an applicable standard of care;
>
> (2) the breach was the proximate cause of the plaintiff's damages; and
>
> (3) the statute was designed to prevent an injury to that class of persons to which the plaintiff belongs.

Trujillo v. Carrasco, 318 S.W.3d 455, 458 (Tex. App.—El Paso 2010, no pet.).

1. Violated Statute of Ordinance

A "party seeking to recover on the ground of negligence per se must plead a statutory violation." *Daugherty v. S. Pac. Transp. Co*., 772 S.W.2d 81, 83 (Tex. 1989). A pleading of general negligence alone ordinarily will not give an opposing party fair notice of a specific statutory violation. *See Murray v. O & A Express, Inc*., 630 S.W.2d 633, 636 (Tex. 1982) (reasoning that "a party relying upon a statutory violation should plead this reliance if he is to recover on that basis" because the defendant "must frame his defense in terms of the recognized excuses for the violation of a statute"). The interpretation of a statute is a question of law. *See Kerr v. Tex. Dep't of Pub. Safety*, 973 S.W.2d 732, 734 (Tex. App.—Texarkana 1998, no pet.).

At the trial court level, Mauricio alleged numerous violations of various codes and ordinances that had been adopted by the City of Kingsville. *See State v. Cooper*, 420 S.W.3d 829, 832 (Tex. Crim. App. 2013) (approving the City of Plano's incorporation of the International Property Maintenance Code published by the International Code Council; noting that international codes "give local governments the ability to adopt more thorough and well-researched codes at lower costs to their taxpayers"). However, on

appeal, she limits her argument to the 2009 International Fire Code (2009 IFC). Mauricio contends that the trial court erred in granting the motion for summary judgment as to the negligence per se claim because Chapter 46, § 4604.6.1 of the 2009 edition of the IFC states: "**Height of guards**. Guards shall form a protective barrier not less than 42 inches (1067 mm) high."[2] She contends that the evidence showed that the guard rails were not 42 inches high and therefore, Yaklin violated the 2009 IFC by not changing out the guard rails on his property. However, in response, Yaklin argues that, because the property existed prior to the 2009 IFC, it did not violate the code. Specifically, Yaklin states that the 2009 IFC's effective use guidelines state that:

> Chapter 46 is also a new chapter in the 2009 International Fire Code. This chapter applies to existing buildings constructed prior to the adoption of this code and intends to provide a minimum degree of fire and life safety to persons occupying existing buildings by providing for alterations to such buildings that do not comply with the minimum requirements of the *International Building Code*.

Yaklin argues that this section of the 2009 IFC requires existing buildings to comply with the International Building Code (IBC).

Yaklin asserts that the IBC required that existing buildings "be maintained in conformance with the code edition under which installed."[3] While there is no definitive evidence of the date that the property was built, both parties agree that it was either 1970 or 1972. Yaklin contends that the code at that time would have been the Southern Standard Building Code (SSBC). In his reply to Mauricio's response to the summary judgment motion, Yaklin attached the expert report of engineer William H. ElDorado. In

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[2] International Code Council, Inc., *International Fire Code* § 4604.1 (2009 ed.) (emphasis in original), *available at* https://codes.iccsafe.org/content/chapter/4774/. (last visited July 29, 2019).

[3] International Code Council, Inc., *International Building Code* § 3401.2 (2009 ed.), *available at* https://codes.iccsafe.org/content/chapter/4665/. (last visited July 29, 2019).

his report, ElDorado stated that the SSBC from 1969 provided that the guard rails needed to be “not less than 36 inches, not more than 42 inches.” Mauricio’s own expert, Jim W. Sealy, agreed that the codes at the time of construction of the property required guard rails to be “not less than 36 inches and no more than 42 inches high.”

The incident occurred on May 29, 2014. At that time, the 2009 IFC was in effect and adopted by the City of Kingsville. The 2009 IFC specifically states that existing buildings need to be compliant with the “minimum requirements” of the IBC. And the IBC clearly states that existing buildings must be compliant with the code under which they were installed—here, the evidence from both parties shows that at the time of construction the required height of the guard rails was “not less than 36 inches, nor more than 42 inches.” The evidence from both sides, including deposition testimony and expert reports, establishes that the guard rails were 36 inches, meaning that they were not in violation of the code at the time in which they were installed. Therefore, we conclude that Yaklin was not in violation of the 2009 IFC as Mauricio contends. Yaklin established that Mauricio could not prove it violated a statute or ordinance setting an applicable standard of care. *See Trujillo*, 318 S.W.3d at 458. The trial court did not err in granting summary judgment as to Mauricio’s negligence per se claim.

C. Summary

Having found that the trial court did not err in granting Yaklin’s traditional motion for summary judgment as to Mauricio’s claims for premises liability and negligence per se, we overrule her first issue.[4]

[4] Mauricio also argues that the trial court erred in admitting the affidavit of Roel Cavazos and that Yaklin failed to prove the defense of excuse. Because we have determined that the trial court did not err in granting traditional summary judgment in her first issue, we need not address these two issues as they are not dispositive. *See* TEX. R. APP. P. 47.1.

III. CONCLUSION

The judgment of the trial court is affirmed.

NORA L. LONGORIA
Justice

Delivered and filed the
22nd day of August, 2019.