IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FRANCESCA GIUSTI, a single person, Appellant, v. CSK AUTO, INC., an Arizona Corporation doing business in Washington as SCHUCK's AUTO SUPPLY, and Keybank, National Association, a bank incorporated in the District of Columbia, Respondents.	)	No. 66677-1-I DIVISION ONE UNPUBLISHED OPINION FILED: August 20, 2012

Grosse, J. — A violation of a building code may be evidence of negligence. However, absent a nexus between that code and the harm suffered, one is not entitled to an instruction that violation of the code is evidence of negligence. Here, the plaintiff failed to present any evidence of any applicable code that pertained to the ramp on which she fell. The trial court's ruling is affirmed.

FACTS

Francesca Giusti sued CSK Auto, Inc. for injuries sustained as a result of a fall caused by a misstep on a ramp when she exited Schuck's Auto Supply store to the parking lot on March 14, 2006. Giusti argued that the cross cut at the end of the ramp was an unsafe condition, which caused her to misstep and fall.

Prior to trial CSK filed several motions in limine requesting, inter alia, to

exclude any reference to building codes not applicable to the walkway on which Giusti fell. There was no evidence of when the ramp was built. The building was built in 1951 and CSK posited that the ramp was built at that time. Based on testimony from a CSK employee that the ramp was there when he started working in 1979, Giusti conceded that the walkway was built sometime before then. The trial court ruled that none of the safety codes Giusti provided were applicable and therefore excluded any testimony that the ramp's condition violated any codes. However, the trial court ruled that experts could refer to the non-applicable codes as standards to inform their opinions about the safety of the ramp. The jury found no negligence and returned a verdict in favor of CSK. Giusti appeals.

ANALYSIS

Absent an abuse of discretion, we will not disturb on appeal a trial court's rulings on motions in limine, the admissibility of evidence, and the admissibility and scope of expert testimony.[1] A motion in limine should be granted if (1) the motion describes the evidence sought to be excluded with sufficient specificity to enable the trial court to determine that it is clearly inadmissible; and (2) the evidence is so prejudicial that the moving party should be spared the necessity of calling attention to it by objecting when it is offered during the trial.[2]

All relevant evidence is admissible. ER 402. Relevant evidence is evidence having any tendency to make the existence of any fact that is of

[1] Gammon v. Clark Equip. Co., 38 Wn. App. 274, 286, 686 P.2d 1102 (1984); Christensen v. Munsen, 123 Wn.2d 234, 241, 867 P.2d 626 (1994).
[2] Douglas v. Freeman, 117 Wn.2d 242, 255, 814 P.2d 1160 (1991).

consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. Thus, "[a]ll facts tending to establish a theory of a party, or to qualify or disprove the testimony of his adversary, are relevant."[3] ER 403 further requires that the evidence be more probative than prejudicial.[4]

Giusti contends evidence of the 2006 Seattle Building Code is relevant and should have been admitted to show that the ramp's failure to comply with the slope requirements created a hazardous situation resulting in her fall. She argues that the 2006 code is retroactive and applies to the ramp where she fell. In support thereof, Giusti cites Fay v. Allied Stores Corp.[5] In Fay, an invitee had fallen in a department store on a stairway without any handrails. The stairway conformed with building codes at the time it was built—1928. In 1942, the city adopted a new building code requiring all stairways with a width over 88 inches to have intermediate handrails.[6] The court found the building code retroactive because of the legislature's use of the words "all buildings" and "all stairways." Additionally, the declared objective of the code stated that it should be applied "in every instance."[7] Thus, the Fay court found it was not error for the jury to find negligence based on the respondent's failure to erect handrails as required in the 1942 building code.

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[3] Fenimore v. Donald M. Drake Constr. Co., 87 Wn.2d 85, 89, 549 P.2d 483 (1976).
[4] Kirk v. Washington State Univ., 109 Wn.2d 448, 462, 746 P.2d 285 (1987).
[5] 43 Wn.2d 512, 262 P.2d 189 (1953).
[6] Fay, 43 Wn.2d at 515.
[7] Fay, 43 Wn.2d at 516.

But in a later case, Sorensen v. Western Hotels, Inc.,[8] the Supreme Court was presented with the question of whether the 1953 Bellingham Building Code was retroactive and applicable to a hotel constructed in 1913, and expanded in 1929, thus making conditions in existing buildings unlawful even though such conditions were lawful at the time of construction. The Sorensen court noted that both it and Fay were guided by the rule that legislative acts are generally given prospective, not retroactive application.[9] Whereas Fay held the provisions of the particular code it was reviewing to be retroactive, the Sorensen court did not. Sorensen distinguished the Bellingham building code from the Seattle building code because a subsequent clause in the Bellingham building code referred to "[n]ew buildings and structures hereafter erected in the city." The use of the term "new buildings," the court opined, belied any intent on the part of the legislature to make the ordinance retroactive. The Sorensen court found the trial court erred by instructing the jury that the ramp, which had no handrails, was a violation of the ordinance and as such was "negligence in and of itself."[1]

Giusti argues that the 2006 Seattle Building Code applied because the stated purpose of the code remained unchanged for decades. That code clearly states that the city continued to adopt the requirements of the International Building Code (IBC), 2003 edition, with certain technical changes or other amendments not pertinent to the means of egress section found in Chapter 10. Chapter 1, section 101 provides:

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[8] 55 Wn.2d 625, 349 P.2d 232 (1960).
[9] Sorensen, 55 Wn.2d at 629.
[1] Sorensen, 55 Wn.2d at 636.

> **101.2 Scope**. The provisions of this code apply to the construction, alteration, moving, demolition, repair and occupancy of any building or structure within the City, except . . . .
>
> **101.3 Additions, alterations, repairs and change of occupancy**. Additions, alterations, repairs and changes of occupancy or character of occupancy in all buildings and structures shall comply with the provisions for new buildings and structures, except as otherwise provided in Chapter 34 of this code.
>
> **NOTE:** If a structure is constructed and maintained in compliance with standards and procedures of the Seattle Residential Code currently in effect, as well as the Seattle Building, Mechanical, Fire, Electrical and Plumbing Codes, currently in effect, the Seattle Housing and Building Maintenance Code, SMC 22.200-22.208 does not apply.

Relying on the language contained in the note, the trial court determined that the ordinance was prospective, rather than retroactive. In so doing, the court distinguished both Fay and Sorensen, noting that the language in the 2006 code was different than "what the Fay court interpreted and the Sorensen court strained itself to conclude as somehow different." The trial court reasoned that this language was sufficiently different than that dissected by both the Fay and Sorensen courts.

Moreover, Chapter 34 of the 2006 code applies to existing structures. Chapter 34 is entirely comprised of Seattle amendments to the IBC. Section 3401, Existing Occupancies:

> **3401.1 General.** This chapter controls the alteration, repair, addition, maintenance and change of occupancy of existing structures.
>
> **Exception:** Existing bleachers, grandstands and folding and telescoping seating shall comply with ICC 300.
>
> Buildings in existence at the time of the passage of this building code that were legally constructed and occupied in

> accordance with the provisions of a prior code are permitted to have their existing occupancy continued, provided such occupancy is not hazardous.
>
> In order to legalize an existing occupancy for the record, the building shall comply with the fire and life safety requirements of this building code or the effective code at the time the building was constructed. If the existing occupancy or character of the occupancy is other than that for which the building was constructed, the building shall comply with this building code or the effective code at the time the existing occupancy was legally established.[11]

Section 302 of the 2006 code classifies business as "occupancy." See Section 302.1. The variety of business groups are classified in Sections 304 and 306.

> **304.1 Business Group B.** Business Group B occupancy includes, among others, the use of a building or structure, or a portion thereof, for office, professional or service-type transactions, including storage of records and accounts. Business occupancies shall include, but not be limited to, the following:

CSK is a business and Chapter 34 clearly supports a prospective, rather than a retroactive application of the code.

Giusti next argues that the walkway was in violation of the provisions of the Uniform Building Code (UBC) and sought to introduce provisions of the UBC from the 1940s, 1950s, and 1970s. However, the UBC was not adopted by the city of Seattle until 1985 and thus is not applicable to the ramp, which all parties agree was at least built before 1979. Furthermore, Giusti did not argue that these provisions were applicable at the motion in limine. There, the argument centered only on the retroactivity of the 2006 code.

[11] (Emphasis added.)

Relying on Pettit v. Dwoskin,[12] Giusti argues that violation of a subsequently enacted building code is evidence of common negligence. There, the appellant produced evidence showing that a deck that collapsed during a party failed to satisfy building requirements. The evidence included a building permit and the applicable UBC sections. The Pettit court held that the trial court erred in refusing to instruct that "violation of an ordinance may be evidence of negligence."[13] But there, unlike here, there was no dispute that the building code applied. Here, Giusti sought to introduce violation of the 2006 code as evidence that the 1951 (or pre-1979) ramp was negligently built. Further, building codes and other municipal codes do not necessarily form a basis for tort liability.[14]

Proposed Jury Instruction 11

In reviewing a challenge to jury instructions, this court's inquiry is whether the trial court abused its discretion by giving or failing to give certain instructions.[15] There is no proposed jury instruction 11 to review. The most that can be said is that Giusti's counsel stated that that trial court's ruling would prevent an instruction that CSK had violated the code. Counsel offered no such instruction. Having failed to do so, Giusti cannot now predicate error on the court's failure to do so.[16] Giusti has not preserved the error.

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[12] 116 Wn. App. 466, 68 P.3d 1088 (2003).
[13] Pettit, 116 Wn. App. at 475.
[14] Jackson v. City of Seattle, 158 Wn. App. 647, 654, 244 P.3d 425 (2010).
[15] Goodman v. Boeing Co., 75 Wn. App. 60, 68, 877 P.2d 703 (1994).
[16] Bean v. Stephens, 13 Wn. App. 364, 367, 534 P.2d 1047 (1975) (citing McGarvey v. City of Seattle, 62 Wn.2d 524, 532, 384 P.2d 127 (1963)).

Moreover, the instructions from the court permitted Giusti to argue her theory of the case. Jury instruction 6 states in pertinent part:

> 1. The plaintiff claims that the defendant was negligent in the following respects:
>   a. The defendant failed to exercise ordinary care with respect to plaintiff, a business invitee, to maintain in a reasonably safe condition those portions of the premises that the invitee is expressly or impliedly invited to use or might reasonably be expected to use, which included a ramp from the parking lot that was part of the entrance to defendant store;
>   b. The condition of the ramp was unreasonably dangerous; and
>   c. The defect existed for a sufficient length of time and under such circumstances, that defendant or its employees should have discovered it in the exercise of ordinary care.
>
> The plaintiff claims that defendant's failure to correct the defect or to warn her of the defect was a proximate cause of injuries and damage to plaintiff. The defendant denies these claims.

Likewise, jury instruction 17 states:

> The plaintiff was a business invitee of defendant. An owner or occupier owes to a business invitee a duty to exercise ordinary care for his or her safety. This includes the exercise of ordinary care to maintain in a reasonably safe condition those portions of the premises that its customers as business invitees are expressly or impliedly invited to use or might reasonably be expected to use.

To establish negligence, Giusti needed to establish a duty, breach of that duty, resulting injury, and the proximate cause between the breach and the injury.[17] The instructions given permitted Giusti to argue her theory of the case.

Affirmed.

[17] Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994).

Grosse, J

WE CONCUR: