STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0104

Melissa Stang,
Appellant,

vs.

ThreeQuarters LLC, et al.,
Respondents.

Filed October 6, 2009
Reversed and remanded
Collins, Judge[*]

Hennepin County District Court
File No. 27-CV-07-26682

Douglas E. Schmidt, Schmidt Law Firm, 13911 Ridgedale Drive, Suite 110, Minnetonka, MN 55305 (for appellant)

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Considered and decided by Chief Judge Toussaint, Jr., Presiding Judge; Stoneburner, Judge; and Collins, Judge.

U N P U B L I S H E D O P I N I O N

COLLINS, Judge

Appealing from the district court's grant of summary judgment to respondents, appellant argues that material issues of fact exist as to whether (1) there was a violation

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

of the Uniform Building Code (the UBC); (2) respondents knew or should have known of the violation and failed to remedy it; (3) the injury was of the kind the UBC was meant to prevent and appellant was in the class meant to be protected; and (4) the violation was the proximate cause of her injuries. We reverse and remand.

FACTS

For 17 years, appellant Melissa Stang rented a "second story artist's studio, which she used as an apartment and workspace[,]" from respondents Bruce Stillman and ThreeQuarters, LLC. In the mid-1990s, Stillman installed a metal platform structure (the structure) at the bottom of double doors opening to the outside from Stang's studio apartment. The structure was made of a checkboard steel plate mounted on a steel tube frame and was approximately ten feet across, extending outward 19.5 inches in width. At some point, Stang added chicken-wire fencing to prevent her cat from jumping off the structure.

In May 2007, Stang returned home from work, had a glass of wine and a mixed drink, and opened the double doors to let her cat out onto the structure. But then, concerned that the cat might jump over the chicken wire, Stang walked onto the structure to bring the cat in. Stang lost her balance as she bent over to pick up the cat, fell to the paved parking lot below, and was injured.

Stang sued respondents, alleging negligence per se based on violation of the UBC. Respondents moved for summary judgment, which the district court granted. Stang appeals.

D E C I S I O N

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[ ] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

> A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law. On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.

Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted).

> In a negligence action, the defendant is entitled to summary judgment when the record reflects a complete lack of proof on any of the four essential elements of the claim: (1) the existence of a duty of care; (2) a breach of that duty; (3) an injury; and (4) the breach of the duty being the proximate cause of the injury.

Gradjelick v. Hance, 646 N.W.2d 225, 230 (Minn. 2002).

"A per se negligence rule substitutes a statutory standard of care for the ordinary prudent person standard of care, such that a violation of a statute . . . is conclusive evidence of duty and breach." *Id.* at 231 n.3. "[B]reach of a statute gives rise to negligence per se if the *persons harmed by that violation are within the intended protection of the statute* and the *harm suffered is of the type the legislation was intended to prevent*." *Alderman's Inc. v. Shanks*, 536 N.W.2d 4, 8 (Minn. 1995) (quoting *Pac. Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 558-59 (Minn. 1977)).

> A landlord or owner is not negligent per se for a violation of the [Uniform Building Code] unless: (1) the landlord or

> owners knew or should have known of the Code violation; (2) the landlord or owners failed to take reasonable steps to remedy the violation; (3) the injury suffered was the kind the Code was meant to prevent; and (4) the violation was the proximate cause of the injury or damage.

Bills v. Willow Run I Apartments, 547 N.W.2d 693, 695 (Minn. 1996).

UBC violation

Initially, respondents argue that Stang has not based her claim on applicable UBC authority and, therefore, none of the alleged violations supports a determination of liability. In support of her premise that the structure violates the UBC, Stang submitted an expert's affidavit in which the expert opined that a guardrail was required and its absence was a violation of section 1711 of the UBC. Although the section number had been changed from 1711 in the 1985 UBC to 509 in the applicable 1994 UBC, the substantive guardrail requirements have not changed as they pertain to the structure. The expert referenced the 1994 UBC, which indicates that he was applying the appropriate version of the UBC. The expert also stated: "A guardrail as specified in Section 1711 of the UBC (both codes) would have been required[,]" which further supports the expert's reference to the guardrail requirements found in both the 1985 and 1994 versions of the UBC, regardless of their assigned number. Thus, Stang's negligence per se claim alleged a valid and applicable UBC violation.

The district court granted summary judgment to respondents based on its determination that the structure is not a "balcony" under the 1994 UBC—quoting section 203, which defines balcony as "that portion of the seating space of an assembly room . . . and shall include the area providing access to the seating area or serving only as

a foyer." An "assembly room" is not defined, but an "assembly building" is defined as "a building or portion of a building used for the gathering together of 50 or more persons for such purposes as deliberation, education, instruction, worship, entertainment, amusement, drinking or dining or awaiting transportation." Unif. Bldg. Code § 203 (1994). This definition of "balcony" obviously pertains to balconies in theaters or auditoriums, not a platform structure mounted on the exterior wall of a building.

Instead, the operative UBC definition is that pertaining to "balcony, exterior exit," which is "a landing or porch projecting from the wall of a building and which serves as a required exit." Unif. Bldg. Code § 1001.2 (1994). The structure here projects from the wall of the building, and Stang's expert stated in his affidavit pertaining to Stang's studio apartment that the UBC requires "an emergency egress in addition to the front door. This opening is the only apparent egress and, for that additional reason, must be code compliant." Although the expert does not cite the specific code provision, the UBC requires that sleeping rooms in dwelling units "below the fourth story shall have at least one operable window or door approved for emergency escape or rescue." Unif. Bldg. Code § 310.4 (1994). The evidence supports Stang's contention that the doors opening to the structure are the only means of emergency egress. And viewing the evidence in the light most favorable to Stang, the language of the UBC supports that the structure is a "balcony, exterior exit," and that failure to have a guardrail on the structure is a violation of the UBC.

Moreover, Stang's expert also opined that the opening was in violation before the installation of the balcony. This opinion is supported by language of the UBC, which

states: "When additional doors are provided for egress purposes, they shall conform to all provisions of this chapter." Unif. Bldg. Code § 1004.12 (1994). The chapter includes a reference to section 509 for guardrail requirements. Here, the double doors were not secured in such a way as to demonstrate that they were not intended to be used as an exit but rather simply were secured by a two-by-four that slid through two brackets on the interior side of the wall.

Respondents' contention that the statements made by Stang's expert are conclusory and insufficient to sustain a claim fails. "[A]n expert's affidavit must contain more than a conclusory assertion about ultimate legal issues." *Potter v. Pohlad*, 560 N.W.2d 389, 394-95 (Minn. App. 1997) (citation and quotation omitted). But the expert's determination that the structure was a balcony erected in violation of the UBC is not a conclusion about ultimate legal issues, but rather is based on his expertise as a certified building inspector and former consultant for the state building codes and standards division and the application of his expertise to the facts at hand. Further, Minn. R. Civ. P. 56.05's requirement that affidavits "present specific facts" rather than "mere averments or denials" is met here, as the expert has outlined the facts upon which he based his opinions, including descriptions of the structure and its installation and his understanding that the building was being used as residential apartments.

Viewing the evidence in the light most favorable to Stang, we conclude that she has presented a genuine issue of material fact regarding a violation of the UBC by Stillman's failure to install guardrails, and the district court's conclusion that Stang's claim is unfounded because there is no such code violation is erroneous.

Knowledge of violation, failure to take reasonable steps

It is undisputed that Stillman built and installed the structure and knew that it had no guardrail. All citizens are "presumed to know the law." *Elec. Short Line Terminal Co. v. City of Minneapolis*, 242 Minn. 1, 10, 64 N.W.2d 149, 154 (1954). Respondents here are "presumed to know" that the law requires a guardrail, and their failure to install the required guardrail is sufficient to address this *Bills* element.

Injury of the type to be prevented, class of persons to be protected

"The purpose of [the UBC] is not to create or otherwise establish or designate any particular class or group of persons who will or should be especially protected or benefited by the terms of this code." Unif. Bldg. Code § 101.2 (1994). But contrary to respondents' contention that this defeats a negligence per se claim based on violations of the UBC, this provision simply indicates that a code violation, *in and of itself*, is insufficient to establish a class intended to be protected. *See Gradjelick*, 646 N.W.2d at 232 (noting that *Bills* provides that a landlord is not negligent per se *unless* the four *Bills* elements are present, including that the injury suffered was the kind the UBC was meant to prevent). A plaintiff is permitted, then, to present evidence beyond the code violation to demonstrate that the plaintiff was in the class meant to be protected and the injury was of the type meant to be prevented.

Here, Stang relies on her expert's statements that Stang's injuries "occurred in circumstances that are exactly of the type that the UBC is intended to prevent and the UBC violation was, without question, the direct cause of her injuries." This statement on its own is a conclusory statement about an ultimate legal issue, which is insufficient

evidence upon which to base a claim. But the expert elaborated on this conclusion with factual allegations that "[t]he opening is located in such a manner that it would easily be [ ] presumed to be the rear entrance of the apartment and it is highly foreseeable that someone would simply walk out the back door, expecting a landing and/or stairway beyond." The expert further states that "[i]t is reasonable to assume that this balcony will be used . . . by any tenant and that inevitably a potentially serious injury will result." Again, viewing the evidence in the light most favorable to Stang, these statements support an argument that on these facts a guardrail is required so as to prevent people from falling and being injured, and Stang has presented evidence sufficient to defeat the summary judgment motion.

Proximate cause

Stang relies not only on her expert's conclusion that the lack of a guardrail caused Stang's injuries but Stang also submitted photographs of the structure, from which a reasonable jury could conclude that a guardrail would have protected her.[1]

Stang has presented substantial evidence that (1) there was a UBC violation, (2) respondents knew or should have known of the violation but failed to remedy it, (3) the injury was the kind that the UBC was meant to prevent and Stang was in the class meant to be protected, and (4) the violation was the proximate cause of Stang's injuries,

[1] Stang also points to the testimony from David Cragg that a "reasonable person" would put up a barrier as a result of Stang's fall. Should it become an issue, this is evidence that could support a jury's finding that the installation of a barrier was feasible and would have prevented the fall. David Cragg is a stockholder of respondent ThreeQuarters, LLC. Stang does not contest the district court's dismissal of her claim against Cragg individually.

precluding dismissal of her action on summary judgment. Therefore, we reverse the district court's entry of summary judgment and remand for further proceedings.

Reversed and remanded.