21CA0193 Martinez v Cast 06-09-2022

COLORADO COURT OF APPEALS

Court of Appeals No. 21CA0193
La Plata County District Court No. 18CV30085
Honorable William L. Herringer, Judge

Anthony Martinez, as father and next friend of Rivers Picasso Martinez, a minor, and Ira Picasso Martinez, a minor,

Plaintiff-Appellant and Cross-Appellee,

v.

Cast, LLC, a Colorado limited liability company; Caroni Adams, Inc., a Colorado corporation, d/b/a The Property Manager; and Carolyn Caroni Adams,

Defendants-Appellees and Cross-Appellants.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE YUN
Grove and Taubman*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced June 9, 2022

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2021.

¶ 1 In this premises liability action, the plaintiff, Anthony Martinez, appeals the district court's order granting summary judgment in favor of the defendants, Cast, LLC; Caroni Adams, Inc.; and Carolyn Caroni Adams (collectively, the Cast defendants). The Cast defendants cross-appeal part of the district court's judgment, as well as orders determining the applicable fire code and refusing to consider expert testimony. We affirm in part, reverse in part, and remand the case to the district court for further proceedings.

I. Background

¶ 2 In June 2017, Grisela Picasso and her two children were staying in her sister's apartment at the Tercero Townhomes in Durango, Colorado. Cast, LLC, and Caroni Adams, Inc., are the owner and property manager, respectively, of the Tercero Townhomes. Ms. Adams is the managing member of Cast, LLC, and an employee of Caroni Adams, Inc.

¶ 3 According to her affidavit, Ms. Picasso was awakened in the early morning hours of June 14 by heat and smoke in the bedroom in which she and her children were sleeping. She went to the door, but she was unable to leave the room because of an overwhelming amount of heat and smoke in the hallway. Shortly thereafter, she

pushed the children out a window "seconds before the bedroom was . . . engulfed in flames." The children suffered burns and other injuries. Ms. Picasso never heard a smoke alarm.

¶ 4 Martinez, as father and next friend of the children, brought a personal injury lawsuit against the Cast defendants, alleging violations of the Colorado Premises Liability Act (CPLA), § 13-21-115, C.R.S. 2021. The complaint asserted that the apartment did not have the required number of smoke alarms; that the single smoke alarm in the apartment was not working; and that the lack of working smoke alarms (1) resulted from the Cast defendants' failure to comply with the applicable fire code and (2) constituted an unreasonably dangerous condition of which the Cast defendants had actual knowledge.

¶ 5 The Cast defendants filed a motion for determination of question of law, arguing that (1) the fire, not the lack of working smoke alarms, was the dangerous condition that caused the children's injuries; and (2) the Cast defendants did not have actual knowledge of a dangerous condition. The court determined that the Cast defendants' motion was more properly characterized as a motion for summary judgment. Although it rejected the Cast

defendants' arguments, it concluded that Martinez had failed to show that "but for the lack of functioning smoke alarms in the required locations, the [children] would not have been injured." Accordingly, the court granted summary judgment in favor of the Cast defendants.

II. Analysis

¶ 6 Martinez contends that the district court erred by granting summary judgment because a genuine issue of material fact exists as to whether the lack of functioning smoke alarms in the apartment caused or contributed to the children's injuries. In their cross-appeal, the Cast defendants contend that we should affirm the district court's summary judgment on the alternate ground that they lacked actual knowledge of a dangerous condition. They further contend that the district court incorrectly determined the applicable fire code and erred by refusing to consider expert testimony on the applicable code. We address each contention in turn.

A. Causation

¶ 7 Martinez first contends that the district court erred by resolving the case on summary judgment because the issue of causation should have gone to the jury. We agree.

1. Standard of Review

¶ 8 We review summary judgment decisions de novo. *Hunter v. Mansell*, 240 P.3d 469, 474 (Colo. App. 2010). "Summary judgment is appropriate only when the pleadings, affidavits, depositions, or admissions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Id.*; *see* C.R.C.P. 56(c). In evaluating a motion for summary judgment, all doubts must be resolved against the moving party, and the nonmoving party is entitled to the benefit of all favorable inferences that may be reasonably drawn from the undisputed facts. *Hunter*, 240 P.3d at 474.

¶ 9 "[T]he trial court's function is to determine whether any material facts are disputed, not to assess the credibility or weight of the evidence." *Capitran Inc. v. Great W. Bank*, 872 P.2d 1370, 1376 (Colo. App. 1994). Issues of causation are "generally to be resolved by the jury, and only in the 'clearest of cases where the facts are

undisputed and reasonable minds can draw but one inference from them' should such issues be determined as a matter of law." *Deines v. Atlas Energy Servs., LLC*, 2021 COA 24, ¶ 10 (quoting *Starks v. Smith*, 475 P.2d 707, 707 (Colo. App. 1970) (not published pursuant to C.A.R. 35(f))).

2. Law and Discussion

¶ 10 To prove causation, a plaintiff must show that, but for the alleged negligence, the harm would not have occurred. *Id.* at ¶ 12; *see Rocky Mountain Planned Parenthood, Inc. v. Wagner*, 2020 CO 51, ¶ 26 (applying common law tort principles to construe the concept of causation under the CPLA). "The requirement of 'but for' causation is satisfied if the negligent conduct in a 'natural and continued sequence, unbroken by any efficient, intervening cause, produce[s] the result complained of, and without which that result would not have occurred.'" *Smith v. State Comp. Ins. Fund*, 749 P.2d 462, 464 (Colo. App. 1987) (quoting *Stout v. Denver Park & Amusement Co.*, 87 Colo. 294, 296, 287 P. 650, 650 (1930)).

¶ 11 The district court found that Martinez failed to show that "the lack of functioning smoke alarms . . . caused the [children's] injuries." Specifically, the court found that Martinez did not prove

"the point of origin of the fire or the course the fire took through the apartment" and that these were "critical facts" in determining exactly when functioning smoke alarms would have gone off. Although Martinez provided an affidavit by an expert in fire safety systems stating that functioning smoke alarms "would have increased the likelihood that all of the occupants of [the apartment] would have escaped the fire" safely, the court determined that this opinion was "entirely conclusory in nature" because "[t]he phrase 'increased the likelihood' is not quantified to describe how much or how little smoke alarms would have assisted the [children] in avoiding injury."

¶ 12 The district court erred by finding that no disputed issue of material fact existed on the issue of causation. To start, Ms. Picasso stated in her affidavit that, by the time she woke, there was already an overwhelming amount of smoke in the hallway outside the bedroom, leaving the window as the only avenue of escape. She further stated that she never heard a smoke alarm. Martinez's expert explained that "[a] smoke alarm is an early warning device that will alert occupants in a dwelling unit of fire due to the activation of the smoke alarm from smoke from an

incipient fire." He further stated that, based on his review of reports from the National Fire Protection Association, "the use of smoke alarms throughout dwelling units . . . does decrease the risk of injury and/or death during a fire." Specifically, based on 2015 statistics, "[t]he chance of dying in a home structure fire is basically cut in half in homes with working smoke alarms," from 1.18 deaths per 100 home fires where there was no smoke alarm or where the smoke alarm did not operate to 0.53 deaths per 100 home fires where a smoke alarm was present and operated.

¶ 13 We disagree with the district court that the expert's opinion was conclusory. As an expert in fire safety systems, he was qualified to set forth a basis for his opinion that "[w]orking and additional smoke alarms" in the apartment would have "increased the likelihood" of the children's safe escape, and he did so. *See Smith v. Mehaffy*, 30 P.3d 727, 730 (Colo. App. 2000). Giving Martinez the benefit of all favorable inferences and resolving all doubts against the Cast defendants, we conclude that Ms. Picasso's statements in her affidavit and the expert's opinion were sufficient to create a genuine issue of material fact as to whether functioning

smoke alarms would have awakened Ms. Picasso in time for her to escape safely with the children.

¶ 14 Further, summary judgment on the issue of causation is appropriate only when "reasonable minds can draw but one inference" from the facts. *Deines*, ¶ 10. In other words, the district court had to determine that the only inference to be drawn from the evidence was that functioning smoke alarms would not have prevented the children's injuries. Courts in other jurisdictions, however, have found that a different inference can be drawn from similar facts. *See Taylor v. N.Y.C. Hous. Auth.*, 940 N.Y.S.2d 844, 850 (Sup. Ct. 2012) ("It may be inferred reasonably that had the smoke detector promptly sounded after the commencement of the fire, [one of the plaintiffs] would have been alerted immediately to the possibility of danger and, as a result, reacted quicker to investigate the situation and escape . . . ."), *aff'd*, 983 N.Y.S.2d 583 (App. Div. 2014); *see also Dillon v. Maxus Props., Inc.*, No. 4:17CV0813, 2019 WL 1549715, at *4 (E.D. Ark. Apr. 9, 2019) (unpublished opinion) (denying summary judgment on the issue of causation because "[i]t is reasonable to infer . . . that had a smoke alarm sounded," a woman who died in the fire could instead have

escaped); *Murdock v. Kircher*, No. 251153, 2005 WL 356642, at *3 (Mich. Ct. App. Feb. 15, 2005) (per curiam) (unpublished opinion) (where the plaintiff was asleep when the fire started and was ultimately forced to jump from a balcony, it was "reasonable to infer that working smoke detectors would have awoken [her] in time to escape the inferno in a safe manner").

¶ 15 For all these reasons, we reverse the district court's summary judgment and remand the case for trial.[1]

B. Actual Knowledge

¶ 16 The Cast defendants contend that we should affirm the district court's summary judgment on the alternate ground that they lacked actual knowledge of a dangerous condition. We disagree.

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[1] Martinez further contends that the district court erred by granting summary judgment based on a "but for" causation analysis that the Cast defendants did not raise in their motion. *See Antelope Co. v. Mobil Rocky Mountain, Inc.*, 51 P.3d 995, 1001 (Colo. App. 2001) ("An issue not raised by the moving party in the motion or brief cannot serve as the basis for summary judgment because the nonmoving party is not put on notice of the need to present evidence concerning that issue."). Because we have already determined that the summary judgment must be reversed, we need not address this additional contention.

¶ 17 Under the CPLA, a licensee[2] may recover damages "caused . . . [b]y the landowner's unreasonable failure to exercise reasonable care with respect to dangers created by the landowner that the landowner actually knew about." § 13-21-115(4)(b)(I). In their motion, the Cast defendants argued that they "had no knowledge of fire or building codes" and "had [no] knowledge that the number of smoke detectors was allegedly in violation" of an applicable code. The district court ruled, however, that Martinez had presented sufficient evidence to create a genuine issue of material fact as to the Cast defendants' knowledge:

> While the [d]efendants deny that they knew that there were an inadequate number of smoke alarms on the property, the jury, as the finder of fact, is not required to accept that denial. Given Ms. Adams' lengthy career as a property manager, her professional qualifications, the number of properties she has managed, her personal use of smoke alarms in her home and business as safety devices, her participation in continuing education classes, the existence of fire codes requiring a certain number of smoke alarms in specified locations, her understanding of the need to comply with laws and regulations and her inspection of the property[,] a reasonable juror could conclude that her denial of

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[2] The district court ruled that the children were licensees for purposes of the CPLA, and neither party appeals this ruling.

> knowledge of the dangerous condition is not credible and that she did in fact have actual knowledge of the dangerous condition.

¶ 18 The record, when viewed in the light most favorable to Martinez, supports the district court's determination that Ms. Adams's awareness of a code violation could not be determined as a matter of law. Although she testified in her deposition that it was her understanding that there were "no laws in Durango requiring smoke alarms," she also admitted that she has managed hundreds of rental properties over thirty-two years; that she has a real estate broker's license; that she attends continuing education classes in order to maintain her license; and that those classes include the subject of updates to the law.

¶ 19 Further, Ms. Adams's own conflicting testimony about her move-in inspection of the apartment created a genuine issue of material fact regarding her knowledge of a dangerous condition. She testified that

- there were two smoke alarms in the unit, despite evidence that there was only one alarm;
- she had no recollection of the number of smoke alarms in the unit;

- there was a smoke alarm on the ceiling on the second floor of the unit;
- the object on the ceiling was a doorbell;
- she inspected a smoke alarm on the second floor;
- she did not recall how she inspected it; and
- she knew it was working because "it was not buzzing."

Ms. Adams also told her insurance carrier that she had inspected the apartment just weeks before the fire. As part of such an inspection, she would have checked whether the smoke alarm was in working order. But there was nevertheless evidence that the alarm was not working.

¶ 20 Because the district court correctly determined that the issue of witness credibility is for the jury to decide, *see Capitran*, 872 P.2d at 1376, the court did not err by denying summary judgment on the basis of the Cast defendants' actual knowledge.

C. Applicable Code

¶ 21 The Cast defendants contend that the district court incorrectly determined that the International Code Council, Inc.'s 2003 International Fire Code (IFC) is relevant to establishing the standard of reasonable care applicable to Martinez's CPLA claims.

But based on the record before us, we cannot tell whether the district court has ruled on the question of which fire code is relevant to establishing the applicable standard of care.[3] Thus, we decline to review this contention.

1. Additional Background

¶ 22 The Tercero Townhomes were originally built in 1978-1979. The applicable building code at the time of the construction was the 1976 Uniform Building Code (UBC), by the International Conference of Building Officials, adopted by the City of Durango in 1978. At that time, according to the Cast defendants, the UBC required only one smoke alarm per dwelling unit.

¶ 23 In fire code terms, the apartment was an "R-2" occupancy, with a kitchen and living room on the first floor and two bedrooms on the second floor. In 2005, Durango passed Ordinance No. O-2005-33 adopting the 2003 IFC. Section 907.2.10.1.2 of the 2003 IFC required that smoke alarms be installed and maintained in existing R-2 occupancies (1) outside of each separate sleeping

[3] At oral argument, Martinez argued that the district court had not ruled on this question, while the Cast defendants acknowledged that it was unclear.

area, (2) in each room used for sleeping purposes, and (3) in each story within a dwelling unit.

¶ 24 On May 1, 2014, Ms. Picasso's sister leased the apartment, and Ms. Adams performed a move-in inspection. In her deposition, Ms. Adams testified that she inspected a single smoke alarm located between the two bedrooms. She did not remember how she inspected it, but she remembered that it was "not buzzing."

¶ 25 In 2015, Durango passed Ordinance No. O-2015-30 adopting the International Code Council's 2012 IFC. Section 907.2.11.2 of the 2012 IFC contains the same requirements as the 2003 IFC for the installation and maintenance of smoke alarms in existing R-2 occupancies. However, under section 1103.8.1 of the 2012 IFC, additional smoke alarms are not required when (1) "the code that was in effect at the time of construction required smoke alarms and smoke alarms complying with those requirements are already provided" or (2) "the existing smoke alarms comply with requirements that were in effect at the time of installation." The commentary to section 1103.8.1 states that

> this section requires the installation of smoke alarms in Group . . . R occupancies that do not currently have any smoke alarms. It does not

> require compliance with the current smoke alarm requirements if the building already has smoke alarms that meet requirements that were applicable when they were installed. The focus here is not to have the owner replace or revise their smoke alarms any time the code requirements for new construction change.

¶ 26 Martinez moved for determination of question of law seeking rulings from the district court that (1) "the 2003 [IFC] was applicable to the duties and obligations of the [d]efendants at the time of [Ms. Picasso's sister's] lease" of the apartment in 2014; and (2) "the 2012 IFC was applicable to the duties and obligations of the [d]efendants at the time of the fire" in 2017. The district court agreed and ruled that the 2003 IFC was "the applicable code at the time of the lease" and the 2012 IFC was "the applicable code at the time of the fire."

¶ 27 Martinez then filed a request for clarification, asking the court to determine "whether the exception contained in [s]ection 1103.8.1 of the 2012 IFC retroactively relieved the [d]efendants from complying with the smoke alarm requirements contained in the 2003 [IFC]." In an oral ruling, the court stated:

> [W]hat the 2003 code was trying to accomplish was to place a relatively minor burden on R-2 occupancies of installing . . . smoke alarms in

> certain locations for the purposes of effectuating a minimal level of public safety in those occupancies . . . . And I understand that by the subsequent adoption of the 2012 International Fire Code, that . . . burden on property owners may have been obviated later on, but at least at the time of the lease, my interpretation is that this is what was applicable.

On April 14, 2019, the court reduced its ruling to writing: "[A]t the time of the lease[,] existing R-2 occupancies were required to comply with the requirements of Section 907.2.10" of the 2003 IFC. The court entered an additional order indicating that Martinez's request for clarification had been "resolved . . . as reflected in the April 14, 2019 order."

2. Law and Discussion

¶ 28 Under the CPLA, as noted above, a licensee may recover damages caused by the landowner's "unreasonable failure to exercise reasonable care." § 13-21-115(4)(b)(I). The landlord's violation of a statute or ordinance may be evidence of a failure to exercise reasonable care. *See Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 575 (Colo. 2008) (concluding that, although the CPLA abrogated certain common law claims and defenses in the premises liability context, "the General Assembly did not intend to

preclude a party from arguing that certain statutes and ordinances are relevant to establishing the standard of reasonable care, and thus that the violation of that statute or ordinance is evidence of a failure to exercise reasonable care").

¶ 29 In negligence cases, the relevant standard of care is the one in effect at the time of the alleged negligence. *See Bennett v. Greeley Gas Co.*, 969 P.2d 754, 760 (Colo. App. 1998) (holding that "a safety code or regulation in effect at the time of the alleged negligence may be admissible . . . because it gives some indication of the standard of care at the time of the alleged negligence"); *see also Yarbro v. Hilton Hotels Corp.*, 655 P.2d 822, 826 n.5 (Colo. 1982) (where the plaintiff's wife tripped over a radiator and fell to her death from a hotel room window in 1977, the standard of care relevant to the plaintiff's suit against the building's architects for "negligently designed room configuration" was "the standard of care of a reasonably prudent architect at the time the design services were rendered in the late 1950's").

¶ 30 Here, the Cast defendants argue that the district court erroneously determined that the 2003 IFC is relevant to establishing the standard of reasonable care applicable to

Martinez's CPLA claims. But, based on our review of the district court's orders, we conclude that the court has determined only that the 2003 IFC was applicable at the time of the lease and the 2012 IFC was applicable at the time of the fire. These two rulings do not answer the question of which code applies to Martinez's CPLA claims. Further, though the parties have analyzed the requirements of the 1976 UBC, the 2003 IFC, and the 2012 IFC, they have not yet developed their arguments, either on appeal or before the district court, regarding which time period is relevant to Martinez's CPLA claims. Stated another way, the parties have not addressed which code was in effect or relevant at the time the Cast defendants allegedly failed to exercise reasonable care. § 13-21-115(4)(b)(I); *Bennett*, 969 P.2d at 760.

¶ 31 Thus, based on our review of the record, we cannot tell whether the district court has ruled on the question of which code is relevant to establishing the standard of reasonable care applicable to Martinez's CPLA claims, and the parties have not yet developed their arguments on this question. Absent such a ruling and without the benefit of the parties' arguments, we decline to review this issue. *See BKP, Inc. v. Killmer, Lane & Newman, LLP*,

2021 COA 144, ¶ 76 (declining to review an unresolved summary judgment motion "because ruling on summary judgment motions in the *first instance* is the trial court's responsibility"); *Colo. Pool Sys., Inc. v. Scottsdale Ins. Co.*, 2012 COA 178, ¶ 51 ("[T]he better practice on issues raised below but not ruled on by the district court is to leave the matter to the district court in the first instance." (quoting *Greystone Constr., Inc. v. Nat'l Fire & Marine Ins. Co.*, 661 F.3d 1272, 1290 (10th Cir. 2011))).

D. Expert Testimony

¶ 32 The Cast defendants contend that the district court erred by refusing to consider testimony from an expert, a deputy city clerk, and a fire marshal on the question of which fire code is relevant to establishing the standard of care. We disagree.

¶ 33 We review a district court's ruling admitting or excluding expert testimony for an abuse of discretion. *Kutzly v. People*, 2019 CO 55, ¶ 8. A court abuses its discretion if its decision is manifestly arbitrary, unreasonable, or unfair, or based on an erroneous application of the law. *Genova v. Longs Peak Emergency Physicians, P.C.*, 72 P.3d 454, 459 (Colo. App. 2003).

¶ 34 Issues of law are to be determined by the court. *Hartman v. Cmty. Resp. Ctr., Inc.*, 87 P.3d 202, 205 (Colo. App. 2003). "[A]n expert may not usurp the function of the court by expressing an opinion regarding the applicable law or legal standards." *Id.*; *see also Black v. Black*, 2018 COA 7, ¶ 113 ("To the extent the expert intended to testify about the correct legal standard, his testimony was inadmissible."). Accordingly, the district court did not abuse its discretion by refusing to consider expert testimony regarding the relevant fire code.

¶ 35 Nor are we persuaded by the Cast defendants' argument that the district court should have considered the interpretation of the municipal agency charged with administrating the fire code. Even if we assume that the deputy city clerk[4] or the fire marshal could provide the agency interpretation, the court need not defer to such interpretation when the interpretation is clear from the text. *Friends of Denver Parks, Inc. v. City & Cnty. of Denver*, 2013 COA 177, ¶ 43; *see also FirstBank-Longmont v. Bd. of Equalization*, 990 P.2d 1109, 1111 (Colo. App. 1999) ("[C]ourts must interpret the

[4] We do not decide whether the city clerk is part of an agency.

law and are not bound by an agency interpretation that misconstrues it."). Thus, the district court did not abuse its discretion by declining to consider the testimony of the deputy city clerk or the fire marshal.

III. Conclusion

¶ 36 We reverse the district court's summary judgment in favor of the Cast defendants, affirm the district court's order refusing to consider expert testimony regarding the applicable code, and remand the case to the district court for further proceedings. We decline to review which fire code is relevant to establishing the standard of reasonable care applicable to Martinez's CPLA claims because we cannot tell whether the district court has ruled on that issue.

JUDGE GROVE and JUDGE TAUBMAN concur.