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SUPREME COURT, STATE OF COLORADO
2 E. 14th Ave.
Denver, CO 80203

Appeal from the District Court, Teller County
Case No. 02 CV 49
Honorable Thomas L. Kennedy

Certiorari from the Court of Appeals
Case No. 05 CA 1781

TURENE LOMBARD and
PUEBLO SCHOOL DISTRICT #60, Petitioners,

v.

COLORADO OUTDOOR EDUCATION CENTER, INC., a Colorado Non-Profit Corporation, d/b/a The Nature Place, and SANBORN WESTERN CAMPS, INC., A Colorado Non-Profit Corporation, d/b/a The Nature Place, Respondents.

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The Petitioners, Turene Lombard and Pueblo School District #60, ("Lombard"), submit their Reply Brief as follows:

I. ISSUES PRESENTED FOR REVIEW

A. Whether the Colorado Premises Liability Act, §13-21-115 abrogates the common law principle of negligence per se in the premises liability context

B. Whether courts may presume that landowners have knowledge of the particular provisions of building codes, or other similar codes, in a premises liability case

II. REPLY CONCERNING RESPONDENTS' STATEMENT OF FACTS AND STATEMENT OF THE CASE

The respondents have misstated certain facts which establish that significant material factual disputes remain in this case. These facts mandate the trial court's order granting summary judgment be overturned. Respondents state, that beside their own building code safety violations, "Lombard adduced no other basis" to establish that respondents knew or should have known of the danger their ladder created. This is simply false.

Lombard presented photographs taken from the top of the ladder showing the open and obvious danger presented by the extremely steep, unreasonably and irregularly constructed ladder with no guard or handrails. (V5, P842-843-844--850, exhibits) Lombard submits that these photographs raise a reasonable

inference that respondents should have known of the unreasonable danger presented by the subject ladder in this commercial setting.

Because this appeal is a de novo review of the trial court's summary judgment entered against the injured plaintiff and her employer, all material facts must be undisputed and any doubt as to the existence of a material fact must be resolved against respondents. *Cotter Corp. v. American Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 819 (Colo. 2004); *Healthone v. Rodriguez*, 50 P.3d 879, 887 (Colo. 2002). Utilizing this standard of review, Lombard is entitled to the benefit of all favorable inferences that may be drawn from the established facts.

Viewed from the foot of this ladder, the danger may not be obvious, but from the loft looking downward, this ladder looks like the edge of a cliff and is openly and obviously an unreasonable danger. A reasonable person could conclude that it was an open and obvious danger. Additionally, in the same regard, Lombard submitted respondents' own pleadings in this case, in which they claim, contrary to their current position, the defense of open and obvious danger. (V1, P13-18, ¶21; V1, P97-104, ¶26) Lombard is entitled to the reasonable inference that respondents should have known of the unreasonable danger of this ladder simply by looking at it from the loft.

Respondents omit certain facts and argue as if these facts did not exist. Specifically, they ignore the established fact that they actually created this danger, that they acted as their own construction contractor and that they were in charge of the construction of this project including the ladder. This omission becomes significant because Lombard submitted extensive proof through the affidavits of Paul Logan, a licensed architect, Bruce Barnes, a licensed professional engineer, Joseph Wodiuk a general contractor, and Fred Zook, a commercial general contractor and engineer, that when respondents acted as their own contractor they were required to know of the danger they created by violating the safety standards of the building code. (V3, P557-572, 577-588, 791-798)

Respondents attempt to infer that design specifications of this ladder were prepared and approved by the building department. That is false. No specifications or detailed drawings of this ladder were ever prepared or submitted to the building department.

Respondents' statement of fact mislead the court concerning their selection of an unlicensed individual to prepare the drawings for their project including the sketch of the ladder. Respondents call him an architectural designer, but it is undisputed that he was not an architect. This is important because respondents attempt to infer that this "designer" should have told them if the ladder was unsafe.

However, the reasonable factual inferences are that respondents should have known that a nonlicensed draftsman would not be expected to understand and apply safety standards and that because respondents failed to use a qualified architect to design its commercial project, as the landowner, they alone would be responsible to ensure the safety of their project and "know" that they had to comply with the building code's safety standards. There is no proof in this record that this draftsman was even asked to conform his drawings to the building code. In fact, it was the respondents, not the draftsman, who certified that they would comply with the building code.

Additionally, respondents mischaracterize the involvement of the Teller County building department in this construction project. They insinuate that the building department physically inspected both the ladder's design and its installation. This is incorrect and misleading. There is no evidence within the record whatsoever that the building department actually inspected the portion of the project drawings showing the existence of the ladder. Nor is there any evidence that the ladder was actually inspected after it was put in place. The actual process of obtaining approval to occupy this facility was initiated by respondents' corporate president and employees. The respondents submitted written and signed building permits agreeing "to perform the work and to conform to all requirements

of the Teller County building code for construction". Lombard submitted seven separate permits, all signed by the respondents' president or their corporate employee, acknowledging their responsibility to build this project in compliance with the building code. (V3, P507, exhibit; V5, P543A-555, exhibits). Respondents cannot, factually or as a matter of law, rely upon the building department's failure to detect this danger. In fact, the reverse is true. The building department, in issuing its certificate of occupancy, is entitled to rely upon the representation and agreement of the owner promising that he has followed the code's requirements. *See, Springer v. Denver*, 13 P.3d 794 (Colo. 2000).

Respondents also incorrectly state that "thousands" of other guests have used this loft ladder without incident. That is not what the evidence in this record shows. In fact, Sanborn could not identify a single guest who had used any ladder at the resort before Mrs. Lombard fell.

Finally, respondents claim that no one ever "advised" them that the ladder did not meet the building code safety standards. This is false. The code itself advised them. Under the code, a ladder is not permitted at all. The code requires a staircase. The Teller County building department required them to promise in writing to follow the building code. Respondents furthermore presented no proof that anyone within the corporation or on behalf of the corporation ever asked for

guidance about the building code. A reasonable person cannot promise to build in accordance with a building code and then claim that they should not know what the code requires. Reasonable people comply with safety codes.

The facts in this case establish that respondents owned the land long before the danger was created, that they actually built the dangerous ladder on their own property, that they actually agreed through the building permit process to comply with the building code, and that they were commercially using the property when Lombard fell from the dangerous ladder and was permanently injured. Lombard submits that respondents' responsibility in this case is nondelegable. They cannot shift blame to a draftsman or the building department for their unreasonable conduct. The landowner is responsible for its agents' acts and omissions and for the knowledge that its agents have or should have. *Springer v. Denver*, *supra.*

The defense amicus brief has also incorrectly stated certain facts of this record. It is the essence of the defense amicus argument that the landowner had no notice that their violation of the building code's safety standards created a danger, because it alleges factually that the code violations could be "technical" instead of "safety" violations. This is incorrect and completely unsupported. The record shows clear evidence that the code violations created by the landowners were safety standard violations not merely technical violations. (V3, P557-572; V3,

P577-588; V4, P791-798). This is a factual dispute that must be resolved in favor of Lombard and cannot be resolved on summary judgment. *Smith v. Boyett*, 908 P.2d 508 (Colo. 1995). The record contains absolutely no proof to support the factual allegation of a technical violation. Lombard submits that the argument is made to avoid the obvious conclusion that a violation of the code's safety standards should have given the respondents notice of the danger they were creating. In fact, the code's stated purpose is to provide minimum standards to safeguard life, limb, and health. (V3, P571)

III. SUMMARY OF ARGUMENT IN REPLY

The fatal flaw of the respondents' argument is that they fail to distinguish between a common-law claim of negligence per se and the principle of negligence per se as a principle of proof of unreasonable conduct.

Throughout their brief, the respondents incorrectly change the issue to be addressed. They analyze only the elements of a common-law negligence per se "claim." However, certiorari was granted on the issue of whether the Colorado Premises Liability Act, §13-21-115, C.R.S., (CPLA) abrogates the common-law principle of negligence per se in the premises liability context.

The principle of negligence per se is the principle of liability per se. Therefore, the principle of negligence/liability per se is the principle of law that

proof of a violation of a valid law that controls a party's conduct is proof of unreasonable conduct. Inherent in the principle of negligence/liability per se is the presumption that a party should know the law that controls his conduct, and is responsible to the people the law is enacted to protect.

Although the CPLA exclusively establishes the "duty" owed by a landowner to a business invitee, it does not establish or even attempt to address the methods of proof available to show a breach of that duty or any of the remaining elements necessary to establish liability of the landowner. Statutes in derogation of the common law must be strictly construed, so that if the legislature wishes to abrogate rights that would otherwise be available under the common law, it must manifest its intent either expressly or by clear implication. *Vigil v. Franklin*, 103 P.3d 322 (Colo. 2004).

The elements necessary to prove premises liability for an invitee are well established and ingrained in Colorado law through the CPLA and the common-law history leading up to its enactment. C.J.I. -- Civ 12:3 provides, in pertinent part, as follows:

> For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on (his) (her) claim of premises liability, you must find all the following have been proved by a preponderance of the evidence:
>
> 1 The plaintiff had (injuries) (damages) (losses);
>
> 2 The defendant actually knew about a danger on the property (or, as a person using reasonable care, should have known about it);

3 The defendant failed to use reasonable care to protect against the danger on the property; and

4 The defendant's failure was a cause of the plaintiff's (injuries) (damages) (losses).

Accordingly, the common-law negligence principles concerning proof of causation, damages, "reasonable care" and what a "reasonable person" should know, must be incorporated into every premises liability claim.

The principle of negligence per se is used as a method to prove a breach of the duty of reasonable care. *Restatement of Torts. 2d,* §285. *Neiberger v. Hawkins,* 208 F.R.D. 301 (D.Colo. 2002).

Unreasonable conduct proven by the principle of negligence/liability per se is frequently determined to be conclusive proof of liability. *Gerrity v. Magness*, 946 P.2d 913, 930 (Colo. 1997); *Aetna Casualty and Surety Co. v. Crissy Fowler Lumber Co.*, 687 P.2d 514 (Colo.App. 1984). But under all circumstances, the violation of an applicable statute or ordinance is objective proof of unreasonable conduct. In the case presently before the court, because the trial court granted respondents' summary judgment, the ultimate issue that must be determined is if the principle of negligence/liability per se provides any proof of unreasonable conduct which raises a genuine issue of material fact prohibiting the grant of summary judgment.

Lombard requests that this Court hold that the CPLA did not abrogate the common-law principle of negligence/liability per se as a method of proving the unreasonable conduct defined in the Act.

Additionally, Lombard requests the Court to hold that any court may reasonably presume that landowners have knowledge of building code and other safety standards in a premises liability case. The General Assembly established that landowners owe the highest standard of care to invitees. They established the standard of notice as actual knowledge and constructive knowledge. The language used in the CPLA is "knew or should have known." The law is well established in Colorado that a party should know the law that controls his conduct. *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083 (Colo. 1991); C.J.I. -- Civ 9:16; *Restatement of Torts 2.d § 290(b) and (o).*

Accordingly, any landowner who creates or constructs a building on his or her property should be presumed to know the applicable building code safety standards. Because the General Assembly required landowners to comply with building code standards, they had a legal duty to know what the code required and courts should presume that landowners know what the code requires. C.R.S. § 30-28-209.

For these reasons we request that the Court reverse the Court of Appeals and remand the case for trial.

IV. ARGUMENT IN REPLY

A. The background and purposes of the CPLA establish that property owners owe the highest standard of care to invitees.

Concerning the background and purposes of the CPLA, respondents incorrectly characterize the purposes of the Act as it relates to the protection of invitees, as opposed to trespassers and licensees and distorts the Act's express purpose as it relates to the standard of care owed to invitees. There is no question that the CPLA dramatically changed the common-law "duties" owed by landowners to both trespassers and licensees and further changed the common-law negligence use of "status" of the injured party. However, respondents fail to address the Acts' express statutory purpose applicable to invitees such as the plaintiff, Mrs. Lombard.

Historically, the common-law of Colorado applied a reasonable care standard of duty to all persons injured on a landowners' premises. The status of the injured party was merely one of the circumstances considered when determining reasonable conduct. The CPLA did change and preempt how the common-law determined "duties owed" to particular claimants. However, the CPLA did not change the duty owed to an invitee. The respondents erroneously

argue that the duty owed to invitees was changed by the Act. *Vigil v. Franklin*, *supra*.

Specifically, the General Assembly's stated purpose was to impose "on landowners a higher standard of care with respect to an invitee than a licensee." C.R.S. §13-21-115(1.5)(c). Lombard submits that respondents' argument concerning the CPLA's stated duty owed to invitees is simply "form over substance." The label of negligence consumes respondents' entire argument without ever confronting the reality that the duty of common-law negligence is, "failure to exercise reasonable care" and the statutory duty owed to invitees is likewise, "unreasonable failure to exercise reasonable care." See, C.R.S. §13-21-115(3)(c); and CJI -- Civ, 9:6, 9:8, and 12:3.

Colorado legal scholars organized as the Colorado Supreme Court Committee on Civil Jury Instructions have analyzed and compared the common-law negligence duty and the CPLA duty owed to invitees and have concluded that there was no meaningful difference between a "failure to exercise reasonable care" and an "unreasonable failure to exercise reasonable care." See, committee note 11 CJI -- Civ 12:3.

None of the cases or authorities cited by respondents address the duties that are owed to Mrs. Lombard as an invitee on their commercial premises under the

CPLA as compared to the duties previously defined by common-law negligence. Lombard submits that the language of the CPLA, its background and its purposes all support the use of the principle of negligence per se to establish a breach of the duty of reasonable conduct by establishing a violation of an applicable law.

B. The principle of negligence per se remains a viable method of proving a breach of the duty of care established by the CPLA.

Respondents in their response brief fail to distinguish between a common-law "claim" of negligence per se and the "principle" of negligence per se as a principle of proof of unreasonable conduct. As the court in *Vigil, supra*, explained, "In cases involving negligent torts, a common law prima facie cause of action requires the proof of four elements: a plaintiff must show that first, the defendant owed a legal duty of care; second, the defendant breached that duty; third, the plaintiff was injured; and fourth, the defendant's breach caused that injury. E.g., *Ryder v. Mitchell*, 54 P.3d 885, 889 (Colo.2002). Of these, duty is the threshold element. Only if there is a legal duty to avoid unreasonably risky conduct does the issue of breach and then the other negligence elements arise." *Id.* at 325.

Likewise, in premises liability claims under the CPLA, the prima facie tort cause of action requires the proof of the same four elements: first, the legal duty of care owed pursuant to the CPLA; second, the defendant breached that duty; third, the plaintiff was injured; and fourth, the defendant's breach caused that injury.

The difference, of course, being that the CPLA establishes the first element in the prima facie tort cause of action for premises liability as follows: "a landowner owes an invitee the duty to exercise reasonable care in protecting against known dangers or those which the landowner should have known." *Id.* at 328.

The principle of negligence per se is used to prove the second element of the prima facie premises liability case: breach of the established duty of reasonable care. The concept is simply that a reasonable person would know and obey the law. When a defendant violates a statute or ordinance adopted for the public's safety and the violation proximately causes the plaintiff's injury, the principle of negligence per se proves breach of the duty of reasonable care. *Scott v. Matlack*, 39 P.3d 1160 (Colo. 2002); *Gerrity v. Magness*, 946 P.2d 913 (Colo. 1997); *Lyons v. Nasby*, 770 P.2d 1250 (Colo. 1989); CJI -- Civ 9:14.

Respondents argue that building code safety standards are irrelevant and their violation provides no proof (not even an inference) of dangers of which the landowner should reasonably have known. This argument ignores the undisputed fact that the purpose of the building code is to protect the public from injuries resulting from unsafe and substandard construction. *Iverson v. Solsberry*, 641 P.2d 314 (Colo.App. 1982). The purpose of other safety codes that apply to businesses is to protect the public.

Although, the CPLA exclusively establishes the "duty" owed by a landowner to an invitee, it does not establish or even attempt to address proof of a breach of that duty or any of the remaining elements necessary to establish liability of the landowner.

Respondents argue that once the injured party's status as an invitee is determined, the level of duty owed is established, and therefore the principle of negligence per se cannot apply and that building code safety violations are irrelevant. What they fail to recognize is that the duty established by the CPLA is "reasonable care", and it is the breach of this established duty that is proven by proof of the landowners' violation of the safety standards enacted by Teller County.

The common-law negligence principles concerning proof of causation must be incorporated into all premises liability claims. Further, the common-law negligence principles concerning damages must be likewise incorporated into all premises liability claims. And finally, and most importantly, the common-law negligence principles concerning proof of "reasonable care" and proof of what a "reasonable person should have known" about must be incorporated into every premises liability claim.

In order to determine whether the CPLA abrogates the common-law principle of negligence per se in the premises liability context, the principle of negligence per se must be properly analyzed. Respondents' argument that the CPLA abrogates this principle, fails to address the central issue in this case: What is the principle of negligence per se.

It is submitted that the principle of negligence per se is the principal of liability per se. It is the principle of law that proof of a violation of a valid law that controls a party's conduct is proof of unreasonable conduct. Inherent in the principle of negligence/liability per se is the presumption that a party should know the law that controls his conduct.

There are two essential aspects contained within the principle of negligence per se. The respondents fail to address both concepts. First, the principle of negligence/liability per se can be used to prove unreasonable conduct -- in other words to prove, "failure to use reasonable care." Second, the principle of negligence/liability per se can be used to prove reasonable knowledge -- in other words to prove that, "a person using reasonable care should have known of a danger that is set forth in the law."

The principle has been well established as a method to define an objective standard of proof of unreasonable conduct by utilizing legislative or administrative

enactments. It is the principle that proof of violation of an applicable statute is proof of unreasonable conduct. *Restatement of Torts.2d, §285.* Negligence per se is an evidentiary rule to establish unreasonable conduct. *Neiberger, supra.*

Lombard submits that it cannot be reasonably disputed that proof of a violation of a statute or ordinance is, at the minimum, proof of unreasonable conduct. (Neither the respondents nor the Court of Appeals has ever addressed this very basic and fundamental precept.) Because this is an appeal from a granted motion for summary judgment, no fact finder has determined that respondents' violation of the building code was anything other than unreasonable conduct.

The essence of the respondents' argument in this case is "labeling." In other words they argue that the label of "negligence per se" should cause the principle to be abrogated regardless of the concepts supporting the principle. The respondents ignore the basic principle and concept that violation of a law is unreasonable conduct.

Mrs. Lombard respectfully requests this Court to hold that the common-law doctrine of negligence/liability per se applies in this case to provide: first, proof of the danger created by violating the building code's safety standards; second, proof of the unreasonable conduct of the landowner by violating safety mandates of the building code; and third, proof that the landowner, charged by the law to construct

its building in compliance with safety provisions of the code, should have known that it's violation of the codes safety standards would create a danger.

Respondents admit that Mrs. Lombard was an invitee as defined by the statute. Accordingly, she is entitled to the benefit of the highest standard of care established by the CPLA. If the ruling of the Court of Appeals stands, Mrs. Lombard, and every commercial invitee in the state of Colorado, will have lost the benefit of the statutory defined higher standard of care. Invitees will have no different rights than a licensee since the element of constructive notice is the distinguishing element.

C. Courts may presume that landowners have knowledge of the particular provisions of building codes, and other similar codes, in a premises liability case.

In their response brief, respondents erroneously attempt to establish two separate standards for presuming that parties should know the law. The first standard would be if the government is a party; in which case, the defendant would be presumed to know the law. The second standard apparently would be for all other Civil litigants; in which case, ignorance of the law would be an excuse and there would be no presumption that either party should know the law. Further, respondents actually admit that, "[i]f the state charged Sanborn with a violation of

the building code, then of course they would be presumed to know the law, and ignorance of the law would be no excuse." (Response page 21.)

Lombard submits that such a contorted rule is contrary to the well-established and firmly ingrained law of Colorado. In civil litigation the rule is so fundamental that a specific jury instruction addresses it. CJI -- Civ 9:16 sets forth the rule as follows: "[i]t is not a defense to a claimed act of negligence that a person was unaware that his or her conduct constituted a violation of a (statue) (ordinance)." This instruction specifically applies to cover the situation where the person was aware he or she was engaging in the conduct, but claims to be unaware of a statute or ordinance making such conduct unlawful." *See, committee note 3, CJI -- Civ 9:16; see also, CJI -- Civ 30:10 Implied Warranties for builders or sellers of buildings; and Peterman v. State Farm, 961 P.2d 487 (Colo. 1998) (where contracts that violate statutes or public policy are unenforceable or void.)*

Respondents also admit that the CPLA does not permit a landowner to "close his eyes to a dangerous condition on the property or pretend that it does not exist" and further, they concede that a party is required to use due diligence in discovering relevant circumstances using an objective standard to avoid rewarding self-induced ignorance. (Response brief page 16.) That is exactly what the principle of negligence/liability per se accomplishes. Because the building code

provisions are safety requirements, the landowner should have known that their violation created an unsafe and dangerous condition. That is the objective standard of "due diligence in discovering" the danger.

The building code itself obligates every landowner who constructs a commercial building to know the safety provisions of the locally enacted building code (and, in fact, requires the landowner to acknowledge in writing that it will conform its construction to the code's requirements). It creates an objective standard that should not be avoided by intentional ignorance. By violating the building code's safety standards, respondents should have known that it created a dangerous condition for its customers.

Lombard submits that the only reasonable inference that can be drawn from the code's requirements (and in particular from the code's requirement that the property owner or its designated agent acknowledge the obligation to comply with the code's provisions) is that respondents should have known of the code's requirements and their violations.

Respondents use an example of an electrical fire in a commercial skyscraper to show the difference between "actually know" compared to "should have known" under the CPLA. However, the Colorado Supreme Court has already considered a better example in *Springer v. Denver*, *supra.* In *Springer,* the City of Denver hired

a contractor for a major remodeling of the Temple Buell Theatre, a building, which is owned by the City of Denver. The contractor erroneously built a door threshold plate twice the correct height. The building was used by thousands of people without incident over a period of more than four years and there was no evidence that the owner had actual or direct knowledge of the defect.

The Court specifically held that although there was no evidence the City had actual knowledge of the dangerous condition, "[t]he City knew or should have known of this unsafe condition in the exercise of reasonable care." *Id.* at 799.

The Court, in *Springer, supra.,* also construed C.R.S. §24-10-103(1), which is the governmental immunity statute section concerning waiver of immunity for a dangerous condition in a public building. The court held that the language of this section "parallels the language" in the CPLA, and defines a dangerous condition as "[A] physical condition of a facility. . . which constitutes an unreasonable risk to the health or safety of the public, which is **known to exist or which in the exercise of reasonable care should have been known to exist. . . .**" (Emphaseis added.) The implication is that the language "should have known" imposes liability upon the landowner because in the exercise of reasonable care it should have known of the danger. The constructive notice for the danger it's contractor

created, should have been known by the business property owner under both §24-10-103 (1) and parallel language of the CPLA.

If the standard argued by respondents and applied below by the Court of Appeals is upheld, the statutory language, ". . .or should have known" becomes meaningless.

Further, the facts in the case *sub judice*, establish a stronger case that the property owner should have known of the danger because respondents actually created the danger themselves. They were their own builder and caused Mrs. Lombard's fall by violating established building code safety provisions, which were expressly enacted to protect the public from such dangers and respondents affirmed in writing to build in compliance with the same safety code which they violated. Obviously, the danger created by respondents in the case presently being reviewed was also open and obvious to them unlike the defect in *Springer, supra.*

If respondents' argument and the Court of Appeals' holding is upheld, public safety codes will provide no protection to our communities. Even minimal safety standards enacted to protect the public's health and property will be ignored without responsibility. All property owners will be immunized from compliance with building codes and all commercial land owners will be motivated to "not inspect" their property for dangers and thereby risk actual knowledge and liability.

Intentional ignorance rather than common sense and reasonable conduct will be the law of Colorado.

V. CONCLUSION

This Court should reverse the Court of Appeals decision on its merits, vacate the trial court's order granting summary judgment for defendants and remand the case to the trial court.

Respectfully submitted this 24th day of March, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 24th day of March, 2007, a true and correct copy of the foregoing pleading was mailed by United States Mail, postage prepaid and addressed to:

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