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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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PETITIONERS' OPENING BRIEF

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ISSUES

WHETHER THE COLORADO PREMISES LIABLITY ACT, §13-21-115, C.R.S., ABROGATES THE COMMON LAW PRINCIPLE OF NEGLIGENCE PER SE IN THE PREMISES LIABILITY CONTEXT.

WHETHER COURTS MAY PRESUME THAT LANDOWNERS HAVE KNOWLEDGE OF THE PARTICULAR PROVISIONS OF BUILDING CODES, OR OTHER SIMILAR CODES, IN A PREMISES LIABILITY CASE.

A. Nature of the case.

The Plaintiff Turene Lombard ("Lombard") fell from a ladder on the premises of a conference center and resort owned by the Defendants Colorado Outdoor Education Center, Inc. and Sanborn Western Camps, Inc. ("the owners") in Teller County. Lombard brought suit against the owners, alleging that she was a business invitee injured as a result of a dangerous condition on the property and that the owners "actually knew or should have known" about the condition. Lombard claimed that the owners, who were also the builders of the buildings at the resort, actually "knew" and "should have known" about the dangerous condition of the ladder, which went to a sleeping loft in her unit (similar ladders went to sleeping lofts in 43 other units in the resort) because the owners constructed the ladder in violation of the Teller County Building Code and the danger created by the ladder was open and obvious.

The Teller County District Court granted summary judgment for the owners, ignoring the fact that the ladder was an open and obvious danger and holding that the owners' violations of the applicable building code were irrelevant and provided no inference, presumption or evidence of notice that the condition was dangerous. The Court of Appeals affirmed, ruling that the Colorado Premises Liability Act, §13-21-115, C.R.S., abrogated use of the common law principle of negligence per se to establish constructive knowledge of an unreasonably dangerous condition. Lombard v. Colorado Outdoor Education Center, Inc., ____ P.3d ____, 2007 WL 177686*6 (Colo.App. Jan. 25, 2007) (attached as Appendix A). The court also ruled that because a building code is complex, knowledge of its provisions should not be presumed, especially when a building inspector has issued a certificate of occupancy. Id. at *7. The Court of Appeals did not address the open and obvious nature of the danger.

On certiorari review, Lombard contends that although the premises liability statute displaced the common law standards of a landowner's duty to persons injured on the landowner's premises, it did not displace either the common law principle of negligence per se or the use of statutes or ordinances as evidence that a landowner knew or should have known of a dangerous condition on the premises. Lombard also contends that a

landowner/builder should be presumed to know the pertinent provisions of a building code. Lombard concludes that the district court's summary judgment in favor of the owners should be reversed because a builder/owners' failure to comply with the building code is relevant and there was evidence that the landowners knew or should have known about the dangerous ladder.

B. Course of proceedings and disposition in court below.

Lombard filed her complaint in February, 2002. In an amended complaint, she asserted claims for violation of the Premises Liability Act. Lombard's injuries occurred while she was at a required work function, a retreat for teachers, and her employer, Pueblo School District #60 ("the School District"), paid her medical bills of more than $300,000.00 and lost wages. The School District is self-insured; it asserted its subrogation rights under §8-41-203, C.R.S., and joined Lombard's lawsuit as a plaintiff. The resort denied liability and as an affirmative defense asserted that the ladder was an open and obvious dangerous condition.[1]

Following completion of discovery, both sides moved for summary judgment. Lombard and the School District argued that the owners were

1 Vigil v. Franklin, 103 P.3d 322, 330 (Colo. 2004), held that the open and obvious affirmative defense to landowner liability did not survive the enactment of the premises liability statute, and the owners withdrew the affirmative defense.

liable as a matter of law because the ladder from which Lombard fell violated safety provisions of the building code, and the owners knew or should have known, as a matter of law, that the ladder was dangerous. Lombard also argued that the building code was relevant evidence and that the owners in fact knew that the ladder was dangerous.

Lombard and the School District submitted affidavits from their engineering and architectural experts stating that the ladder from which Lombard fell was built by the owners in violation of the building code in effect at the time the resort was built. 3:557-75; 3:577-93. The experts opined that the issuance of a certificate of occupancy does not excuse a violation of the building code. Id.

The owners asserted that they had no notice of the danger because (1) the county building department had issued a certificate of occupancy for the building with the ladder in place and (2) no one before Lombard had been injured descending the ladders. The district court granted summary judgment, holding that "the Plaintiffs have failed to demonstrate any evidence that the Defendants knew or should have known of the alleged dangerous condition." 4:742-43 (district court judgment attached as Appendix B).

The Court of Appeals affirmed, concluding that §13-21-115, the premises liability statute, abrogates the common law principle of negligence per se and that "negligence per se is not a viable theory upon which to establish a breach of a duty in a premises liability case." Lombard, 2007 WL 177686*6. The appellate court also ruled that negligence per se is not applicable when the ordinance violated is a complex building code and the property has been approved for occupancy by a building inspector. Id. *7.

C. Statement of facts.

Lombard is a kindergarten teacher, who at the School District's request, attended an overnight training session at "The Nature Place," a conference facility and resort in Teller County owned and operated by the Defendants. The Defendants assigned her to Unit 25, described in the owners' advertising literature as a studio or apartment. 3:484, 516. Unit 25, like other units at the resort, has a main floor with a kitchenette, bathroom and sleeping area with two double beds, and a second floor "loft," containing a mattress, an area for reading and a place to store luggage.

On the afternoon of February 26, 2000, Lombard and her roommate, Karen Duncan, returned from their training session to Unit 25. Duncan had a migraine headache, and in order not to disturb her, Lombard went up to

the loft to read a book. The loft was connected to the main floor by a ladder that was nearly vertical, with steps that were seventeen and a half inches wide and five and a half inches deep. 3:595-96. The steps on the ladder varied in spacing from between eleven and a half inches to thirteen inches. The ladder did not have handrails. Id. After it began to get dark (the loft had a skylight but not a light fixture), Lombard attempted to climb down the ladder. She was not quite sure how to get down, and when she took a single step, her foot slipped. There was no handrail to grab, and she fell to the ground, injuring herself. 5:870-73. Lombard did not know that Duncan earlier had twice climbed to the loft; Duncan nearly fell when she put her foot on the second step from the top of the ladder, a step that she described as "slippery." 4:804-05.

Roger Sanborn established the Defendant, Sanborn Western Camps, Inc., in 1948 as a for-profit corporation. 3:480. During his lifetime, he was president of the corporation. Id. In 1967, he established the Defendant, The Colorado Outdoor Education Center, Inc., a non-profit corporation. The purpose of the non-profit corporation was to conduct education programs for school districts. Id.

In the late 1970s, Sanborn decided to build a convention center and apartments on the corporations' property. ***He selected Alex Purinsh, who was not a licensed architect,*** to design the buildings, including the building where Unit 25 was located. 3:455, 486. Purinsh's drawings show access to the loft by way of a ladder, but there are no specifications for how the ladder is to be constructed or the angle at which it would be affixed to the loft. 3:489, 540-41.

The corporations served as their own general contractor to construct the buildings even though Sanborn, who was the corporations' officer in charge of the project, was not a licensed general contractor and had no education in the construction trades. 3:486-87. Harvey Rotz, the Defendants' hourly employee who worked as a maintenance man, did the construction work for the Defendants. 3:487-91; 4:779-80.

Sanborn obtained at least seven building permits for the project. Sanborn signed each permit, agreeing to construct the buildings (including Unit 25) in compliance with the building codes in Teller County. 3:543A, 545, 547, 549, 551, 553, 555. Rotz was listed on the permits as the contractor.

The resort constructed the ladder in Unit 25 in violation of the 1976 Uniform Building Code in effect in Teller County when the Defendants signed the permits and built Unit 25. 3:557-93. ***The building code required that access from the ground floor to the loft be by a stairway.*** A staircase was the minimum standard of ingress and egress for a second floor of an occupied building in Teller County. To comply with the building code, the stairway steps had to be at least thirty inches wide (not the seventeen and a half inch width of the steps on the ladder) and have an average rise of seven and a half to eight inches (not the eleven to thirteen inch rise of the steps on the ladder). The steps had to be deep enough to allow a person to place her entire foot on the step (not the five and a half inch depth of the ladder steps). 3:571. ***Finally, the ladder did not have handrails*** (had a ladder been permitted, handrails would have been required). 3:579.

The owners obtained a certificate of occupancy for Unit 25. Section 3.02(c) of the building code provided that granting a certificate of occupancy was not to be construed as approval of a violation of the code; under §205 of the code, it is unlawful for any person, firm or corporation to erect, construct or enlarge, use, occupy or maintain a building that is built

contrary to code provisions. 3:573-75. The Defendants were the contractors that built Unit 25, and contractors know that the failure of a building inspector to note a code violation does not relieve them of their duty to comply with the code. 3:601-02; 4:791-92, 797.

After constructing the resort, the Defendants owned and were operating it at the time that Lombard fell. They acknowledged that Unit 25 should be safe but they never inspected it to see if it complied with the minimum safety requirements established by the building code. 3:488-489, 496. After this lawsuit commenced, Jane Sanborn – an officer of the Defendant corporations – examined the Defendants' records and interviewed employees. She could not find any records of an occupant of any of the units being injured in a fall from a ladder.

SUMMARY OF ARGUMENT

The Court of Appeals ruled that the Premises Liability Act abrogates the common law principle of negligence per se and that negligence per se is not a viable theory upon which to establish a breach of a duty in a premises liability case. The court also ruled that because a building code is complex, knowledge of its provisions should not be presumed and that negligence per se is not applicable where a property has been approved for occupancy by a

building inspector. In sum, the combination of the Court of Appeals' rulings is that a violation of a building code can never be used to prove the negligence of a builder/landowner that results in injury to an invitee on the landlord's premises.

The Premises Liability Act's abrogation of the common law elements of premises liability does not prevent the common law principle of negligence per se from being used to conclusively establish that a defendant breached its duty of care in a premises liability case. See Vigil v. Franklin, 103 P.3d 322 (Colo. 2004). Moreover, the Premises Liability Act allows the admission of a statute or ordinance as non-conclusive evidence of the standard of care. See Scott v. Matlack, 39 P.3d 1160 (Colo. 2002). Further, there is no reason under the Premises Liability Act to exclude a building code from evidence. To rule that a person should not be presumed to know the pertinent provisions of an applicable complex code undermines the use of a statute or ordinance as evidence of lack of reasonable care in all other areas of tort law and as evidence of guilt in criminal law. Finally, the fact that a certificate of occupancy has been issued by a building inspector should not preclude consideration of building codes as evidence of the appropriate standard of care in premises liability cases.

The district court erred in granting summary judgment for the Defendants on the basis that the Plaintiffs had not produced any evidence in support of their claim that the Defendants knew or should have known that the ladder from which Lombard fell was a dangerous condition. This Court should reverse the decision of the Court of Appeals and remand the case for further proceedings.

ARGUMENT

Standard of review.

This Court's review of a district court's entry of summary judgment is *de novo*. Vail/Arrowhead, Inc. v. District Court, 954 P.2d 608, 611 (Colo. 1998). The entry of summary judgment can only be affirmed if the controlling facts are undisputed and if in view of those undisputed facts the moving party is entitled to judgment as a matter of law. Cotter Corp. v. American Empire Surplus Lines Ins. Co., 90 P.3d 814, 819 (Colo. 2004). The non-moving party is entitled to the benefit of all favorable inferences that may be drawn from the undisputed facts, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party. HealthONE v. Rodriguez, 50 P.3d 879, 887 (Colo. 2002).

I. THE COLORADO PREMISES LIABILITY ACT DOES NOT ABROGATE THE COMMON LAW PRINCIPLE OF NEGLIGENCE PER SE IN THE PREMISES LIABILITY CONTEXT.

Negligence per se is a common law principle that makes it easier to prove breach of the standard of care by assuming that a reasonable person would obey the law (under the Colorado Premises Liability Act, reasonableness is the "unreasonable failure to exercise reasonable care," §13-21-115(3)(c)(I)). Negligence per se occurs when the defendant violates a statute or ordinance adopted for the public's safety and the violation proximately causes the plaintiff's injury. Scott v. Matlack, 39 P.3d 1160, 1166 (Colo. 2002); Lyons v. Nasby, 770 P.2d 1250, 1254 (Colo. 1989); CJI-Civ. 9:14. A plaintiff must demonstrate that the statute or ordinance was intended to protect against the type of injury the plaintiff suffered and that the plaintiff is a member of the group of persons that the statute was intended to protect. Id. If the statute or ordinance applies, then it conclusively establishes the defendant's standard of care, and violation of the statute or ordinance is a breach of the defendant's duty. Gerrity v. Magness, 946 P.2d 913, 930 (Colo. 1997).

Lombard demonstrated (1) that the resort violated the Teller County Building Code by constructing a steep narrow ladder without handrails between the ground floor and the loft in a unit that was rented to the public, (2) that the building code's requirement of stairs with handrails rather than a ladder was adopted for the public's safety, and (3) that the dangerous features of the ladder proximately caused her injuries. She also demonstrated that the building code was intended to prevent injuries like those she suffered from falling from the top of the ladder to the ground floor and that she was a guest at the resort whom the building code was intended to protect.

In cases that arose before the adoption of the Colorado Premises Liability Act in 1990, the building code conclusively established the owner's duty of care, and the owner's violation of the building code was a breach of its duty. See Harless v. Geyer, 849 P.2d 904 (Colo. App. 1992) (landlord did not owe duty to tenant who fell down stairs lacking handrail because building was constructed before building code adopted); Comfort v. Rocky Mountain Consultants, Inc., 773 P.2d 615 (Colo. App. 1989) (landowner did not owe duty to passenger in car that left traveled portion of highway and crashed into drainage ditch that did not conform to building

code); Aetna Casualty and Surety Co. v. Crissy Fowler Lumber Co., 687 P.2d 514 (Colo. App. 1984) (jury should have been instructed on negligence per se where trusses in building failed because manufacturer did not comply with building code); Iverson v. Solsbery, 641 P.2d 314 (Colo. App. 1982) (cost to subsequent purchaser of bringing building into compliance with building code was not type of injury that building code intended to prevent and did not constitute negligence per se).

A. The Premises Liability Act does not abrogate negligence per se.

The Premises Liability Act, §13-21-115(2), provides:

> In ***any*** civil action brought against a landowner by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, or activities conducted or circumstances existing on such property, the landowner shall be liable ***only*** as provided in subsection (3) of this section.

(emphasis added). Subsection (3) describes the circumstances when trespassers, licensees and invitees can recover damages caused by a landowner.[2] In Vigil v. Franklin, 103 P.3d 322, 328 (Colo. 2004), this Court held that the premises liability statute's "definition of landowner duty

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2 With respect to invitees like Lombard, §(3)(c)(I) provides that "an invitee may recover for damages caused by the landowner's unreasonable failure to exercise reasonable care to protect against dangers of which he actually knew or should have known."

is complete and exclusive, fully abrogating landowner common law duty principles."[3]

Relying on Vigil, here the Court of Appeals described negligence per se as "a common law principle that the violation of a statute or ordinance establishes a breach of a duty owed to the plaintiff, thus conclusively proving negligence." 2007 WL 177686*4. Consequently, the Court of Appeals concluded that the district court did not err in granting summary judgment because "negligence per se is not a viable theory upon which to establish a breach of a duty in a premises liability case." Id.*6. Vigil does not provide a complete resolution of the issue raised by Lombard since the duty to invitee under the Premises Liability Act is identical to the duty in a negligence claim.[4]

---

[3] Vigil also concluded that the premises liability statute abrogated the common law regarding defenses to the existence of such duties and that had the General Assembly intended to retain one of those defenses, "the open and obvious danger doctrine, it could have done so." 103 P.3d 322. Consistent with Vigil, the Court of Appeals recently ruled in Martin v. Union Pacific Railroad Co., 2007 WL 2728625 (Colo. App.) (upholding premises liability verdict for plaintiff injured in grade crossing collision), that the 1990 version of the premises liability statute abrogated the affirmative defenses of comparative negligence and pro rata liability.

[4] For an invitee to recover against the landowner, he must show that the landowner's conduct constituted an unreasonable failure to exercise reasonable care to protect against a danger of which he actually knew or should have known. The Premises Liability Act establishes a duty for landowners, *vis-a-vis* invitees, which is identical to the duty of a defendant to a plaintiff in a negligence action. (Cont'd next page).

The Court of Appeals' extension of Vigil to negligence per se is wrong. In Vigil, this Court described the premises liability statute as setting forth the nature and extent of duties owed by a landowner. 103 P.3d at 330. The premises liability statute addressed the duties owed by a landowner to trespassers, licensees and invitees. Although the statute did not refer to the affirmative defense of a danger that is open and obvious, this Court held that the statute precluded that affirmative defense because it is a defense related to a landowner's duties.[5]

Negligence occurs "where a person should reasonably foresee that his act, or failure to act, will involve an unreasonable risk of harm to another, there is a duty to avoid such harm." See Largo Corp. v. Crespin, 727 P.2d 1098, 1102 (Colo. 1986).

The identical nature of the claim of an invitee under the Premises Liability Act to that of an injured party in a negligence action can also be seen by examining the comparative jury instructions.

Under CJI-Civ. 12:5B, an invitee must show that he was injured, that the defendant actually knew about a danger on the property or as a person using reasonable care should have known about it, and that the defendant failed to use reasonable care to protect against the danger and causation. According to Note 4 to CJI-Civ. 12:5B, the definitions of reasonable and causation in an invitee's claim under the Premises Liability Act are the same definitions that are used in a negligence claim.

According to CJI-Civ. 9:1, the plaintiff in a negligence claim must prove that he suffered injuries, damages or losses, that the defendant's conduct was negligent (which according to CJI-Civ. 9:6 means: "a failure to do an act which a reasonably careful person would do, or the doing of an act which a reasonably careful person would not do, under the same or similar circumstances") and causation.

[5] The Court contrasted the failure of the General Assembly to retain the open and obvious danger defense with its specific retention of the attractive nuisance doctrine, "another common law defense to the imposition of landowner duties." 103 P.3d at 331.

In general, negligence per se serves to establish the existence of the defendant's breach of a legally cognizable duty owed to the plaintiff. Largo Corp. v. Crespin, 727 P.2d 1098, 1107 (Colo. 1986). The standard of conduct is adopted by the court from the statute or ordinance, and violation of the enactment conclusively establishes breach of the duty. Id. The party seeking to recover under the doctrine of negligence per se must show not only that the defendant violated the statutory standard, but also that the violation was the proximate cause of the injuries sustained. Id. The premises liability statute addresses the duties owed by a landowner to trespassers, licensees and invitees, but it does not address what constitutes a breach of those duties. Under the premises liability statute, a landowner has a duty to an invitee "to exercise reasonable care to protect against dangers of which he actually knew or should have known." §13-21-115(3)(c)(1). Statutes or ordinances such as building codes can be used to establish "dangers of which he actually knew or should have known," and violation of such a statute can be a conclusive presumption that the landowner breached his duty to exercise reasonable care with respect to an invitee. See Aetna Casualty and Surety Co. v. Crissy Fowler Lumber Co., 687 P.2d 514 (Colo.App. 1984).

Negligence per se is a broad common law principle not restricted to landowner liability. It does not create a "duty owed by a landowner."[6] 103 P.3d at 330. There is no reason that the General Assembly's adoption of the premises liability statute should abrogate a common law principle that in all types of tort cases violation of a statute may conclusively establish liability. As this Court noted in Vigil, "where the interaction of common law and statutory law is at issue, we acknowledge and respect the General Assembly's authority to modify or abrogate common law, but can only recognize such changes when they are clearly expressed." 103 P.3d at 327. The legislature here made no reference in the premises liability statute to eliminating negligence per se as a conclusive presumption. Instead, it set out classifications that "delineate the duty a landowner owes an injured trespasser, licensee, or invitee." Id. at 328. Use of violation of a statute or ordinance to prove that a landowner should have known of dangers on its premises is a means of proof that the landowner breached its duty and is not a codification of a different duty.[7]

6

Negligence per se is an evidentiary rule used to establish that the party's conduct was unreasonable. Neiberger v. Hawkins, 208 F.R.D. 301 (D. Colo. 2002).

7

Negligence per se is a ***method of establishing*** the standard of the ***conduct of a reasonable man***. *Restatement of Torts.2d*, §285 states:

"How Standard of Conduct is Determined. (Cont'd next page)

There is nothing in the premises liability statute that prevents the use of a building code, for example, to establish that a landowner should have known the dangerous condition that caused injury to a licensee. If violation of a safety statute or ordinance such as a building code cannot be used to establish what a reasonable builder/landowner should have known, the Premises Liability Act will abrogate state and local protections for the health and safety of the public – something that the legislature could not have intended.

The legislative branch of government has the right to define what is and is not reasonable conduct by a landowner or contractor. For this Court to hold that building codes and other codes that apply to landowners who open their property to the general public cannot be used in determining whether the landowner's conduct is or is not reasonable, and whether there are or are not dangers ***was not*** the intent of the legislature in adopting the Premises Liability Act. No one can seriously argue that by enacting the

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The standard of conduct of a reasonable man may be

(a) established by a legislative enactment or administrative regulation which so provides, or

(b) adopted by the court from a legislative enactment or an administrative regulation which does not so provide, or

(c) established by judicial decision or

(d) applied to the facts of the case by the trial judge or the jury, if there is no such enactment, regulation, or decision."

Premises Liability Act the legislature intended to tell commercial landowners and contractor/landowners who open their property to the public that they can violate building and other safety codes, and not face civil liability. The danger of the Court of Appeals' decision is that it weakens other safety codes. Arguably, now, restaurants and bars can avoid civil liability for health code violations, casinos and hotels can avoid liability for fire code violations, etc.

This Court must interpret and apply the Premises Liability Act in a manner that harmonizes it with all legislative enactments designed to protect invitees. People v. Hampton, 876 P.2d 1236 (Colo. 1994). This can only be done by holding that statutes, ordinances and regulations that set safety standards for invitees define what is or is not dangerous on a property and what is reasonable and unreasonable conduct on behalf of a landowner. These safety codes put the landowner on notice of the danger created by violating the law.

B. In the alternative, the Premises Liability Act does not preclude the admission of a statute or ordinance as non-conclusive evidence of the standard of care in a premises liability case.

In Scott v. Matlack, 39 P.3d 1160 (Colo. 2002), this Court ruled that although a defendant may not be held negligent merely with proof that he

violated an Occupational Safety and Health Act, 29 U.S.C. §§651-678 (2000) ("OSH Act") regulation, a plaintiff may use a safety statute or regulation as "some evidence of the standard of care in defendant's industry." 39 P.3d at 1167.

The OSH Act and the Premises Liability Act are similar in that they both abrogate reliance on common law duties.

Section 653(b)(4) of the OSH Act provides, "Nothing in this Act shall be construed...to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries... ." In Canape v. Petersen, 897 P.2d 762, 767 (Colo. 1995), this Court held that OSH Act regulations do not create a private cause of action and therefore a plaintiff could not establish a negligence per se claim by alleging that a defendant violated OSH Act regulations.

Nevertheless, Matlack concluded that §653(b)(4) and Canape "do not preclude the admission of OSH Act regulations in a negligence action as some, non-conclusive, evidence of the standard of care in the relevant industry." 39 P.3d at 1166; see also Gerrity Oil & Gas Corp. v. Magness, 946 P.2d 913, 931 (Colo. 1997) (violations of commission rules are valid,

but not conclusive, evidence that lessee breached duty owed to surface owner). To be admissible, "the safety standards must be relevant, offered in support of expert testimony, objective, and recognized and accepted in the industry involved." 39 P.3d at 1167.

In the instant case, the premises liability statute – like the OSH Act – should not be read to preclude the admission of the pertinent provisions of the building code as non-conclusive evidence of the standard of care in the construction industry. The building code standards for stairways between one floor and another in the Teller County Building Code were relevant, offered in support of expert testimony, objective, and recognized and accepted in the construction industry. The building code, which is the Uniform Building Code, is intended to provide safety to guests at a resort and has been adopted by most governmental entities to ensure safe construction practices. Thus, like the decision in Matlack, this Court should rule that Vigil (if it is read to preclude a conclusive presumption that violation of a building code is negligence per se) does not preclude the admission of the pertinent provisions of the building code in a premises liability action as some, non-conclusive, evidence of the standard of care.

A building code is non-conclusive evidence that a property owner knew or should have known of a dangerous condition.

Section 30-28-209(1)(a), C.R.S. expressly establishes a landowner's legal duty to build in compliance with the building code's safety standards by mandating that, "it is unlawful to erect, construct, reconstruct, or alter any building or structure in a manner that results in a violation of any regulation in, or of any provisions of, the area building code..." See also §30-28-209(1)(b) (a landowner cannot use any building built in violation of the building code.) Accordingly, a landowner is legally obligated to know what the provisions of the area building code require.

There is no dispute that the owners built Unit 25 and the ladder connecting the main floor to the loft and therefore they were required to comply with the Teller County Building Code. In fact, Sanborn certified to the building department that it would comply with the code.

This is evidence that the resort knew the contents of the code. Evidence of what the owners knew need not be direct but can be circumstantial. Anderson v. Dunton Management Co., 865 P.2d 887, 890 (Colo. App. 1993).

Lombard was an "invitee" onto the resort property; she "enter[ed] or remain[ed] on such land in response to the owner's express or implied representation that the public is requested, expected, or intended to enter or remain." §13-21-115(5)(a). Thus, she could recover for damages "caused by the landowner's unreasonable failure to exercise reasonable care to protect against dangers of which he ***actually knew or should have known***." §13-21-115(3)(c)(I) (emphasis added).[8]

In opposing summary judgment, Lombard and the School District argued that the owners had both actual notice and constructive notice of the dangerous condition created by the steep and narrow ladder between the main floor and the loft. 3:433-445; 5:822-824, 836-839. The affidavits and depositions filed with the opposition contained the Plaintiffs' evidence that the owner "actually knew or should have known" of the danger.[9] 3:477-

[8] See Sofford v. Schindler Elevator Corp., 954 F.Supp. 1459 (D. Colo. 1997) (a violation of 13-21-115(3)(c)(1) can be based on actual or constructive notice).

[9] The evidence of actual knowledge includes the deposition testimony of Jane Sanborn, the secretary and treasurer of the owners, and the danger that the ladder presented to anyone viewing the ladder from the loft. 3:484-96. Neither the district court nor the Court of Appeals addressed the Plaintiffs' evidence that the owners actually knew of the danger. The appellate court noted only that the Plaintiffs responded to the summary judgment motion with reports and affidavits of two expert witnesses, both architects, stating that the ladder violated the Uniform Building Code and therefore constituted a dangerous condition. 2007 WL 177686*2. The district court and the Court of Appeals concluded that the owners did not know of the danger based on Sanborn's affidavit stating that she

478, 485-488, 496, 520, 557-558, 577-579, 595-596, 599; 4:791-792; 5:842-844, 846-849. The district court granted summary judgment for the owners on the ground that the Plaintiffs "failed to demonstrate ***any*** evidence" of the owners' actual or constructive notice. (App. B at 1). (emphasis added).

The Court of Appeals addressed constructive knowledge only, ruling that §13-21-115 abrogated use of the common law principle of negligence per se to establish constructive knowledge of an unreasonably dangerous condition. 2007 WL 177686*6. Consequently, the court concluded that the district court did not err in granting summary judgment because, as a matter of law, Lombard could not prove that the owners should have known that the ladder was dangerous.

The effect of the Court of Appeals' ruling requires that a landowner have actual knowledge of a dangerous condition before it can be held liable for injuries caused by that condition. This is contrary to precedential authority concerning the meaning of "or" in the phrase "actually knew or should have known." See Zab, Inc. v. Berenergy Corp., 136 P.3d 252, 255 (Colo. 2006) ("we presume the disjunctive use of the word 'or' marks

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had reviewed the owners' records and had not found a report of any accident or injury associated with the use of the ladders. 2007 WL 177686 *1.

distinctive categories"); Springer v. City and County of Denver, 13 P.3d 794, 799 (Colo. 2000) (the disjunctive "or" in the phrase "constructing or maintaining" means either negligent construction or negligent maintenance).

The decision in this case also creates a redundancy in the statute because the Court of Appeals uses the word "knew" to mean the same as "should have known," which according to the court means actual knowledge. Such a redundancy writes "should have known" out of the statute. This violates the well-established rule that the legislature is presumed to have given distinct meaning to each word and phrase in a statute. Department of Transportation v. Stapleton, 97 P.3d 938, 943 (Colo. 2004).

In Colorado, the phrase "knew or should have known" is used in 38 statutes and three rules of the court. The phrase "should have known" is constructive notice. See e.g., Harrison v. Pinnacol Assurance, 107 P.3d 969 (Colo. App. 2004); Hoang v. Arbess, 80 P.3d 863 (Colo. App. 2003). Constructive notice is that notice a person would have if the person had acted with reasonable diligence under the circumstances. It is determined by applying an objectively reasonable standard to the conduct of a

hypothetical reasonable person acting under the same or similar circumstances. This differs materially from actual notice.

If the Court of Appeals' decision stands, business property owners have no duty of reasonable diligence to discover dangerous conditions and are not required to inspect their property or otherwise act as a reasonable person in maintaining their property in a safe condition for use by the general public. Instead, business property owners would be liable only for dangerous conditions of which they had actual knowledge.

The appellate court ruling is wrong. If a building code cannot be considered to establish constructive knowledge, then the effect of the Court of Appeals' decision is to abolish the statutory distinction between a landlord's liability to a "licensee" (based on actual notice) and to an "invitee" (based on "actually knew or should have known").[10]

Holding a landowner liable to an invitee because of constructive notice is good public policy. The public policy is discussed by the Alaska Supreme Court in Kremer v. Carr's Food Center, Inc., 462 P.2d 747 (Alaska 1969). The court there explained:

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[10] The premises liability statute also requires actual knowledge when the property is classified for tax purposes as either agricultural or vacant land. §13-21-115(3)(c)(II).

> Unlike the licensee, a business invitee enters on possessor's land accompanied by an implied representation that land has been prepared and made ready and safe for his reception and, as such, [a business invitee] is entitled to the undertaking of affirmative steps by the possessor in order to promote [the invitee's] safety... .

The Court of Appeals' decision abolishing constructive notice is also contrary to the law in Colorado. Both before and after the adoption of the Premises Liability Act landowners have notice of what a contractor working for them would have known. See Frazier v. Edwards, 190 P.2d 126 (Colo. 1948), Jules v. Embassy Properties, Inc., 905 P.2d 13 (Colo. App. 1995), Kidwell v. K-Mart Corporation, 942 P.2d 1280 (Colo.App. 1996), and Springer v. City and County of Denver, 13 P.3d 794 (Colo. 2000).

The Court of Appeals' decision encourages intentional ignorance to the detriment of the public. Landowners would have no incentive to know the law, but additionally they would have no incentive to inspect their property for dangerous conditions. The mantra of defense would be "ignorance is bliss."

Moreover, Lombard had supplied the district court with evidence that the owner had actual knowledge and constructive knowledge that the ladder was dangerous.[11] The evidence of constructive knowledge included the

[11] CRE 401 defines relevant evidence as evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the

pertinent building code provisions. Those provisions were "some, non-conclusive, evidence of the standard of care" for building a stairway between the ground floor and the loft that the owners should have known. Given the Plaintiffs' evidence of actual and constructive knowledge, the district court erred when it entered summary judgment on the ground that the Plaintiffs "failed to demonstrate ***any*** evidence" of the resort's actual or constructive notice.

II. COURTS MAY PRESUME THAT LANDOWNERS HAVE KNOWLEDGE OF THE PARTICULAR PROVISIONS OF BUILDING CODES, OR OTHER SIMILAR CODES, IN A PREMISES LIABILITY CASE.

The Court of Appeals also ruled that violation of a building code can never provide proof of lack of reasonable care under the Premises Liability Act because a building code is too complex. 2007 WL 177686*7. According to the court, "knowledge of the provisions of the building and related codes and their application to a particular structure should not be presumed." Id. There is nothing in the premises liability statute that

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action more probable or less probable than it would be without the evidence. Here, the building code was relevant to a fact of consequence, whether the owner knew or should have known that the ladder was dangerous. The building code is evidence of the standard of care at the time that the ladder was constructed and at the time that Lombard fell. See Scott v. Matlack, 39 P.3d 1160; Gerrity v. Magness, 946 P.2d 913.

precludes building codes as evidence of the standard of care for construction of public accommodations.

The Court of Appeals' ruling undermines the protection of invitees to commercial property provided by §§30-28-209 and 210, C.R.S.,[12] and local building codes. A broader effect of the Court of Appeals' ruling that violation of a complex statute or regulatory scheme cannot be used to prove lack of reasonable care restricts the use of the negligence per se principle in all other areas of tort law and the admission of statutes and ordinances as non-conclusive evidence in all other areas of law.

It is the responsibility of each person to know applicable laws. Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083 (Colo. 1991) (property owner is presumed to know the law); CJI-Civ. 9:16 ("It 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 statute/ordinance."). Thus, it is presumed that a reasonable builder/owner knows the law. See Moore v. Smith, 158 P.3d 562 (Utah App. 2007); Restatement of Torts.2d §§290(b) and (o); Restatement of Property.2d §17.6. Moreover, under §§30-28-209

[12] Section 30-28-209 provides that "[a]ny person, firm, or corporation violating this part 2 [building codes] or any provision of the area building code is guilty of a misdemeanor ... [or may be the subject of injunctive relief.]" Section 30-28-210 (1) provides, "It is unlawful to erect, construct, reconstruct, alter, maintain, or use any building, structure, or land in violation of this part 2 or any provisions of the area building code." The penalty for violation of §210 is civil.

and 210, C.R.S., builders must construct buildings in compliance with applicable building codes, and they must acquaint themselves with the building codes or be subject to civil and criminal penalties. If the builder/owners in this case are excused from compliance with the building code, then there is no reason that any other lawbreaker cannot be excused from complying with complex codes such as the tax code.

The fact that the county inspector issued a certificate of occupancy does not excuse compliance by the builder/owners. In Board of County Commissioners v. Moreland, 764 P.2d 812 (Colo. 1988), the plaintiff fell from the deck of a cabin due to the absence of a guardrail in violation of La Plata County's Uniform Building Code. Under the La Plata County Code, building inspectors were responsible for inspecting newly constructed buildings for code compliance. The county inspector either failed to make the required inspection or overlooked the missing guardrail. This Court concluded that the building code did not contain any indication that a private civil remedy was contemplated for negligent violations of the code by the county. 764 P.2d at 818. The Court relied on the state statute authorizing a county to enact a building code which contains specific remedies against entities violating the code, §§30-28-209 and 210, but made

no provision for the imposition of civil liability against the county. Id. at 818-19.

When a public entity has a regulatory duty to ensure that a private party is in compliance with safety regulations, the public entity is not subject to civil tort liability for injuries sustained by a person as a result of the public entity's failure to comply with its regulatory duty. At the same time, the fact that a public entity has a regulatory duty does not excuse the private party from compliance with safety regulations. The most important purpose of a building code is to protect the public from injuries resulting from substandard or unsafe construction. Iverson, 641 P.2d at 316. If the builder/owner of a public accommodation cannot be presumed to know the pertinent building code provisions, there will be no reason for a builder/owner to construct or maintain accommodations in a safe condition.

CONCLUSION

This Court can apply common law principles that have been used both in the context of tort litigation and property litigation which allow courts to look to the legislature to define what is and is not reasonable conduct, what is and is not dangerous, and what the landowner should know. Application of this rule in Colorado does not create a new cause of

action but simply defines as a matter of law under the provisions of C.R.S. §13-21-115(3)(c) what is and is not reasonable conduct. Utilizing legislative enactments and codes to establish what is or is not reasonable conduct by a landowner in the context of a premises liability statute benefits the landowner by advising him of an objective standard of care and puts him on notice of what is and is not acceptable. Ignorance of the law is not a defense that courts want to adopt.

This Court should vacate the trial court's order granting summary judgment for Defendants and remand this case for further proceedings, including reconsideration of Lombard's motion for summary judgment.

Dated this 7th day of January, 2008.

JAMES M. CROSHAL #7438
FOR THE PETITIONERS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she mailed, on this 7th day of January, 2008, by U.S. Mail, first class postage prepaid, a true and correct copy of the above and foregoing **PETITIONERS' OPENING BRIEF**, to the following:

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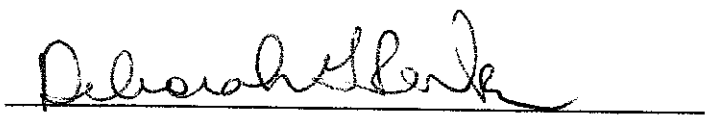

Respectfully submitted this 7th day of January, 2008.

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Exhibit A

Westlaw.

--- P.3d ----, 2007 WL 177686 (Colo.App.)
(Cite as: --- P.3d ----)

Lombard v. Colorado Outdoor Educ. Center, Inc.
Colo.App.,2007.
Only the Westlaw citation is currently available.
NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. A PETITION FOR REHEARING IN THE COURT OF APPEALS OR A PETITION FOR CERTIORARI IN THE SUPREME COURT MAY BE PENDING.
Colorado Court of Appeals,Div. IV.
Turene LOMBARD and Pueblo School District # 60, Plaintiffs-Appellants,
v.
COLORADO OUTDOOR EDUCATION CENTER, INC., a Colorado nonprofit corporation, d/b/a The Nature Center, and Sanborn Western Camps, Inc., a Colorado non-profit corporation, Defendants-Appellees.
No. 05CA1781.

Jan. 25, 2007.

Background: Teacher and her employer school district brought action against operators of conference facility that hosted education conference, to recover for losses resulting from teacher's fall from ladder when she was climbing to lofted sleeping area at facility. The District Court, Teller County, Thomas L. Kennedy, J., entered summary judgment in favor of conference facility. Teacher and school district appealed.

Holdings: The Court of Appeals, Roy, J., held that:

(1) premises liability statute abrogates common law principle of negligence per se in the premises liability context;

(2) even if negligence per se was a viable theory in premises liability context, violation of building code would not establish negligence per se, where property had been approved by a building inspector for occupancy;

(3) conference facility's agreement to comply with building code did not establish constructive knowledge of dangerous condition;

(4) conference facility's statement in pleading that ladder was "open and obvious" did not constitute an admission that ladder was faulty or constituted a dangerous condition.

Affirmed.

[1] Statutes 361 ⇐239

361 Statutes
361VI Construction and Operation
361VI(B) Particular Classes of Statutes
361k239 k. Statutes in Derogation of Common Right and Common Law. Most Cited Cases
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.

[2] Negligence 272 ⇐1025

272 Negligence
272XVII Premises Liability
272XVII(B) Necessity and Existence of Duty
272k1025 k. Duty Based on Statute or Other Regulation. Most Cited Cases
Premises liability statute abrogates common law principle of negligence per se in the premises liability context. West's C.R.S.A. § 13-21-115.

[3] Negligence 272 ⇐1595

272 Negligence
272XVIII Actions

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A

Blumberg No. 6516

272XVIII(C) Evidence
272XVIII(C)2 Presumptions and Inferences
272k1592 Premises Liability
272k1595 k. Buildings and Other Structures. Most Cited Cases
Premises owner's knowledge of the provisions of the building and related codes and their application to a particular structure should not be presumed in premises liability context.

[4] Innkeepers 213 ⚿10.4

213 Innkeepers
213k10 Injury to Person of Guest
213k10.4 k. Defective Floors, Stairs, or Passageways. Most Cited Cases
Even if negligence per se was not abrogated by the premises liability statute, conference facility that hosted education conference was not liable for negligence per se to teacher who fell from ladder when she was climbing to lofted sleeping area at facility, even though ladder did not comply with applicable building code, where property had been approved by a building inspector for occupancy, thus indicating compliance with the applicable ordinances.

[5] Negligence 272 ⚿1101

272 Negligence
272XVII Premises Liability
272XVII(D) Breach of Duty
272k1100 Buildings and Structures
272k1101 k. In General. Most Cited Cases
Agreement made by the landowner in an application for a building permit to comply with the applicable building code does not establish that landowner was aware of the applicable provisions of the building code and actually knew or should have known that element of premises failing to comply with building code constituted a dangerous condition within the meaning of premises liability statute. West's C.R.S.A. § 13-21-115.

[6] Evidence 157 ⚿201

157 Evidence
157VII Admissions
157VII(A) Nature, Form, and Incidents in General
157k201 k. Subject-Matter. Most Cited Cases
Premises owner's statement in pleadings in premises liability action, that injuries sustained in plaintiff's fall from ladder were the result of an open and obvious condition, was not admissible as an admission against interest to prove that ladder constituted a dangerous condition under premises liability statute; pleadings asserted that the existence of the ladder was open and obvious, and did not admit that the ladder was faulty or constituted a dangerous condition.

[7] Evidence 157 ⚿208(6)

157 Evidence
157VII Admissions
157VII(A) Nature, Form, and Incidents in General
157k206 Judicial Admissions
157k208 Pleadings
157k208(6) k. Pleadings Superseded, Withdrawn, or Abandoned. Most Cited Cases
Where the defendant files a pleading that is subsequently abandoned or superseded by amendment, the original pleading is admissible against the pleader in the proceedings in which it was filed, as evidence of admissions against interest contained therein; however, the alleged admission must be unequivocal.

Law Office of Mickey W. Smith, Mickey W. Smith, Pueblo, Colorado; Gradisar, Trechter, Ripperger, Roth & Croshal, James M. Croshal, Pueblo, Colorado, for Plaintiff-Appellant Turene Lombard.
Law Office of Jeffrey C. Fleischner, Jeffrey C. Fleischner, Greenwood Village, Colorado, for Plaintiff-Appellant Pueblo School District # 60.
Burg Simpson Eldredge Hersh & Jardine, P.C., Diane Vaksdal Smith, David K. TeSelle, Englewood, Colorado, for Defendants-Appellees.
Opinion by Judge ROY.
***1** Plaintiffs, Turene Lombard (the teacher) and Pueblo School District # 60 (the employer), appeal

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the trial court's summary judgment in favor of defendants, Colorado Outdoor Education Center, Inc., and Sandborn Western Camps, Inc. (collectively, the camp). We affirm.

Plaintiffs commenced this proceeding alleging that the teacher was injured when she slipped and fell from a ladder in her room while attending programs at "The Nature Place," a conference facility, lodge, and camp owned and operated by defendants. The ladder connected the lower floor of her unit with an upper level loft which provided an additional sleeping area. The employer's interest in this matter is that it has paid, and continues to pay, workers' compensation benefits to the teacher.

The camp filed a motion for summary judgment in which it asserted that there was no evidence that it actually knew or should have known that the ladder was a dangerous condition. The teacher filed a cross-motion for summary judgment. The trial court granted the camp's motion, and this appeal followed.

I. Facts

The facts are undisputed. On February 26, 2000, the teacher, in the course of her employment, was attending a conference at the camp's facility and was staying in the lodge. Her lodge unit measured twenty feet by twenty feet. The lower level had a closet, kitchenette, and bathroom along one wall, all of which measured approximately ninety square feet. The loft, positioned above the closet, kitchenette, and bathroom, also measured approximately ninety square feet. The loft's floor was seven and one-half feet above the lower level. An attached ladder connected the two levels.

The ladder consisted of eight treads approximately fifteen inches wide and five and one-half inches deep, situated between two two-by-six side rails. The ladder had no hand rails or guard rails and was "leaning" against the wall to which it was attached at a seventy-six degree angle to the floor. There were, however, rails and walls at the top of the ladder with which a person could steady and orient himself or herself before starting down the ladder. The teacher apparently slipped on, or missed, a step as she was descending the ladder, fell to the lower floor, and suffered injuries.

The unit was constructed between 1981 and 1983 by the camp from plans prepared by an " Architectural Designer." The camp obtained a building permit from the county, which approved the plans, conducted the requisite inspections, and issued a certificate of occupancy. The construction was accomplished with the then president of the camp acting as a general contractor and an employee acting as a subcontractor.

The camp submitted the affidavit of an employee stating that, after a thorough review of the records and interviews with current and former employees, there had been no accidents or injuries associated with the use of ladders in the unit in question or the other forty-three similarly designed units in the seventeen years the subject unit had been used and the twenty years since the first of such units was constructed. Nor had the camp been advised by anyone that the ladders constituted a dangerous condition.

***2** Plaintiffs responded with the reports and affidavits of two expert witnesses, both architects, which stated that the ladder violated the provisions of the applicable building code, International Conference of Building Officials, *Uniform Building Code* §§ 3301, 3305 (1976), and, therefore, constituted a dangerous condition. They further opined that a traditional or standard stairway was required. One expressed the additional opinion that the ladder did not comply with American National Standards Institute (ANSI) Standard A14.3-1974 (safety requirements of fixed ladders), and, therefore, constituted a dangerous condition. The ANSI standard is not a law or a regulation.

II. Issue

The issue presented here is whether a violation of an applicable building code provision on a premises, without more, can constitute a dangerous condition about which the owner actually knew, or should have known, such that the owner is liable under § 13-21-115, C.R.S.2006, for personal

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injuries sustained by an invitee. Or, put another way, can negligence per se based on the violation of an applicable building code provision in the construction of a premises, without more, establish liability under § 13-21-115? We conclude that it can not.

III. Standard of Review for Summary Judgment

Summary judgment is appropriate 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. The moving party has the burden of establishing the lack of a triable factual issue, and all doubts as to the existence of such an issue must be resolved against the moving party. *Cung La v. State Farm Auto. Ins. Co.,* 830 P.2d 1007 (Colo.1992). In a case where a party moves for summary judgment on an issue on which that party would not bear the burden of persuasion at trial, the initial burden of production may be satisfied by showing the court that there is an absence of evidence in the record to support the nonmoving party's case.*Cont'l Air Lines, Inc. v. Keenan,* 731 P.2d 708 (Colo.1987). We review a grant of summary judgment de novo. *Vail/Arrowhead, Inc. v. Dist. Court,* 954 P.2d 608 (Colo.1998).

IV. Premises Liability Statute

When construing statutes, our primary duty is to give effect to the intent of the General Assembly, looking first to the statute's plain language. *In re 2000-2001 Dist. Grand Jury,* 97 P.3d 921 (Colo.2004). If a statute is clear and unambiguous on its face, then we need not look beyond the plain language and must apply the statute as written. *Garhart ex rel. Tinsman v. Columbia/HealthONE, L.L.C.,* 95 P.3d 571 (Colo.2004). In addition, "[w]e construe statutory and constitutional provisions as a whole, giving effect to every word and term contained therein, whenever possible."*Bd. of County Comm'rs v. Vail Assocs., Inc.,* 19 P.3d 1263, 1273 (Colo.2001).

[1] Finally, as here, where the interaction of common law and statutory law is at issue, " ' [s]tatutes 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.'"*Vaughan v. McMinn,* 945 P.2d 404, 408 (Colo.1997) (quoting *Van Waters & Rogers, Inc. v. Keelan,* 840 P.2d 1070, 1076 (Colo.1992)).

*3 The premises liability statute was adopted in direct response to *Mile High Fence Co. v. Radovich,* 175 Colo. 537, 489 P.2d 308 (1971), for the stated purpose of "protect[ing] landowners from liability in some circumstances when they were not protected at common law and to define the instances when liability will be imposed in the manner most consistent with the policies set forth in [the same subsection]."Section 13-21-115(1.5)(e), C.R.S.2006 . In *Mile High Fence,* a police officer conducting surveillance late at night stepped into an empty post hole located on private property seven inches off of a paved alley. The officer obtained judgment against the fencing company responsible for constructing the fence, which argued on appeal that the officer was a licensee and, therefore, it did not owe him a duty of care. The supreme court, after concluding that the common law classifications of invitee, licensee, and trespasser were harsh, established one standard of care for possessors of real property. The standard adopted was one of a reasonable landowner in view of the probability or foreseeability of injury to others. And while the classification of the injured party's status could have some bearing on the question of liability, it was only as a factor and was not conclusive.

After the supreme court's holding in *Mile High Fence,* the General Assembly's adoption of the premises liability statute reinstated the common law classifications and established a standard of care applicable to each classification. The current premises liability statute, § 13-21-115, provides in pertinent part that an invitee may only recover from a landowner "damages caused by the landowner's unreasonable failure to exercise reasonable care to protect against dangers of which he *actually knew or should have known.*" Sections 13-21-115(2),

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(3)(c)(I), C.R.S.2006 (emphasis added). An "invitee " is a person "who enters or remains on the land of another to transact business in which the parties are mutually interested or who enters or remains on such land in response to the landowner's express or implied representation that the public is requested, expected, or intended to enter or remain."Section 13-21-115(5)(a), C.R.S.2006.

Our supreme court then held in *Vigil v. Franklin,* 103 P.3d 322 (Colo.2004), that the current premises liability statute abrogated the common law of landowner duties. In *Vigil,* an injured party sued the property owner after suffering serious injury by diving into an aboveground pool that was four feet deep. The property owner raised the obvious hazard defense, which holds that there is no duty to warn of an obvious hazard. The trial court granted summary judgment to the defendants. The supreme court reversed, stating that the unambiguous language in the premises liability statute indicates the General Assembly's intention to completely occupy the field and supersede the existing law in the area. In addition, the supreme court stated:

***4** [T]he premises liability statute's classification of the duty owed ... invitees is ... complete and exclusive....*[A] landowner owes an invitee the duty to exercise reasonable care in protecting against known dangers or those which the landowner should have known. Since these are the "only" situations under which a[n] ... invitee may recover, the statute's definition of landowner duty is complete and exclusive, fully abrogating landowner common law duty principles.*As such, the plain language preempts prior common law theories of liability, and establishes the statute as the sole codification of landowner duties in tort.

Vigil v. Franklin, supra, 103 P.3d at 328 (emphasis added).

V. Negligence Per Se

Negligence per se is a common law principle that the violation of a statute or ordinance establishes a breach of a duty owed to the plaintiff, thus conclusively proving negligence. Generally, persons are presumed to have constructive notice of a statute, ordinance, or code. *See, e.g., Hecla Mining Co. v. New Hampshire Ins. Co.,* 811 P.2d 1083 (Colo.1991).

For negligence per se, a plaintiff must show that (1) the defendant violated a statutory standard; (2) this violation proximately caused the injuries at issue; and, (3) the plaintiff "is a member of the class which the statute or ordinance was intended to protect and ... his injuries are of the type it was enacted to prevent."*Foster v. Redd,* 128 P.3d 316, 318 (Colo.App.2005) (quoting *Bittle v. Brunetti,* 750 P.2d 49, 55 (Colo.1988)); *see also Largo Corp. v. Crespin,* 727 P.2d 1098 (Colo.1986).

In the building code context, and prior to the enactment of the current premises liability statute, negligence per se had been entertained and rejected in several cases because one or more of its elements was not present. *See Harless v. Geyer,* 849 P.2d 904 (Colo.App.1992) (installation of linoleum on stairs was not a sufficient modification to require that stairs be brought up to current code); *Comfort v. Rocky Mountain Consultants, Inc.,* 773 P.2d 615 (Colo.App.1989) (ordinance requiring approval of plans for construction of a ditch was not designed to protect passengers of an automobile that left the road and crashed into the ditch); *Iverson v. Solsbery,* 641 P.2d 314 (Colo.App.1982) (cost of bringing residence up to code is not an injury that the code is intended to prevent).

However, in those cases in which the elements of negligence per se have been found to be present, divisions of this court are split on its application to the building code. In *Singleton v. Collins,* 40 Colo.App. 340, 574 P.2d 882 (1978), a plaintiff fell while climbing a stairway in an apartment building. While the stairs violated the building code, the defendant was not the builder of the apartment complex, and the property had been approved for occupancy by the building inspector, thereby indicating compliance with the applicable ordinances. The division concluded that "[u]nder these circumstances there is no reasonable basis for the application of the strict rule of negligence per se, and in the absence of some showing of notice there is no liability."*Singleton v. Collins, supra,* 40 Colo.App. at 342, 574 P.2d at 882.

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*5 In *Aetna Casualty & Surety Co. v. Crissy Fowler Lumber Co.,* 687 P.2d 514 (Colo.App.1984), the defendant fabricated trusses which sagged after a snowfall because they pulled apart at their joints. The plaintiff, having reimbursed the owner for his damages under an insurance contract, brought a subrogation claim against the defendant for the cost of repair. The trial court refused to give the jury an instruction on negligence per se, and the division reversed. Without acknowledging *Singleton v. Collins, supra,* or identifying the provision of the building code in question, the division stated:
[I]n the instant case, different from *[Iverson v. Solsbery, supra],* there was evidence that an actual failure did occur, that the building itself was damaged, and that such damage would not have occurred had [the defendant] complied with the code. There is no logical reason to exclude the building owner from the class designed to be protected by the building code. And, the damages to the building resulting from the failure of the trusses is obviously a type of injury that the code was designed to prevent. An instruction on negligence per se should have been given.

Aetna Cas. & Sur. Co. v. Crissy Fowler Lumber Co., supra, 687 P.2d at 516;*see also Creek v. Nonpareil Inv. Co.,* 66 Colo. 550, 185 P. 473 (1919) (court applied a state statute establishing standards for stairways that specifically permitted personal injury claims based on noncompliance with the statute).

Cases from other jurisdictions decline to apply negligence per se to building code violations because some such defects cannot be discovered upon a reasonable inspection of the premises. *See, e.g., Fitzgerald v. Cestari,* 569 So.2d 1258 (Fla.1990) (defendants were relieved from liability for failing to ascertain that the sliding glass door was not made of safety glass as required by the applicable building code because the lack of safety glass was not discoverable through a reasonable inspection by the owners); *Bills v. Willow Run I Apartments,* 547 N.W.2d 693 (Minn.1996) (the owner reasonably relied on the inspection reports of a state building inspector and thus could not be expected to reinspect the property); *Sikora v. Wenzel,* 88 Ohio St.3d 493, 727 N.E.2d 1277 (2000) (the property owner had no way of knowing that a deck was improperly designed).

VI. Analysis and Holding

[2] Here, the parties agree that the teacher was an invitee. The standard of care contained in the premises liability statute for invitees is "the unreasonable failure to exercise reasonable care to protect against dangers of which [the landowner] actually knew or should have known."Section 13-21-115(3)(c)(I). The phrase "unreasonable failure to exercise reasonable care" appears to be redundant in that the failure to exercise reasonable care is, almost by definition, unreasonable. However, the phrase makes the statement more emphatic and may serve to narrow those dangerous conditions about which a landowner "knew or should have known." In addition, the General Assembly did not define "should have known." However, by recognizing that its purpose in revising the premises liability statute was "to protect landowners from liability in some circumstances when they were not protected at common law," at a minimum "should have known" provides the same, if not higher, protection for landowners than existed prior to *Mile High Fence v. Radovich.*Section 13-21-115(1.5)(e).

*6 Based on the definition of an invitee, we conclude here that the common law principle of negligence per se is abrogated in the premises liability context by § 13-21-115. As previously described, our supreme court in *Vigil v. Franklin, supra,* held that the premises liability statute's classification of a duty owed to an invitee is complete and exclusive and fully abrogates landowner common law duty principles. In addition, there is a logical disconnect between the standard contained in the premises liability statute and the principle of negligence per se.

Negligence per se is premised on constructive, not actual, notice of the requirements of a statute, ordinance, code, or regulation. *See, e.g., Hecla Min. Co. v. New Hampshire Ins. Co., supra.*" Constructive notice" is defined as "[n]otice arising by presumption of law from the existence of facts

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and circumstances that a party had a duty to take notice of ...; notice presumed by law to have been acquired by a person and thus imputed to that person."*Black's Law Dictionary* 1090 (8th ed.2004). "Constructive knowledge" is defined as " [k]nowledge that one using reasonable care or diligence should have, and therefore is attributed by law to a given person."*Black's, supra,* at 888. " Actual knowledge" is defined as "[d]irect and clear knowledge as distinguished from constructive knowledge."*Black's, supra,* at 888.

The phrase "should have known" has historically been used in conjunction with "know" or " knowledge" to create an objective standard to avoid denial of apparent facts or intentionally induced ignorance. A division of this court in *Sulca v. Allstate Insurance Co.,* 77 P.3d 897 (Colo.App.2003), citing a previous edition of *Black's Law Dictionary,* stated:

Dictionaries define "knowledge" as "an awareness or an understanding" and "actual knowledge" as " [an awareness or an understanding] of such information as would lead a reasonable person to inquire further."*E.g., Black's Law Dictionary* 876 (7th ed.1999); *Webster's Third New International Dictionary* 1252 (1986) (defining "knowledge" as " the act, fact, or state of knowing; ... awareness [or]understanding").

Most statutes of limitations require that a plaintiff know or, after the exercise of reasonable diligence, should have known of the triggering event or circumstance.

The requirement that a plaintiff use due diligence in discovering the relevant circumstance or event imposes an objective standard and does not reward denial or self-induced ignorance.

Sulca v. Allstate Ins. Co., supra, 77 P.3d at 900 (additional citations omitted).

In our view, it is improper to equate "actually knew or should have known" with "constructive notice" or "constructive knowledge." The former type of knowledge is actual and direct, while the latter two are presumed. This disconnect, coupled with our supreme court's holding in *Vigil v. Franklin, supra,* that the premises liability statute abrogates the common law, leads us to conclude that negligence per se is not a viable theory upon which to establish a breach of a duty in a premises liability case.

*7 [3] Moreover, the building code, standing alone, is a complex document which contains only a portion of the requirements applicable to the construction of a building. Other requirements are contained in, among perhaps others, equally complex electrical, mechanical, plumbing, and fire codes. The interpretation and application of these codes, individually and collectively, is not an altogether simple matter and is, in our view, beyond the purview of the general citizenry, as it is beyond ours. Therefore, knowledge of the provisions of the building and related codes and their application to a particular structure should not be presumed, and it would be sophistry to conclude that landowners in general know or should know that the conditions occasioned by a violation of them would constitute a dangerous condition.

[4] Moreover, even if we determined that negligence per se was not abrogated by the premises liability statute, it is not a doctrine of universal application, and we would be disposed to follow *Singleton v. Collins, supra,* a pre-premises liability statute case, because there, as here, the property had been approved by a building inspector for occupancy, thus indicating compliance with the applicable ordinances.

[5] Finally, plaintiffs argue that, because the application for the building permit was made by the camp, the application was signed by an officer of the corporation, and the work was contracted to an employee, the camp had actual knowledge of the dangerous condition because it had actual knowledge of the building code. This argument is predicated on the "agreement" set forth on the building permit application, which states, in part: "I, the undersigned, do hereby agree to perform the work herein and to conform to all requirements of the Teller County Building Code for construction within this jurisdiction."

In our view, an "agreement" made by the landowner in an application for a building permit to comply with the applicable building code does not support the proposition that the landowner was aware of the

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applicable provisions of the building code and actually knew or should have known that the ladder violated the building code and, therefore, constituted a dangerous condition within the meaning of the premises liability statute.

Therefore, we conclude that the trial court did not err in granting summary judgment on plaintiffs' premises liability claim based on their contention that violation of the building code established negligence per se.

VII. Camp's Admission Against Interest

[6] Plaintiffs assert that the trial court erred by refusing to consider the camp's admission that the condition created by the ladder was open and obvious. We disagree.

[7] Where the defendant files a pleading that is subsequently abandoned or superseded by amendment, the original pleading is admissible against the pleader in the proceedings in which it was filed, as evidence of admissions against interest contained therein. W.R. Habeeb, Annotation, *Admissibility in Evidence of Withdrawn, Superseded, Amended, or Abandoned Pleading as Containing Admissions Against Interest,* 52 A.L.R.2d 516 § 5[a] (1957);*see also Burris v. Anderson,* 27 Colo. 506, 62 P. 362 (1900). However, the alleged admission must be unequivocal. *Anderson v. Watson,* 929 P.2d 6 (Colo.App.1996).

***8** Here, the camp's eleventh defense to plaintiffs' complaint stated that "Plaintiffs' injuries occurred as the result of an open and obvious condition."By this statement, the camp asserted that the existence of the ladder was open and obvious; it did not admit that the ladder was faulty or constituted a dangerous condition. Thus, the trial court correctly refused to consider this statement as an admission of a dangerous condition under the premises liability statute.

The judgment is affirmed.

Judge LOEB and Judge ROMÁN concur.

Colo.App.,2007.
Lombard v. Colorado Outdoor Educ. Center, Inc.
--- P.3d ----, 2007 WL 177686 (Colo.App.)

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Exhibit B

DISTRICT COURT, TELLER COUNTY, COLORADO Court address: **P.O. Box 997** **101 West Bennett Ave.** **Cripple Creek, CO 80813** **(719) 689-0450**	**EFILED Document** **CO Teller County District Court 4th JD** **Filing Date: Jul 12 2005 2:44PM MDT** **Filing ID: 6188419** **Review Clerk: Nancy Ashley** Court Use Only
TURENE LOMBARD, et. al., Plaintiffs, vs. COLORADO OUTDOOR EDUCATION CENTER, INC., et. al., Defendants.	Case Number 02CV49 **Division 11**
ORDER RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT	

This matter is before the Court on the Defendants' motion for summary judgment. Having reviewed the pleadings and being fully advised, the Court Orders as follows:

The Defendants have sought summary judgment, arguing that there is no evidence that they knew or should have known of the alleged dangerous condition on the subject property. In support of the motion, the Defendants rely on the premises liability act and submit the affidavit of Jane Sanborn. The Court is satisfied that based upon the Defendants' motion and the supporting affidavit, the Defendants have met their initial burden of showing the absence of a disputed issue of fact.

The burden thus shifts to the Plaintiffs to demonstrate the existence of a triable fact. The Plaintiffs argue that the ladder accessing the loft was not constructed in accordance with the building code, and since the Defendants were responsible for construction and agreed to construct the property in accordance with the code, that satisfies their burden. The Court disagrees. As the Defendants point out, the Plaintiffs' claim is based solely on the premises liability statute. Whether the property was constructed in accordance with the building code is irrelevant, unless the Defendants knew or should have known of that violation. While the fact that the Teller County Building Department approved the construction is not dispositive, it certainly supports the Defendants' argument. In addition, the undisputed fact that the ladder was used without incident for 17 or more years is further support. The Court concludes that consistent with the Casey and Thewlis cases the Plaintiffs have failed to demonstrate any evidence that the Defendants knew or should have known of the alleged dangerous condition and are therefore entitled to prevail.

The Motion for Summary Judgment filed by Defendants Colorado Outdoor Education Center, Inc., and Sanborn Western Camps, Inc. is Granted. Judgment shall enter in favor of the Defendants and against the Plaintiffs. Having resolved all disputed claims, the trial date is vacated and this case is closed. This is a final, appealable Order.

B
Blumberg No. 5116

SO ORDERED July 12, 2005.

BY THE COURT

THOMAS L. KENNEDY
DISTRICT COURT JUDGE