

**IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA**

Case No. 4D 2024-1364

On Appeal from the Seventh Judicial Circuit Court
in and for Broward County, Florida
L.T. CASE NO: CACE-22-009473

XIULING HU,

Appellant,

v.

ANNA HUA, BIHN TEN DIEP
and LAURIS HUA,

Appellees.

APPELLANT'S REPLY BRIEF

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SUPPLEMENTAL PRELIMINARY STATEMENT

Besides the designation of the parties and the references to the record indicated in the Appellant’s Initial Brief, Appellant will refer to (a) her Initial Brief filed on July 26, 2024, as “Initial Brief” or “App. Init. Br.,” followed by the page number, (b) Answer Brief filed November 18, 2024, as “Answer Brief” or “Ans. Br.,” followed by the page number and (c) the Transcript of the March 4, 2024, Hearing on Appellees’ Summary Judgment Motion attached to the Unopposed Motion to Supplemental the Record on Appeal filed on November 11, 2024, granted two days later as “Hearing Transcript,” followed by the page number(s) and line(s), as appropriate.¹

ARGUMENT IN RESPONSE AND REBUTTAL TO ANSWER BRIEF

A. Appellees’ reliance on § 83.51, *Fla. Stat.* is misplaced as a matter of law.

Appellees’ reliance on § 83.51, *Fla. Stat.*, on page 23 of their Answer Brief is misplaced as a matter of law. § 83.51, *Fla. Stat.*, is part of the “Florida Residential Landlord and Tenant Act,” Part II of Chapter 83 of the Florida Statutes, and only applies to “rental of a dwelling unit.” See §§ 83.40 and 83.41, *Fla. Stat.* See, e.g., *Paterson v. Deeb*, 472 So. 2d 1210, 1216 (Fla. 1st DCA 1985). The property at issue here is commercial property governed by Part I of Chapter 83 of the Florida Statutes, see § 83.001, *Fla. Stat.*, and contains no provisions like § 83.51, *Fla. Stat.*

¹ Appellant would refer to a Record citation for the Hearing Transcript, but it appears Appellees do not appear to have monitored its filing by the clerk of the lower tribunal.

B. Appellees Apply the Wrong Standard for Liability,

Appellees cite to cases for the proposition that landlords are not strictly liable for injuries on their property (*see* Answer Brief at 15), boldly concluding that landlords cannot be liable if they are not strictly so. That is not Florida law. Landlords are liable for defects of which they knew or should have known (see, e.g., *Bovis v. 7-Eleven, Inc.*, 505 So. 2d 661, 664 (Fla. 5th DCA 1987) (*see* Answer Brief at 15, 18 and 20), unless the landlord has ceded all control over the property as discussed below.

1. The Appellees did not cede to their tenant all control over the property.

Appellant recognizes the exception to the general rule “that when the owner of real property surrenders possession **and** control of the premises to another, the owner will not be liable for injuries to third parties occurring on the premises.” *See, e.g.*, Answer Brief at 14-15 (Emphasis added). Here, however, as in *Wal-Mart Stores v. McDonald*, 676 So. 2d 12 (Fla. 1st DCA 1996) (*see* Appellees’ Answer Brief at 16), a landlord and a tenant may both be liable for damages to an invitee, and, as in *Haines v. Dania Corner, Inc.*, 920 So. 2d 1289, 1290 (Fla. 4th DCA 2006) and *Wimbush v. Gaddis*, 713 So. 2d 1107, 1108 (Fla. 4th DCA 1998) (*see* Answer Brief at 15 for both), the lease between Appellees and their tenant makes it clear that Appellees did not cede all control over the property.

It remains uncontroverted that the lease between the Appellees and their

tenants (R.435–446) was in effect from October 15, 2016, through November 10, 2019, when Appellant fell and broke her back, including when the lease was assigned on July 27, 2019, by Shufeng Li, the original tenant. *See* Initial Brief at 6 – 7. It is also uncontroverted that the step was built prior to July 27, 2019, when the lease was assigned, and that the 10/15/16 Lease (R.435-445) and 7/27/19 Lease Assignment (R.426 – 452) were signed by Appellee Lauris Hua as manager of Brand 88, LLC (R, 445, 456, 452), leasing manager for the Appellees. The premises continued to be owned by the Appellees until they executed a quit claim deed (R. 447 – 448) on July 22, 2022, a year and a half after the November 2019 accident.

Under the 10/15/16 Lease, Appellees had the right to enter and inspect the premises to assure that tenants complied with the lease and that any construction at the premises complied with building codes. Paragraphs 13 (R.438-439), 15 (R.439) and 20.a. (R.441) of the 10/15/16 Lease state, in pertinent part, as follows:

13. **Improvements and Alterations:**

Tenant covenants and agrees that it will not make any alterations, improvements or additions to the subject premises during the term of this lease or any extension thereof without first obtaining written consent of the Landlord. ...

... Tenant must obtain all required building permits for such work and must provide a copy of same to Landlord. All improvements must comply with any City, County, State and Federal rules or regulations. ...

15. **Right of Entry:**

Landlord has the right at all reasonable times to enter the premises to inspect, to maintain, to repair, or to make reasonable

alterations to the premises. ...

20. **Rights of Landlord:**

Landlord reserves the following rights with respect to the subject premises:

- a. At all reasonable times by itself or by its duly authorized representatives, to go upon and inspect the subject premises and every part thereof at its option to make repairs, alterations and additions to the subject premises or the building of which the subject premises are a part;

Where, as here, owners have “a right of entry and inspection,” they remain responsible for conditions which they did not inspect and can be liable for damages caused by defects in that portion of their property. *See, e.g., Haines*, 920 So. 2d at 1290 and *Wimbush*, 713 So. 2d at 1108 (both cited at page 15 of the Answer Brief). Because a tenant was not given **exclusive** control over the condition and construction of the step, Appellees retained control over the condition of the steps by virtue of their rights in paragraphs 13, 15 and 20.a. of the 10/15/16 Lease and continue to be liable for the dangerous conditions of the step about which they knew or should have known. *See, e.g., Wal-Mart Stores*, 676 So. 2d at 15. *See also Russ v. Wollheim*, 915 So. 2d 1285, 1287 (Fla. 2d DCA 2005) (quoted in *Haines*, 920 So. 2d at 1290).

Alternatively, issues of fact regarding joint control related to a dangerous condition makes summary judgment inappropriate. *See, e.g., Benton Inv. Co. v. Wal-Mart Stores, Inc.*, 704 So. 2d 130, 131 (Fla. 1st DCA 1997).

2. The Appellees are liable for defects of which they knew or should have known.

Analysis of liability starts with the general rule that landowners of commercial premises owe “an invitee two independent duties: (1) to maintain the premises in a reasonably safe condition, and (2) to give warning of concealed perils,” both of which apply here. *See Burton v. MDC PGA Plaza Corp.*, 78 So. 3d 732, 734 (Fla. 4th DCA 2012) (reversing summary judgment for a landowner). The duty is owed whether the danger is latent, arguably as with the step’s flex defect and the lack of anti-slip mats, or patent, arguably as with the step’s lack of handrails. The duty owed by landowners to an invitee is to “keep [their] property reasonably safe and protect the visitor from dangers of which [they are], or ***should be***, aware.” *See, e.g., Arias v. State Farm Fire & Ca. Co.*, 426 So. 2d 1136, 1138 (Fla. 1983) (*see* Answer Brief at 15, emphasis added). The Appellees, through Anna Hua or Lauris Hua, either were, as discussed below, aware and accepted the step despite its dangerous conditions or should have known of those conditions as a consequence of their right of entry and inspection. Here, only if they did not know ***and*** had no reason to know of a dangerous defect in the steps are they relieved of their duty to maintain reasonably safe premises and to give warning of concealed perils. To paraphrase *Bovis*, 505 So. 2d at 664 (*see* Answer Brief at 15, 18 and 20, emphasis added), Appellees may be liable to third persons “for injuries resulting from latent dangerous conditions of which [Appellees] ***knew or should have known*** and which existed on the leased premises when the [Appellees] delivered possession of the leased premises to the lessee [on July 27,

2019], without appropriate warnings[;] such liability is not based on the fact that [Appellees], *as possessor*, can be negligent in these particulars just as any other possessor.” *See also Wimbush*, 713 So. 2d at 1108 (*see* Answer Brief at 15).

As this court also held as to patent dangers, “[c]ase law consistently recognizes that the fact that a danger is open and obvious may operate to discharge a landowner's duty to warn, but it does not discharge the duty to maintain the property in a reasonably safe condition.” *Burton*, 78 So. 3d at 734 (quoting *Lomack v. Mowrey*, 14 So. 3d 1090, 1092 (Fla. 1st DCA 2009)). Even if Ms. Hu was aware of a danger posed by the step, such awareness does not negate the Appellees’ “potential liability for negligence in allowing the dangerous condition to exist,” although it may be relevant to a determination of comparative negligence. *Burton*, 78 So. 3d at 734. “[T]he courts generally agree that the obvious danger doctrine does not apply when negligence is predicated on breach of the duty to maintain the premises in a reasonably safe condition.” *Burton*, 78 So. 3d at 735.

Appellees reliance on *Fitzgerald v. Cestari*, 569 So. 2d 1258 (Fla. 1990), and *Mai Kai, Inc. v. Colucci*, 205 So. 2d 291 (Fla. 1967), both decided before most of the previously cited cases, is also misplaced for several reasons.

First, unlike *Fitzgerald*, the dangerous conditions here - the lack of a handrail and an anti-slip mat and the fact that the step would flex - were, according to Shufeng Li’s testimony, known by the Appellees due to Anna Hua’s acceptance

of the defective steps as described again below. Because Appellees had actual notice of the defects, *Fitzgerald* cannot be a basis for summary judgment. See *Perez v. Belmont at Ryals Chase Condo. Ass'n, Inc.*, 393 So. 3d 859 (Fla. 2d DCA 2024), reversing *Perez v. Belmont at Ryals Chase Condo. Ass'n, Inc.*, CASE NO.: 20-CA-1082-ES, 2023 Fla. Cir. LEXIS 313 at *1 (Fla. 6th Cir. Mar. 29, 2023), which cited *Fitzgerald* as a basis for summary judgment. Even Appellees' knowledge of one of the defects, for example no handrail, might make *Fitzgerald* applicable but not controlling. See *Anderson v. Fiocchi*, 646 So. 2d 275, 276 (Fla. 2d DCA 1994). But summary judgment is also not appropriate, because Appellant has alleged and proven Appellees' had actual or constructive knowledge of the defects constituting code violations, and the defects lasted a sufficient time for the Appellees to correct them, see Complaint at ¶9 (R. 23), even if the Appellees were ignorant of the steps' building code violations. See *Grant v. Thornton*, 749 So. 2d 529 (Fla. 2d DCA 1999) (citing *Fitzgerald* at page 532).

Even if Appellees had not been on actual notice of the defects, Appellant, a business invite who had not previously been in the premises unlike tenants who lived there in *Fitzgerald*, was not in as good a position as Appellees who had control of the premises to guard against the dangerous steps. That the step was built without the consent of the Appellees required by paragraph 13 (R.438-439) of the 10/15/16 Lease should have raised an immediate red flag requiring a thorough inspection.

Appellees' reliance on the *Mai Kai* case is misplaced for many of the same reasons *Fitzgerald*. Here, unlike in *Mai Kai*, defects were known to the Appellees due to Anna Hua's acceptance of the steps despite the obvious defects. See Discussion *infra* at Section D.1. Appellees should also have inspected the steps under the terms of the 10/15/16 Lease, which was not required in *Mai Ka*. In *Mai Kai*, also unlike here where at least some of the defects were patent, the evidence appeared undisputed "to the effect that the imperfection was not apparent on inspection." *Mai Kai*, 205 So. 2d at 292. Even the latent defects here could have been discovered had Appellees been reasonably careful and inspected as they should have under the 10/15/16 Lease, which was not the case in *Mai Kai*. As stated by the *Mai Kai* court, the duty to exercise "reasonable care is nondelegable in the sense that a contract for its performance by another will not necessarily eliminate an owner's responsibility" and "remains one of due care or reasonable care in preventing or correcting an unsafe condition." *Id.* at 293.

C. Appellees Do Not Contest the Lack of Due Process Concerning the Existence of Defects

While Appellees assert in their Answer that Appellant was on notice of Appellees' claim of blanket immunity discussed above, they do not contest Appellant's due process argument that they failed to allege with particularity in their summary judgment motion, as required by *Fla. R. Civ. P.* 1.510(a) and (c); their *ore tenus* argument at hearing that no defect existed was, consequently, waived.

D. Sufficient Evidence Existed to Allow a Jury to Find That Appellees Knew or Should Have Known About the Relevant Defects.

Despite the lack of due process, sufficient evidence existed in the record to allow a jury to find that Appellees knew or should have known about the defects.

1. Appellees knew or should have known of the defects in the steps at the time before Appellant was injured.

The evidence in the record on March 4, 2024, supports a jury finding that at least two of the Appellee owners, Lauris Hua and Anna Hua, had been in the premises and knew or should have known about the step prior to the accident on November 10, 2019. On questioning by both Appellant's and Appellee's counsel, Shufeng Li, the tenant, testified that Anna Hua, one of the owners, came into the premises after the step was built and knew about, inspected and accepted it before the November 2019 accident. *See* Li Dep. p. 11 (R.878), line 17 – p. 12 (R.879) at line 25; p. 26 (R.893) at lines 9-23; p. 27 (R.894) at lines 1-12. Despite the owners' or constructive knowledge, Ms. Li testified that before the lease was assigned on July 27, 2019, the owners did not ask her to remove the step. *See* Li Dep. p. 18 (R.885) at line 21 through p. 19 (R.886) at line 10.

Lauris Hua, another owner, testified that she signed the 7/27/19 Lease Assignment at the leased premises where the step was located (*see* L. Hua Dep. p. 46 (R. 786) at lines 14 – 22, p. 65 (R. 805), lines 1 – 170, over three months before the accident. Even though she, as an owner and one of the landlords, had a right to

do so under the 10/15/16 Lease, Lauris Hua testified that she did not inspect the premises at that time. *See* L. Hua Dep. p. 65 (R. 805), lines 18 – 22. Lauris Hua did not discuss the condition of the step with the new tenants when the 7/27/19 Lease Assignment, which she drafted and approved, was signed. *See* L. Hua Dep. p. 65 (R. 805), lines 23-25, p. 69 (R. 809), line 23 through p. 70 (R. 810), line ; p. 72 (R. 812) lines 10-12.

2. Appellant’s affidavit supplements, and does not contradict, blatantly or otherwise, her deposition testimony.

At deposition through an interpreter (R.619), Ms. Hu testified that she had an impression that a “liquid substance,” water, “partially” caused her fall (R.664 at lines 17- 19; R.665 at lines 19-21), but she also testified that “another reason [for her fall] was there is no anti-mat -- slippery mat on the step” (R.664 at lines 17- 20) and that she was “pretty firm” that the continuous (non-transitory) condition she believed caused her to fall was due to no anti-slip mat. (R.666 at lines 9-13).

Appellees’ counsel confirmed at the March 4, 2024, summary judgment hearing that Appellant testified that the lack of an anti-slip mat also caused her to fall. *Id.* at 21, lines 18-23. Despite Appellees’ counsel confirmation that testimony, Appellees’ counsel inexplicably told the court that “there is no record evidence that a defect in fact exists.” *Id.* at 25, lines 23-24.

Appellant’s affidavit did not contradict her deposition; it supplemented it. Her affidavit reiterated her prior impression of water on the step and re-confirmed her

testimony of no anti-slip mat on the step. R.605-606. at ¶14. It also supplemented her deposition stating that there were no signs warning of danger, that the step had no handrails, that Ms. Hu had to step down onto the step without being able to hold on to anything, and once her body weight shifted onto the step, she felt the step flex causing Ms. Hu to fall. *Id.* at ¶¶14 and 16. Those defects are more than a “janitorial matter,” as argued by Appellees. *See* Hearing Transcript at 5, lines 8-12, and 23, line 5. They are defects which no one can remedy with a broom or a mop.

The standard here is whether Appellant’s affidavit blatantly or baldly contradicts her deposition testimony. *See, e.g., Arnold v. Dollar Gen. Corp.*, 632 So. 2d 1144, 1145 (Fla. 5th DCA1994)(reversing summary judgment in a slip and fall) (*see* Answer Brief at 25).. *See also Perez v. Suszczynski*, 809 F.3d 1213, 1221 (11th Cir, 2016) (“dueling accounts” which do not “utterly discredit” another account is not a blatant contradiction). Appellant’s affidavit does not contradict, much less blatantly or baldly contradict, her deposition testimony. Even an affidavit conspicuously more detailed than deposition testimony does not alone prove a bald repudiation or inconsistency. *See Greeley v. Wal-Mart Stores E., LP*, 337 So. 3d 478, 481-482 (Fla. 2d DCA 2022). Similarly, clarifying prior testimony in light of later acquired information is not a blatant contradiction. *See, e.g., Faber v. Karl of Pasco, Inc.*, 198 So. 3d 875, 877-878 (Fla. 2d DCA 2016).

Because Ms. Hu's affidavit supplements deposition testimony, the supplemental information should be considered in opposition to a motion for summary judgment. *See, e.g., Bell v. Bailey*, 639 So. 2d 1063, 1064 (Fla. 3d DCA 1994). It is not a court's role on summary judgment to weigh credibility. *See, e.g., Grayson v. Warden*, 869 F.3d 1204, 1226-1227 (11th Cir.2017) (quoting *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 (11th Cir. 1996)). Even if there was a discrepancy between Ms. Hu's deposition and her affidavit, which there is not, a

court must be careful to distinguish "between discrepancies which create transparent shams and discrepancies which create an issue of credibility or go to the weight of the evidence." *Tippens v. Celotex Corp.*, 805 F.2d 949, 953 (11th Cir. 1986).

[E]very discrepancy contained in an affidavit does not justify a district court's refusal to give credence to such evidence. In light of the jury's role in resolving questions of credibility, a district court should not reject the content of an affidavit even if it is at odds with statements made in an early deposition.

Id. at 954 (quoting *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 894 (5th Cir. 1980)) (alteration in original) (citation omitted).

Faulk v. Volunteers of Am., N. Ala., Inc., 444 Fed. Appx. 316, 318 (11th Cir. 2011). *See also Sunbelt Worksite Mktg. v. Metro. Life Ins. Co.*, Case No. 8:09-cv- 02188-EAK-MAP, 2011 U.S. Dist. LEXIS 87387 at **8-9 (M.D. Fla. April 8, 2011) (an affidavit which "supplements earlier testimony, presents a variation of testimony, or represents instances of failed memory" at most only creates facts to be resolved by the trier of fact).

3. Appellant’s expert’s opinion meets the requirements of Florida law to be considered in opposition to the Appellees’ motion for summary judgment.

Before signing his affidavit (R. 609-610) opining that the bathroom steps were not built after obtaining a building permit and did not comply with the Florida Building Code or the Americans with Disabilities Act (“ADA”), Mr. Petrocelli inspected the steps to document their condition, and he reviewed the city property records. R. 609-610 at ¶¶ 4–7. He “conducted field measurements” and photographed “the shower and the step.” R. 609 at ¶ 6. A “3d scan of the shower and surrounding lobby” was performed “to create a representative model” for his investigation. R. 610 at ¶ 8. He cited specific sections of the Florida Building Code and the ADA that the construction violated. *Id.* at ¶¶ 8 and 9.

“The facts or data [for Mr. Petrocelli’s opinion were] those perceived by [him] at or before the trial,” as required by § 90.704, *Fla. Stat.* His affidavit was not based on unsupported personal preferences, as in *Ramsey v. Home Depot U.S.A., Inc.*, 124 So. 3d 415 (Fla. 1st DCA 2013) (*see* Answer Brief at 26) and was not framed “in terms only of conclusions of law,” as it must be to be conclusory. *See, e.g., Archer v. Tower Hill Signature Ins. Co.*, 313 So. 3d 645, 649 (Fla. 4th DCA 2021); *Div. of Admin., State Dept. of Transp. v. Samter*, 393 So. 2d 1142, 1145 (Fla. 3d DCA 1981) (*see* Answer Brief at 26). Mr. Petrocelli’s affidavit is supported by a “discernible, factually-based chain of underlying reasoning,” the standard to be applied. *See, e.g., M.A. Hajianpour, M.D., P.A. v. Khosrow Maleki, P.A.*, 932 So. 2d

459, 464 (Fla. 4th DCA 2006) (citing *Div. of Admin.*, 393 So. 2d at 1145). His reasoning based on his observation of the facts and his review of applicable codes is a “discernible, factually-based chain of underlying reasoning,” and is sufficient to support Appellant’s opposition to summary judgment. That he did not measure the friction coefficient of the tile when he described other defects, does not make his affidavit unreliable; at most, it may affect his credibility.

While “[e]xperts are allowed to give opinion testimony based on facts that the expert personally observed, even if those facts are not admissible themselves,” *see, e.g., Bigham v. State*, 995 So. 2d 207, 215 (Fla.2008) (citing § 90.704, *Fla. Stat.* (2005)), the defects in the steps are admissible. Appellees have “not demonstrated that the opinions given by the expert were outside the scope of his expertise or factual observations,” and his opinion should be allowed. *Id.*

Mr. Petrocelli’s personal observation of the steps and his citing to particular regulations violated by the construction requires the conclusion that Mr. Petrocelli’s opinion is not conclusory, even though personal observation is not an absolute prerequisite to admission under § 90.704, *Fla. Stat.*, as long as the facts on which the opinion is based “are of a type reasonably relied upon by experts in the subject to support the opinion expressed.” *See, e.g., Carratelli v. State*, 832 So. 2d 850, 861 (Fla. 4th DCA 2002). *See also Orpe v. Carnival Corp.*, 909 So. 2d 929 (Fla. 3d DCA 2005), concluding that an expert was permitted to testify respecting a safety issue

due to, among other things, the lack of handrails and warnings in a bathroom, even though he had not visited the accident site and had only viewed photographs of the subject door, latch and bathroom and of another cruise line's bathroom. *Id.* at 931.

Unlike in *Ramsey* (*see* Answer Brief at 26), Mr. Petrocelli, did “offer expert testimony to establish that the conditions complained of were [not] in compliance with” the ADA and Florida Building Code, did not rely only on “his own personal preferences” and instead indicated the source of his knowledge, his inspection of the steps and the requirements of. Appellees, on the other hand, provided no evidence and no opinion that the conditions complained of were not dangerous or were, in fact, in compliance with the ADA and the Florida Building Code. Thus, the situation here is the reverse of that in *Ramsey*, in which the movant's expert cited to the particular ADA Standards which the complained-of condition met, while the opposition's expert offered no evidence in opposition.

CONCLUSION

Appellees did not show that as a matter of law that no reasonable jury could find that they were liable for the injuries to Ms. Hu, and thus the court should not have deprived Ms. Hu of the right to trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 11, 2024, I electronically filed the foregoing with the Florida Courts E-Filing Portal and that a copy was served on Alison B. Wasserman, Esq., Law Office of David S. Lefton, counsel for the Appellees, by United States mail to Appellees' counsel at 8151 Peters Road, Suite 2005, Plantation, Florida 33324, and by e-mail to PLTNMAIL@Nationwide.com and alison.wasserman@Nationwide.com.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Reply Brief complies with the word, page and font requirements (Times New Roman 14-Point) contained in Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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