STATE OF MICHIGAN

COURT OF APPEALS

CAROL KORTE, MICHAEL JABLONSKI and KEITH JABLONSKI,

Plaintiffs–Appellants,

v

ATLAS, VENEER, FIREPLACE, STONE AND BRICK, INC., d/b/a ATLAS, INC.,

Defendant–Appellee.

UNPUBLISHED

March 28, 1997

No. 182458
Oakland Circuit Court
LC No. 92433874 CK

Before: Hoekstra, P.J., and Marilyn Kelly and J.B. Sullivan,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order denying their motion for judgment notwithstanding the verdict and/or new trial. They argue that the judge should have granted their motion, because the jury verdict was inconsistent and against the great weight of the evidence. We reverse and remand for a new trial.

Plaintiffs brought an action to recover damages for the destruction of their home caused by the faulty installation of a fireplace. Defendant denied liability, contending that it did not sell or install the fireplace. The jury was given a special verdict form which contained two questions:

> 1. Was the defendant negligent and/or did the defendant breach its duty of implied warranty?
>
> 2. Was the defendant's negligence and/or breach of implied warranty a proximate cause of the injury or damage to the plaintiff?

The jury answered question 1 in the affirmative and question 2 in the negative.

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Plaintiffs argue that the jury verdict was inconsistent and against the great weight of the evidence because, once the jury answered question one in the affirmative, it had to answer question two in the affirmative, as the issue of proximate cause was uncontested. Defendant contends that the jury verdict was not inconsistent. In answering question one, the jury could have found that defendant sold the fireplace but did not negligently install it. Because it was the negligent installation that was the cause of the fire, it reasons, the verdict was not inconsistent.

We find that the trial court properly denied plaintiffs' motion for a judgment notwithstanding the verdict. JNOV should be granted only when insufficient evidence is presented to create an issue for the jury. If the evidence is such that reasonable minds could differ, JNOV is improper. *Constantineau v DCI Food Equipment, Inc*, 195 Mich App 511, 514-515; 491 NW2d 262 (1992). Here, sufficient evidence was presented for reasonable minds to differ as to whether defendant sold and installed the fireplace that caused the damage to plaintiffs' home.

However, we find that plaintiffs were entitled to a new trial because the verdict was inconsistent and against the great weight of the evidence. A new trial may be granted if a verdict is against the great weight of the evidence or contrary to law, or if an error of law has occurred in the proceedings. MCR 2.611(A)(1)(e) and (g); *Constantineau*, *supra* at 514. Where there is an inconsistent and contradictory verdict, the remedy is to grant a new trial. *Payton v Detroit*, 211 Mich App 375, 397; 536 NW2d 233 (1995).

At trial in this case, defendant denied that it sold or installed a fireplace in plaintiffs' home. However, the jury necessarily determined that defendant either sold or installed the fireplace by virtue of finding that defendant was negligent and/or in breach of an implied warranty.

Once the jury determined that defendant was negligent or breached an implied warranty, it necessarily followed that defendant's negligence was the proximate cause of plaintiffs' damages. The only evidence presented at trial regarding the cause of the fire was the improper installation of the adapter on top of the fireplace. Donald Anderson, the fire investigator, testified that the slit made in the adapter to allow it to fit over the collar caused hot gas and air to escape onto a combustible surface that was placed too close to the adapter. He stated that this caused the fire and destruction of plaintiffs' home. Michael Jablonski testified that the fire chief told him that the cause of the fire was the faulty installation of the adapter. Thus, the negligent installation must have been the proximate cause of the fire and plaintiffs' damages.

Moreover, based on the evidence presented at trial, it is illogical to conclude that defendant could have sold the device but not installed it. As noted by plaintiffs, any theory that defendant sold but did not install the fireplace would require that the unit be stolen or taken from defendant and gratuitously installed in plaintiffs' home. If the unit was supplied by defendant, as the jury necessarily determined by finding it negligent, then it can only be assumed that defendant installed it, there being no other evidence as to how else it ended up in plaintiffs' home.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Marilyn Kelly
/s/ Joseph B. Sullivan