# STATE OF MICHIGAN

# COURT OF APPEALS

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WILLIAM G. MCLANE,

Plaintiff-Appellee,

v

BEAVERTON BOWL AND LOUNGE, INC.,

Defendant-Appellant.

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UNPUBLISHED
April 27, 1999

No. 203400
Gladwin Circuit Court
LC No. 95-012220 NO

Before: Smolenski, P.J., and Saad and Gage, JJ.

PER CURIAM.

Following a jury trial in this premises liability action, defendant appeals as of right the $27,111.37 judgment in favor of plaintiff. We affirm.

Plaintiff injured his ankle after falling on a patch of ice in the parking lot of the Beaverton Bowl and Lounge, which is owned and operated by John Klimkiewicz. When plaintiff arrived at the lounge at approximately 6:15 p.m. to participate in his weekly bowling league, he parked his vehicle in the parking lot and entered through the south doors. Plaintiff bowled three games and consumed two beers. When he exited the building at 8:30 or 8:45 p.m., he noticed that the parking lot was covered with a half-inch of new snow. He walked in a diagonal path across the two vacant parking spaces closest to the lounge's south entrance, to his vehicle, which was parked kitty-corner to the south entrance. When he was about six to eight steps from the door, he slipped and fell on a three- to four-foot wide patch of ice. He did not see the ice patch because it was covered with snow. Plaintiff testified that he had not encountered any icy spots in the parking lot on his way into the building, nor did he encounter any more ice after the incident as he hopped toward his vehicle.

The vacant parking space closest to the door was located in front of a drain spout that extended down from the roof, and the next-closest space was located directly underneath an outside air conditioning unit. Klimkiewicz testified that the downspout, which was affixed to a brown background, had been painted brown so it would be less obvious. At trial, it was undisputed that in warmer temperatures the downspout channeled melting snow from the roof directly into the parking space in front of it, and that this water would freeze during the winter evenings. Klimkiewicz admitted that customers and employees had complained about the problem in the past and that he has been aware of

it since the bowling lounge was built. Despite his knowledge of the problems associated with the downspout, Klimkiewicz took no steps to warn his customers about it. Although the area was usually salted before it turned to ice, neither Klimkiewicz nor the chief maintenance employee recalled salting the area where plaintiff fell on the day of the incident.

Defendant first contends that the trial court erred in instructing the jury regarding the standard of care pursuant to SJI2d 19.03, which explains the general standard of care a business invitor owes an invitee, instead of SJI2d 19.05, which sets forth the business invitor's duty regarding a natural accumulation of ice and snow.[1] Defendant contends that the court erroneously concluded that SJI2d 19.05 was inapplicable on the basis that no evidence showed that plaintiff's injuries resulted from a natural accumulation of ice and snow. According to defendant, SJI2d 19.05, is the appropriate instruction in all snow or ice related slip and fall cases, regardless of whether the hazard was created by a natural or unnatural source.

A court must give standard jury instructions whenever they are applicable, accurately state the applicable law, and are requested by a party. MCR 2.516(D)(2); *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 622; 563 NW2d 693 (1997), lv gtd 457 Mich 870; 586 NW2d 918 (1998). It is error, however, to instruct the jury on an issue not sustained by the evidence or the pleadings. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997). The determination whether an instruction is applicable is in the sound discretion of the trial court. *Setterington v Pontiac General Hospital*, 223 Mich App 594, 605; 568 NW2d 93 (1997).

Defendant maintains that *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244; 235 NW2d 732 (1975), from which SJI2d 19.05 is derived, extended a business invitor's duty of reasonable care to its invitees for any natural or unnatural accumulation of ice or snow. Thus defendant claims that because *Quinlivan* rendered the distinction between the two types of conditions unimportant in invitor-invitee situations, SJI2d 19.05 constitutes the appropriate instruction in all cases involving ice or snow. In *Quinlivan*, our Supreme Court held the natural accumulation doctrine, which relieves a landowner of responsibility for a hazard arising from a natural accumulation of ice and snow, inapplicable to the invitor-invitee context. *Quinlivan*, *supra* at 260. The Court explained that a business invitor was required to take reasonable steps within a reasonable time after the accumulation of ice and snow to diminish the hazard of injury to an invitee. *Id*. at 261. This standard was subsequently incorporated into SJI2d 19.05, entitled "Duty of Possessor of Land, Premises, or Place of Business to a Business Invitee Regarding the Natural Accumulation of Ice and Snow." There is no indication that the duty announced in *Quinlivan*, which the Supreme Court decided on facts involving a natural accumulation, sets forth the appropriate duty in cases involving unnatural accumulations. Nor is there any indication that the *Quinlivan* Court, which relied on the "rigorous duty" owed to invitees in overruling the natural accumulation doctrine in the invitor-invitee context, *id*. at 256, 260, intended the duty announced in that case to apply in a case like this that involves ice and snow but in which the facts suggest that the higher and more specified duty contained in SJI2d 19.03 is more appropriate. Furthermore, defendant cites no cases in which the duty announced in *Quinlivan* has been applied to hazards posed by unnatural accumulations. We also note defendant's assertion that SJI2d 19.05 should be read in all slip and fall cases involving ice and snow would require trial courts to ignore the pertinent

facts of the cases before them and potentially give an instruction not warranted by the facts of a particular case. Compare *Murdock*, *supra* (error to instruct on issue not supported by evidence). Therefore, we decline to extend *Quinlivan* as defendant interprets that decision.

After a thorough review of the record, we find that SJI2d 19.05 was inapplicable to the instant case because absolutely no evidence supported defendant's theory that the patch of ice which caused plaintiff's injury resulted from prevailing weather conditions. *Murdock*, *supra*. To the contrary, the evidence established that plaintiff slipped and fell on an ice patch near the area where defendant admitted that the downspout emptied water into the parking lot. Neither plaintiff nor Joe Eisenlohr, who assisted plaintiff to his vehicle after plaintiff fell, experienced in other areas of the parking lot slippery conditions caused by the half-inch of new snow that had fallen. SJI2d 19.03 was therefore the appropriate instruction under the facts of this case, which established that Klimkiewicz had been aware of the danger associated with the downspout, knew that it created an unreasonable hazard in light of customer complaints over the years, and failed to warn customers of the condition despite his knowledge. Accordingly, we conclude that the trial court did not abuse its discretion when it decided to give SJI2d 19.03 instead of SJI2d 19.05.

Defendant next argues that the trial court erred in refusing to instruct the jury regarding comparative negligence because the jury could have rejected plaintiff's assertion that he did not see any parking lot hazards immediately prior to his fall. Comparative negligence is an affirmative defense that must be supported by the evidence. *Pontiac School Dist*, *supra* at 623. Plaintiff testified that when he exited the lounge he was wearing hiking boots and that he watched where he was going. He stated that his footing was good as he first left the lounge, but that he did not see the ice patch because it was concealed by a half-inch of freshly fallen snow. He further indicated that on his way into the bowling center he had been unable to traverse the same area because a vehicle had been parked there, nor did he notice the presence of the brown downspout that was concealed against a brown background. Klimkiewicz himself admitted that the downspout had been concealed by design. He also stated that he did not believe plaintiff would have fallen unless ice was present and that, if there had been smooth ice under the snow, plaintiff would not have been able to anticipate it. Absolutely no indication existed that plaintiff carelessly encountered the ice patch. Therefore, viewing this evidence in the light most favorable to defendant, there was not a scintilla of evidence that plaintiff was negligent. *Pontiac School Dist*, *supra*. Thus, we conclude that the trial court did not abuse its discretion in refusing to read SJI2d 11.01. *Setterington*, *supra*.

Defendant also contends that the trial court erred in refusing to give SJI2d 13.02, the intoxication instruction, because the jury could have deduced that plaintiff's consumption of several beers while bowling affected his judgment or awareness of the outside conditions. Plaintiff testified that he consumed two beers during the two- to three-hour period he spent at the bowling lounge. No evidence suggested that he had consumed more than that. To the contrary, Klimkiewicz, who was plaintiff's strongest supporting witness, testified that during the many years he had known plaintiff he had never seen plaintiff drunk and that he believed that alcohol had played no part in plaintiff's fall. Therefore, because there was no evidence that plaintiff was intoxicated, the trial court did not abuse its discretion in refusing to give the instruction. *Setterington*, *supra*.

Defendant further contends that during the instructions the trial court erred in twice reading to the jury the damages portion of the verdict form, suggesting to the jury that they should award damages. However, we find that the trial court's rereading of the damages portion of the verdict form did not overemphasize damages or improperly suggest that the jury should award damages. The court was careful to preface its revisitation of the damages portions of the verdict form with the conditional phrase, "If you decide to award damages in this particular case." The court was merely attempting to ensure that the jury understood that any award for plaintiff must be apportioned into different categories of damages. Defendant's argument is without merit.

Finally, defendant claims that the trial court erroneously prohibited defense counsel from reading portions of plaintiff's complaint during closing argument to show inconsistencies in plaintiff's theory of the case. We review the trial court's decision whether to admit evidence for an abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998).

The trial court prevented defense counsel from reading plaintiff's complaint because the complaint had not been introduced during the evidentiary phase of trial. Defendant maintains that because plaintiff was cross-examined with the complaint at trial and because the complaint constituted an admission of a party opponent under MRE 801(d)(2), he should have been permitted to read the complaint into the record during closing argument. Defendant correctly asserts that statements of fact contained in pleadings may constitute admissions for purposes of MRE 801(d)(2). *Hunt v CHAD Enterprises, Inc*, 183 Mich App 59, 63; 454 NW2d 188 (1990). While defense counsel may refer during closing argument to a party's pleadings that were not offered into evidence at trial, *Eisbrenner v Stanley*, 106 Mich App 357, 370; 308 NW2d 209 (1981), defendant has cited no authority for the proposition that defense counsel may read pleadings into evidence after the proofs have closed. The purpose of closing argument is to allow attorneys to comment on the evidence and to argue their theories of law to the jury. *People v Finley*, 161 Mich App 1, 9; 410 NW2d 282 (1987), aff'd 431 Mich 506; 431 NW2d 19 (1988). Closing argument is not the time to introduce new evidence. *Id.* Because defendant failed during the evidentiary phase of trial to introduce any portion of plaintiff's complaint, we conclude that the trial court did not abuse its discretion in preventing defense counsel from introducing portions of the complaint during his closing argument.[2]

Furthermore, we find that any alleged error was harmless. The record indicates that, during the remainder of his closing argument after the court's ruling, defense counsel did refer to the complaint in emphasizing plaintiff's allegedly inconsistent theories and suggesting that plaintiff had no idea what created the patch of ice on which he had fallen.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Hilda R. Gage

[1] Although the trial court offered to read both SJI2d 19.03 and 19.05 to the jury, defendant rejected this offer.

[2] Defendant's reliance on *Beals v Walker*, 98 Mich App 214; 296 NW2d 828 (1980), rev'd on other grounds 416 Mich 469; 331 NW2d 700 (1982), is misplaced. In *Beals*, the defense counsel introduced *at trial* evidence of the plaintiff's amended pleadings to refute an assertion made by the plaintiff's counsel during opening argument. *Id*. at 233. This Court found that the trial court had properly admitted the amended pleadings into evidence. *Id*. at 234. In the instant case, defendant made no attempt at trial to introduce any portion of plaintiff's complaint, but instead sought to introduce plaintiff's complaint for the first time during closing argument.