STATE OF MICHIGAN

COURT OF APPEALS

RICHARD A. HERNANDEZ and ROSALINDA HERNANDEZ,

Plaintiffs-Appellants,

v

WALTERS-DIMMICK PETROLEUM, d/b/a CAPPON'S SHELL QUICK MART, CAPPON OIL CO., CAPPON OIL, CAPPON QUICK MART, SHELL FOOD MART-WD, SHELL SPEE-D-MART, ALLAN HARVATH, and MARIAN HARVATH,

Defendants-Appellees.

UNPUBLISHED
July 30, 1999

No. 207228
Eaton Circuit Court
LC No. 93-000667 NO

Before: Murphy, P.J., and Doctoroff and Neff, JJ.

PER CURIAM.

In this slip and fall case, plaintiffs appeal as of right from the trial court's order entering judgment in favor of defendants on a jury verdict of no cause of action. We affirm.

Plaintiff Richard Hernandez injured his knee when he slipped and fell at defendants' gas station. Plaintiff testified that he fell after he slipped on an underground gas tank lid that was covered with snow. After a trial, the jury returned a verdict of no cause of action.

Plaintiffs first argue that the trial court erred in instructing the jury with respect to SJI2d 19.05, and in refusing to instruct the jury with respect to SJI2d 19.03. We disagree. On appeal, claims of instructional error are reviewed for an abuse of discretion. *Nabozny v Pioneer State Mutual Ins Co*, 233 Mich App 206, 216-217; __ NW2d __ (1998). Jury instructions should be viewed in their entirety, rather than extracted piecemeal to establish error in isolated portions. *Nabozny*, *supra* at 217. There is no error if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Id.* Furthermore, the failure to give a properly requested, applicable, and accurate jury instruction does not require reversal unless the error "resulted in such unfair prejudice to

the complaining party that the failure to vacate the jury verdict would be 'inconsistent with substantial justice.'" *Johnson v Corbet,* 423 Mich 304, 327; 377 NW2d 713 (1985); *Nabozny, supra* at 217.

When requested by a party, a standard jury instruction must be given if it is applicable and accurately states the law. MCR 2.516(D)(2); *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 622; 563 NW2d 693 (1997). Whether an instruction is applicable and accurate based on the characteristics of the case is in the sound discretion of the trial court. *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997). A requested instruction need not be given if it would neither add to an otherwise balanced and fair jury charge nor enhance the jury's ability to decide the case intelligently, fairly, and impartially. *Johnson, supra* at 327.

SJI2d 19.03 provides:

> A possessor of [land / premises / a place of business] has a duty to maintain the [land / premises / place of business] in a reasonably safe condition.
>
> A possessor has a duty to exercise ordinary care to protect an invitee from unreasonable risks of injury that were known to the possessor or that should have been known in the exercise of ordinary care.

In addition, SJI2d 19.03 includes the following language, to be given in cases involving a claim of failure to warn[1]:

> A possessor must warn the invitees of dangers that are known or that should have been known to the possessor unless those dangers are open and obvious. However, a possessor must warn an invitee of an open and obvious danger if the possessor should expect that an invitee will not discover the danger or will not protect [himself/herself] against it.

Here, plaintiffs requested the failure to warn instruction, but the trial court refused to so instruct the jury. However, the court gave the following instruction based on SJI2d 19.05:

> It was the duty of the defendants, and when I talk about the defendants I mean both defendants, to take reasonable measures within a reasonable period of time after an accumulation of snow and ice to diminish the hazard of injury to the plaintiff.

The trial court did not err by giving SJI2d 19.05, but not SJI2d 19.03. It is true, as plaintiffs argue, that, generally, an invitor has a duty to warn invitees of hidden defects or dangers. *Riddle v*

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[1] SJI2d 19.03 also includes language regarding a possessor's duty to inspect, to be used in cases involving a claim of failure to inspect. See Notes on Use following SJI2d 19.03. In plaintiffs' statement of the issue on appeal, they argue that the duty to inspect language should have been given. However, plaintiffs did not argue at trial or in their motion for a new trial that the duty to inspect language should have been given, and do not present such an argument in the body of their appellate brief. Thus, this Court will not address whether the duty to inspect language should have been given.

McLouth Steel products Corp, 440 Mich 85, 91; 485 NW2d 676 (1992). However, with respect to ice and snow, the law requires that an invitor take reasonable measures within a reasonable period of time after the accumulation of ice and snow to diminish the hazard of injury to an invitee. *Quinlivan v The Great Atlantic & Pacific Tea Co, Inc,* 395 Mich 244, 261; 235 NW2d 732 (1975); *Anderson v Wiegand,* 223 Mich App 549, 553-554; 567 NW2d 452 (1997). Thus, while the hazards of ice and snow are not always obvious, *Quinlivan, supra* at 261, the law does not impose a duty on an invitor to warn invitees of the dangers of snow and ice. Rather, while the law imposes a duty on invitors to use "reasonable measures" to diminish the hazard of snow and ice, the specific actions that a defendant should take to do so (i.e. whether a defendant should salt, shovel, or warn) is a question for the jury. *Clink v Steiner,* 162 Mich App 551, 556-557; 413 NW2d 45 (1987); *Lundy v Groty,* 141 Mich App 757, 760-761; 367 NW2d 448 (1985). In fact, the Notes on Use following SJI2d 19.05 provide that SJI2d 19.05 "should be used where applicable instead of the more general SJI2d 19.03 Duty of Possessor of Land, Premises or Place of Business to Invitee."

Plaintiffs assert that SJI2d 19.03 should have been given because the slippery condition of the snow-covered gas tank lid was hidden and known to defendants. Thus, plaintiffs argue, defendants had a duty to warn. However, our review of the evidence presented and the arguments of counsel indicates that plaintiffs' theory was that the cause of his fall was the snow covering the gas tank lid, rather than the lid itself. Had the snow not covered the lid, the lid would have been open and obvious and would not have been slippery. Accordingly, SJI2d 19.05, rather than SJI2d 19.03, was applicable to the instant case. Thus, because the trial court's instructions accurately and fairly presented the parties' theories and the applicable law, we cannot conclude that the trial court abused its discretion in giving SJI2d 19.05, and refusing to give 19.03. *Nabozny, supra* at 217.

Furthermore, even if the trial court erred in failing to instruct the jury with respect to SJI2d 19.03, the error did not result in "such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be 'inconsistent with substantial justice.'" *Johnson, supra* at 327; *Nabozny, supra* at 217. Plaintiffs' counsel questioned witnesses with respect to whether defendants warned their customers of the danger caused by the snow and ice covering the gas tank lids, and elicited testimony that defendants did not warn customers of the ice and snow covering the gas tank lids. In addition, plaintiffs' counsel argued during his closing arguments that defendants should have warned their customers of the hazard from the ice and snow. Thus, the jury was free to conclude that defendants did not take reasonable measures to diminish the hazard of injury because they failed to warn customers of the hazards created by the ice and snow. Accordingly, we find no error requiring reversal.

Plaintiffs next argue that the trial court erred in denying their motion for judgment notwithstanding the verdict (JNOV). We disagree. When reviewing a trial court's decision regarding a JNOV motion, this Court views the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Forge v Smith,* 458 Mich 198, 204; 580 NW2d 876 (1998); *Orzel v Scott Drug Co,* 449 Mich 550, 557-558; 537 NW2d 208 (1995). A motion for JNOV should be granted only where the evidence so viewed fails to establish a claim as a matter of law. *Id.*

Here, John Dimmick, the vice-president of Walters-Dimmick Petroleum, testified that there was an oral policy that the gas station managers were to maintain the area around the store, and that the

maintenance duties included shoveling snow and salting "as needed." Several employees of Walters-Dimmick Petroleum testified that defendants stressed the importance of keeping ice and snow off of the gas tank lids to insure customer safety, to prevent water from entering the tanks, and to make it easier for gas deliverers to locate the tanks. Employees further testified that any ice or snow that had accumulated on the gas tank lids was removed daily when the level of gas in the tanks was checked. In addition, Tina Elliston-Houchlei testified that she salted the gas tank lids ten minutes before she checked the gas levels at 6:00 a.m. on the day of plaintiff's fall.

Thus, it is clear that defendants presented evidence that they took measures to diminish the hazards presented by the ice and snow on the gas tank lids. Because reasonable minds could differ with respect to whether the measures taken by defendants were reasonable, the trial court properly denied plaintiffs' motion for JNOV. *Pontiac School Dist, supra.*

Affirmed.

/s/ William B. Murphy
/s/ Martin M. Doctoroff
/s/ Janet T. Neff