STATE OF MICHIGAN

COURT OF APPEALS

LUCILLE HAYNES,

Plaintiff-Appellant,

v

WILLIAM G. LESLIE,

Defendant-Appellee.

UNPUBLISHED
December 28, 1999

No. 209771
Monroe Circuit Court
LC No. 91-018176 NO

Before: Smolenski, P.J., Whitbeck and Zahra, JJ.

PER CURIAM.

Plaintiff Lucille Haynes commenced this slip and fall negligence action against defendant William G. Leslie after she fell while descending the icy steps of an exterior staircase at the back of Leslie's apartment building during a freezing rainstorm. Following a trial, the jury returned a verdict of no cause of action. The trial court denied Haynes' motion for a new trial. Haynes now appeals of right. We affirm.

I. Basic Facts And Procedural History

Before trial, Leslie filed a motion in limine to exclude three photographs of the scene of the slip and fall that Haynes' daughter, Roxanne Haynes Cornoyer, took on the day following the accident. Photograph A was a close-up picture of the bottom step and intermediate landing showing broken ice and snow. Photograph B was a picture of the roof eaves, without a gutter, covered with icicles and ice. Photograph C, a picture of the upper flight of stairs, revealed some salt on the top steps. The trial court ruled that the photographs of the stairway (apparently photographs A and C) were not admissible as substantive evidence because they depicted subsequent remedial measures, i.e., salt on the ice. In addition, the trial court ruled that all the photographs were inadmissible because there was no way to determine from the pictures whether they reflected conditions that were substantially similar to those that existed at the time of the slip and fall. However, the trial court ruled that the photographs could be used for impeachment purposes.

At trial, Cornoyer testified that she resided at the two-story apartment building that Leslie owned. According to Cornoyer, the conditions of the stairway and the roof had not changed since the

slip and fall accident. There was an exterior stairway consisting of two flights of wooden steps. There were six steps, a middle landing, and then six more steps to the door of Cornoyer's apartment; the steps did not have any sort of tread or carpeting to prevent people walking on the steps from slipping. According to Cornoyer, "there wasn't really no guardrails." Although there was a railing, it could not be used because "[i]t was too wide." There was also a roof over the top steps, but "it was real steep tin roof" and snow and water would run right off it because there were no eaves troughs; the tin roof was directly above the third step. There was also one porch light at the doorway, but no yard lights. Cornoyer testified that she and Haynes salted the bottom of the stairs when the temperatures were below freezing because "they collected a lot of ice." She kept salt at the bottom and top of the stairway so that when "you left, you took salt with you; you come up, you brought salt up." Cornoyer recalled that Leslie's son and his daughter-in-law Mary lived in apartment number 3 in the same building and that Leslie instructed her to go to his son if there were any problems. When Cornoyer attempted to testify to what Mary told her after she informed Mary about the conditions of the step, the trial court upheld Leslie's timely objection that the testimony was impermissible hearsay.

Cornoyer admitted that her rent varied; if she mowed the grass and shoveled the walks and steps, she received a $50 discount off her normal monthly rent of $350. Cornoyer also conceded that on the day that Haynes fell, she had run out of salt to put on the top flight of steps, but that she had a bag of salt at the bottom of the steps.

Haynes and Cornoyer recounted that, on the day of the accident, the weather was cold, cloudy, and dreary with freezing rain by the time Haynes arrived at the apartment around 3:30 p.m., but that earlier in the day the sun had been shining and water had dripped off the roof. Haynes recalled that when she arrived at the premises there was no snow on the bottom set of stairs, but "the stairs were wet . . . [and] there was like snow built up on [the second set of stairs] and stuff, you know, but yet I went up [the second set of stairs]." The weather worsened while Haynes was in Cornoyer's apartment, and Haynes became concerned about road conditions, including ice. When Haynes left Cornoyer's apartment at around 5:15 p.m. it was dark and cold outside. Haynes did not check the steps for ice and did not recall if she used the handrail, and then she felt her feet go out from under her. Only then did she realize that ice covered "everything"—the steps and handrails. Cornoyer testified that immediately after Haynes left, she heard a thump so she opened the door and saw her mother lying on the middle landing where she had fallen. Haynes reportedly told her that she "slid down the third step" although she testified at trial that she actually slipped on the first step. On cross examination, Cornoyer acknowledged that Haynes made frequent visits to her apartment and was familiar with the stairway. Cornoyer also testified that there had been no subsequent falls on the stairway.

On the second day of trial, Haynes asked the trial court to reconsider its evidentiary ruling excluding the photographs. The trial court ruled that it would stand by its previous ruling excluding the photographs. Specifically, the trial court stated that Cornoyer's testimony regarding subsequent remedial measures taken by Mary on the day following the slip and fall was not admissible.

Thereafter, Michael Bosanac, director of the City of Monroe's Building Department, testified that the handrail from the landing to the second floor of the apartment building did not meet the building code because it was too wide to grasp. Bosanac also noted that the risers to the second floor varied

too much in height and did not comply with the building code. Bosanac stated that, over part of the stairway, there was a metal roof with no gutters to collect water, and that the City had adopted code provisions to prevent hazardous conditions that occur when water falls on public sidewalks or any public way. Bosanac theorized, however, that even if the steps satisfied the code, they would get icy if exposed to a freezing rain. Bosanac testified that "I think outside steps, in their selves [sic], in this condition that we live in here in Michigan, are dangerous, but there's nothing to prevent in the codes from having them constructed." Bosanac reached the same conclusion about handrails exposed to "freeze-and-thaw conditions."

After Haynes rested, Leslie moved for a directed verdict, which the trial court denied "by the slimmest of margins":

> I'm denying the motion on this basis: what counsel has not addressed is the other possible conclusion that reasonable minds could – could latch onto and that is this: was it the freezing rain that completely covered the outside stairway, or was it a roof that poured directly onto the stairway that caused the condition.

Because the roof was in Leslie's possession and control, and because there was a question of fact regarding which step Haynes fell from, the trial court denied Leslie's motion for directed verdict.

In Leslie's case-in-chief, he testified that Cornoyer did not give him any notice of problems with the stairs, nor was he aware of any slip and falls before February 23, 1990. Leslie stated that he had no formal agreement with Cornoyer about maintaining the stairs, but he had an arrangement with other tenants to shovel his front steps, and his son cleared the sidewalks. Sometimes, Leslie's daughter-in-law Mary also shoveled the sidewalks, and Leslie would provide salt if a tenant requested it. According to Leslie, the first and second steps are not under the roof overhang, and the third step "doesn't appear to be"; the roof overhang begins on the fourth or fifth step down from the top flight.

On the third and final day of trial, Haynes renewed her effort to introduce the photographs into evidence, which the trial court again denied. After the jury returned a verdict of no cause of action, Haynes moved for a new trial on the basis that the jury verdict was against the great weight of the evidence. At a hearing on the motion, Haynes again argued that the three photographs were admissible. Leslie pointed out that Cornoyer's statement in her post-trial affidavit regarding what Mary told her after the slip and fall was essentially untimely testimony not elicited when she was on the stand. In denying Haynes' motion for a new trial, the trial court ruled from the bench:

> As to the motion for a new trial, the Court had indicated at the close of the plaintiff's proofs that I was dangerously close to granting relief for defendant at that time. However, as I indicated, I believe the words – exact words – by the slimmest of margins, I'm going to allow it to proceed to the jury.
>
> We also know that an outside stairway in the state of Michigan is dangerous, even if its constructed by the best of principles and in accordance with the – all city ordinances. It's an outside stairway. We have the plaintiff's own candid testimony that:

I'm going to leave now to pick up your sister at Meijer's because it's icing out there. I want to give myself more time.

She goes out. She doesn't even look down, and she slips on the icy steps and falls and is apparently injured. We have testimony from her daughter that at a discounted rent, she could take care of salting the steps – they, in fact, undertook that duty. They had purchased the salt. They would salt the stairway on the way up, on the way down. On this particular date, they had run out of salt. There was no salt at the top. Nonetheless, which – I think some of the defendant's last arguments are probably the strongest reasons, that being that there was a recent accumulation. A person has to have a reasonable time to respond to that.

I've already ruled against the photographs. I stand by that ruling. I stand by the interpretation and the application of the case law as presented to this Court at the time of trial; and, therefore, the motion for a new trial is denied.

II. Exclusion Of The Photographs

A. Preservation Of The Issue And Standard Of Review

Haynes argues that the trial court abused its discretion by excluding the three photographs Cornoyer took showing the condition of the staircase and the roof above on the day following the slip and fall. Haynes raised the issue below and thus preserved it for appellate review. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Gore v Rains & Block*, 189 Mich App 729, 737; 473 NW2d 813 (1991). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). Further, an error requiring reversal may not be predicated on an evidentiary ruling unless it affected a substantial right. MRE 103(a); *Temple v Kelel Distributing Co*, 183 Mich App 326, 329; 454 NW2d 610 (1990). In other words, whether erroneously admitted evidence requires reversal of a jury verdict depends on the "nature of the error" and "its effect in light of the weight and strength" of the properly admitted evidence. *People v Smith*, 456 Mich 543, 555; 581 NW2d 654 (1998).

B. Accurate Representation

We hold that the trial court justifiably excluded the photographs because they did not accurately represent the conditions of the staircase at the time Haynes fell. In *Knight v Gulf & Western*, 196 Mich App 119, 133; 492 NW2d 761 (1992), this Court observed:

> To lay a proper foundation for the admission of photographs, a person familiar with the scene depicted in the photograph must testify, on the basis of personal observation, that the photograph is an accurate representation. *In re Robinson*, 180 Mich App 454, 460; 447 NW2d 765 (1989). Photographs may still be admissible despite changes in the scene, as long as someone testifies with regard to the extent of the changes. *Id.*, pp 460-461.

In this case, the trial court found that Haynes failed to lay an adequate foundation for the admission of the photographs because Haynes did not establish a substantial similarity between the conditions of the stairway at the time of the slip and fall and those reflected in the photographs. As Leslie noted, after Haynes fell during the freezing rain, it started to snow. Indeed, records introduced into evidence indicated that two inches of snow fell between 9:00 a.m. on February 23 and 9:00 a.m. on the following day. Cornoyer took the proposed photographs at about 8:00 a.m. on February 24, about fifteen hours after the slip and fall. During that time, salt had been applied to the steps, and some ice had been broken. As Leslie pointed out, these conditions did not exist when Haynes fell on a thin coat of ice during the freezing rainstorm. Because the photographs did not accurately represent the conditions at the time Haynes fell, the trial court did not abuse its discretion in excluding their admission into evidence. See *Kolcon v Smewing*, 28 Mich App 237, 241-242; 184 NW2d 244 (1970).

C. The Cornoyer Affidavit

In her motion for a new trial, Haynes claimed that the photographs accurately reflected the conditions at the time Haynes fell and supported her position with an affidavit from Cornoyer stating that the photographs "depict the stairs and eaves trough in question very nearly as they appeared at the time of the fall, the previous day." However, Haynes failed to preserve this argument by timely raising this issue at trial. See MRE 103(a)(1); *People v Grant*, 445 Mich 535, 546, 553; 520 NW2d 123 (1994). Regardless, we note that Cornoyer's statement in her affidavit appears to be at odds with her trial testimony. In addition, Haynes raises for the first time on appeal the argument that the trial court erred in excluding the photographs because Cornoyer could have testified about the extent of any changes that occurred. Because this argument was not timely raised before the trial court, it is not preserved for appellate review. *People v Coon*, 200 Mich App 244, 247; 503 NW2d 746 (1993).

D. Subsequent Remedial Measures

The trial court determined that two of the photographs depicted subsequent remedial measures and, therefore, were inadmissible under MRE 407. On appeal, Haynes contends that MRE 407 did not preclude admitting the photographs because she sought to admit them to show the dangerous condition of the stairway that resulted from the condition of the eaves and handrail, not negligence. We disagree.

While evidence of subsequent remedial measures is not admissible to show negligence, it is admissible to prove something other than negligence or culpable conduct, such as "ownership, control, feasibility of precautionary measures, if controverted, or impeachment." MRE 407. This evidentiary rule promotes the policy of encouraging corrective measures to increase safety. *Smith v E R Squibb &*

Sons, Inc, 405 Mich 79, 92; 273 NW2d 476 (1979); *Palmiter v Monroe County Bd of Rd Comm'rs*, 149 Mich App 678, 685; 387 NW2d 388 (1986).

First, we conclude that Haynes' reliance on this Court's decision in *Ellis v Grand Trunk W R Co*, 109 Mich App 394; 311 NW2d 364 (1981) is misplaced. As noted in *Cox v Dearborn Heights*, 210 Mich App 389, 398-399; 534 NW2d 135 (1995), "*Ellis* involved a study of subsequently generated reports of subsequently existing conditions, rather than subsequent remedial measures. . . ." Unlike *Ellis*, the two photographs of the stairway in this case depicted remedial measures taken after Haynes fell.

Second, the photographs were not admissible to show a subsequent remedial measure by a non-party. Specifically, Haynes contends that Mary's act of salting the stairway after the slip and fall was admissible to establish a dangerous condition. In support, Haynes relies on *Denolf v Frank L Jursik Co*, 395 Mich 661; 238 NW2d 1 (1976), where the Court held that evidence of repairs, change of conditions or precautions after an accident by a non-party admissible is provided that: (1) the evidence was relevant; (2) the admission of the evidence did not offend policy considerations favoring encouragement of repairs; and (3) "the remedial action was not undertaken at the direction of a party plaintiff so that it does not constitute a self-serving, out-of-court declaration by that party." *Id* at 669-670. We find that neither the first nor the third condition were met here. In *Denolf*, evidence of the subsequent remedial action was relevant, when done by the non-party, because there was an issue of alternate design feasibility. Here, the feasibility of using salt was not at issue. Further, although Mary took the remedial action—salting the steps—after *Cornoyer* notified her of the icy conditions on the stairway. In any event, it is clear that the effect of the notice was to prompt the subsequent remedial action, which fits squarely in the prohibition in MRE 407.

Furthermore, we also hold that the trial court also properly concluded that the photographs did not fall under the exception in MRE 407 that allows evidence of subsequent remedial measures to show possession and control. There never was a dispute that Leslie owned the building and with it the steps where Haynes fell.

E. Hearsay

We also hold that the trial court did not err in excluding Cornoyer's statement indicating that Mary told Cornoyer that she failed to salt the stairway on the day Haynes fell because she, Mary, was too busy. As the trial court recognized, Mary's alleged statement to Cornoyer was hearsay under MRE 801(c) and, therefore, inadmissible under MRE 802. Moreover, there was no evidence that Mary acted as Leslie's agent in maintaining the premises. Because Haynes failed to show that Mary was acting as Leslie's agent, she failed to establish that the statement was admissible under MRE 801(d)(2). Finally, Haynes' argument that the statement was admissible under the "state of mind" exception to the hearsay rule, MRE 803(3), was not presented to the trial court and, therefore, was not preserved for appellate review. See *Peterman, supra* at 183.

III. The Great Weight Of The Evidence

A. Preservation Of The Issue And Standard Of Review

Haynes argues that the trial court abused its discretion in denying her motion for a new trial on the basis that the verdict was against the great weight of the evidence. Haynes raised the issue below and thus preserved it for appellate review. *Heshelman v Lombardi,* 183 Mich App 72, 83; 454 NW2d 603 (1990).

A new trial may be granted, on some or all of the issues, if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). However, the jury's verdict should not be set aside if there is competent evidence to support it; the trial court in a jury case cannot substitute its judgment for that of the factfinder. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). On appeal, this Court reviews the trial court's grant or denial of the motion for new trial for an abuse of discretion, *Bordeaux v Celotex Corp,* 203 Mich App 158, 170; 511 NW2d 899 (1993), deferring to the trial court's opportunity to hear the witnesses and its consequent "unique" qualification to assess credibility, *In re Leone Estate,* 168 Mich App 321, 324; 423 NW2d 652 (1988).

B. Elements Of A Prima Facie Case

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. *Schultz v Consumers Power Co,* 443 Mich 445, 449; 506 NW2d 175 (1993). Breach of the duty requires determination of a general standard of care and a specific standard of care; causation requires both cause in fact and proximate cause. *Reeves v Kmart Corp*, 229 Mich App 466, 479; 582 NW2d 841 (1998). "A landowner's obligation to an invitee is to take reasonable measures within a reasonable time after the accumulation of snow to diminish the hazard of injury." *Morrow v Boldt*, 203 Mich App 324, 327-328; 512 NW2d 83 (1994).

C. The Elements In Controversy

After reviewing the evidence, we conclude that there was a dispute regarding each element of the prima facie case and the time in which Leslie had to diminish the hazard. For instance, even if Leslie had possession and control over the steps, the evidence established a genuine factual dispute regarding whether Leslie had a reasonable period of time in which to take appropriate measures to diminish the hazard of an injury. While Haynes argues that she is entitled to a new trial considering the evidence of building code violations in the heights of the step risers, the width of the handrails, and the absence of a roof gutter, Leslie correctly points out that these code violations were only evidence of negligence and did not establish that there was sufficient time to minimize the hazard the ice posed. *Johnson v Bobbie's Party Store*, 189 Mich App 652, 661; 473 NW2d 796 (1991). There also was a genuine question of fact concerning whether the configuration of the stairway and the roof proximally contributed to Haynes' injury. There was evidence that Haynes fell from the first step of the descending stairway during a freezing rainstorm. Although Haynes argued that a proximate cause of her fall was an unnatural accumulation of ice due to water that poured off the roof above onto the steps and then froze, there was

evidence that any run-off from the roof did not affect the first step, which was simply exposed to the sky and a natural accumulation of ice and snow. Accordingly, we conclude that the trial court did not abuse its discretion in denying Haynes' motion for a new trial.

Affirmed.

/s/ Michael R. Smolenski
/s/ William C. Whitbeck
/s/ Brian K. Zahra