STATE OF MICHIGAN

COURT OF APPEALS

BARBARA JOWERS,

Plaintiff-Appellee,

v

GLEN OAKS APARTMENTS,

Defendant-Appellant.

UNPUBLISHED
September 1, 2000

No. 217164
Muskegon Circuit Court
LC No. 97-336707-NO

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment in plaintiff's favor, following a jury trial, in this premises liability action. We order remittitur regarding the award of damages for future wage loss, but affirm the judgment in all other respects.

A. Sufficiency of the Evidence

Defendant first argues that the trial court erred by denying its pretrial and posttrial motions to dismiss plaintiff's claim. Defendant has preserved this issue for appeal by moving for summary disposition pursuant to MCR 2.116(C)(10), and for judgment notwithstanding the verdict (JNOV).

1. Summary Disposition Pursuant to MCR 2.116(C)(10)

A motion for summary disposition under MCR 2.116(C)(10) is subject to de novo review. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In reviewing a motion under MCR 2.116(C)(10), a trial court must consider the affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties. MCR 2.116(G)(5); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Where, as here, the burden of proof at trial on a dispositive issue rests on a nonmoving party, that party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Id.*; see also *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

Defendant argues that the icy condition of the apartment building walkway and steps was evident to plaintiff when she left the apartment to go to her car on the evening of February 23, 1997. However, defendant is not entitled to judgment as a matter of law merely because plaintiff, an invitee, was aware of ice on the walkway and steps. In *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611-612; 537 NW2d 185 (1995), our Supreme Court explained that the obviousness of a condition, or knowledge of it by an invitee, will not always relieve a possessor of land of the duty of reasonable care. The Court stated that, "if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions." *Id.* at 611. Further, in *Quinlivan v The Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 261; 235 NW2d 732 (1975), our Supreme Court remarked:

> While the invitor is not an absolute insurer of the safety of the invitee, the invitor has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation. . . . As such duty pertains to ice and snow accumulations, it will require that reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee. The conduct of the invitee will often be relevant in the context of contributory negligence.

It is undisputed that no alternative route existed that plaintiff could have feasibly used to get from the apartment building to her car; she had to traverse the icy steps to accomplish that objective. Accordingly, we cannot conclude that no genuine issue of fact was presented as to whether, notwithstanding the open and obvious nature of the ice, an unreasonable risk of harm existed, requiring defendant to undertake reasonable precautions to diminish the hazard. Further, the record demonstrates that there was a genuine issue of fact presented concerning whether defendant undertook timely and reasonable measures to address the ice buildup in the hours prior to the accident. For these reasons, the trial court correctly denied defendant's motion for summary disposition. [1]

2. Defendant's Motion for Judgment Notwithstanding the Verdict

"The standard of review for judgments notwithstanding the verdict requires review of the evidence and all legitimate inferences in the light most favorable to the nonmoving party. . . . Only if the evidence so viewed fails to establish a claim as a matter of law, should a motion for judgment notwithstanding the verdict be granted." *Orzel v Scott Drug Co*, 449 Mich 550, 557-558; 537 NW2d 208 (1995). When denying defendant's motion for JNOV, the trial court noted that, if reasonable jurors could have honestly reached different conclusions, the judgment of the jury cannot be

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[1] Defendant tries to avoid this conclusion by citing *Zielinski v Szokola*, 167 Mich App 611; 423 NW2d 289 (1988), overruled in part on other grounds *Robinson v Detroit (On Remand)*, 231 Mich App 361, 363; 586 NW2d 116 (1998), and cases relying on that precedent. However, because *Zielinski* involved an accident on a public sidewalk, the "natural accumulation doctrine" and not the "higher standard" of *Quinlivan* was at issue. *Id.* at 620. In fact, *Zielinski* makes clear that the "natural accumulation doctrine" has no application to injuries suffered by an invitee on private property, as in the present case. *Id.* at 618.

overturned. The court's comment shows that it was cognizant of the applicable standard of review and, in light of our conclusion regarding the summary disposition issue above, no error occurred. *Id.*

B. Motion for New Trial

Defendant next contends that, assuming that the record presented a question of fact for jury consideration, the trial court erred by denying its motion for new trial because the jury's conclusion is against the great weight of the evidence and creates a situation of strict liability. Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). An abuse of discretion occurs when the reasons given by the trial court "do not provide a legally recognized basis for relief," *id.*, or when the decision is "so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias." *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997).

With respect to defendant's liability, plaintiff's allegations regarding defendant's breach of several duties were supported at trial by competent and credible evidence. When denying defendant's motion for new trial, the trial court viewed the entire record as a whole and concluded that the court did not have a definite and firm conviction that a mistake had been committed. See MCR 2.611(A)(1)(e). No clear abuse of discretion occurred. *Jones, supra* at 404.

Defendant next argues that the jury's finding of zero comparative negligence by plaintiff is clearly against the great weight of the evidence and results in a significant miscarriage of justice.[2] Again, we disagree. The jury was clearly instructed regarding the possibility of plaintiff's comparative negligence, but found none. We agree with the trial court, which was "satisfied that the jurors' analysis of [the comparative negligence] issue which was properly presented to them complies with the law and would not give rise to granting the relief sought here today."

C. Damages Issues

As his final allegation of error, defendant argues that the jury awards regarding plaintiff's future pain and suffering and future lost wages are speculative, grossly excessive and against the great weight of the evidence. Defendant moved for remittitur of the jury's verdict in its motion for new trial. We review the denial of remittitur for abuse of discretion. *Palenkas v Beaumont Hospital*, 432 Mich 527, 533; 443 NW2d 354 (1989).

1. Future Pain and Suffering

[2] Defendant also contends that the trial court improperly interfered with defense counsel's attempt during cross-examination of plaintiff to ask her a question phrased in the same language as was asked at her deposition. Following plaintiff's objection and a lengthy colloquy, the court eventually allowed defense counsel to ask plaintiff the deposition question. Defendant's present argument that the court's intervention unfairly prejudiced it, and is in some way related to the jury's finding of zero comparative negligence by plaintiff, is unpersuasive. The trial court's denial of defendant's motion for new trial based on this ground was proper.

In *Precopio v Detroit*, 415 Mich 457, 464-465; 330 NW2d 802 (1982), the Court stated:

> [D]ecisions of this Court state that awards for personal injury should rest within the sound judgment of the trier of fact, particularly awards for pain and suffering, and recognize that there is no absolute standard by which to measure such awards. Such deference in part reflects recognition that the trier of fact observes live testimony, while an appellate court reviews a printed record. In a case tried to a jury, such deference may further reflect a reliance on the communal judgment of the members of the jury in awarding monetary compensation for such imponderables as pain and suffering.

In *Palenkas, supra* at 534, the Court stated:

> An appellate court reviewing a trial court's . . . denial of remittitur must afford due deference to the trial judge since the latter has presided over the whole trial, has personally observed the evidence and witnesses, and has had the unique opportunity to evaluate the jury's reaction to the witnesses and proofs. Accordingly, the trial judge, having experienced the drama of the trial, is in the best position to determine whether the jury's verdict was motivated by such impermissible considerations as passion, bias, or anger. Deference to the trial judge simply reflects the recognition that the trial judge has observed live testimony while the appellate court merely reviews a printed record.

In the present case, the jury, using mortality tables, awarded plaintiff damages for future pain and suffering in the amount of $4,000 per year from 1998 to 2023. In support of this award, it should be noted that plaintiff's treating physician testified that plaintiff would have to undergo additional surgery in 1998 to remove a metal rod and screws from her leg. He related that, because of her leg fracture, plaintiff sustained a permanent shortening of her right leg of approximately one-half inch that would have to be treated to avoid back pain and curvature of the spine. Furthermore, he averred that it was inevitable that plaintiff would develop some arthritis in her ankle, causing her pain, affecting her range of movement, and limiting her ability to be on her feet all day. Finally, he testified that the scars on plaintiff's leg resulting from her surgeries were permanent. Plaintiff testified that she now walks with a limp, continues to experience pain in her right leg, that her right leg feels sore at the end of a workday, that she can no longer run or move about quickly, that she cannot walk as far as she formerly could walk, and that she cannot run with her dog anymore. In light of this evidence, the jury award for future noneconomic damages is supported by the evidence, and the trial court properly denied defendant's motion for new trial or for remittitur regarding these damages.

Defendant's reliance on *Clissold v St Louis-San Francisco Railway Co*, 600 F2d 35 (CA 6, 1979), is misplaced. Most notably, the court in *Clissold* noted that there was "a possibility" that the plaintiff would develop traumatic arthritis at some future time as a result of the accident, but noted that it "has not yet happened and it is by no means a reasonable medical certainty." *Id.* at 38. By contrast, plaintiff's physician testified that development of arthritis in her ankle was "inevitable." Further, *Clissold* involved a bench trial, whereas the present case involves a jury award, and the scope of appellate review is broader in a non-jury case than in a jury case. *Precopio, supra* at 466-467.

2. Future Lost Wages

It is undisputed that plaintiff sustained no wage loss from the time she returned to work on November 17, 1997, to the date of trial. The jury awarded her damages for future lost wages in the amount of $5,000 per year from 1998 to 2015, when she would attain the age of 65 years. The trial court denied defendant's motion for remittitur, concluding that "given the age of the Plaintiff, the testimony about the likelihood of future problems and the effect upon her life, this Court cannot conclude that the damages awarded, while significant, that they shock the judicial conscience."[3] Defendant contends that "even though the possibility that Plaintiff might develop arthritis exists, the record is absolutely devoid of *any* evidence to suggest if and when the arthritis might develop and, if it develops, when it may progress to the point when it would become physically disabling for [plaintiff] to perform her job, if at all."

We find that the evidence regarding future lost wages is too speculative to support the jury's award of $5,000 per year. Plaintiff's vocational rehabilitation counselor testified emphatically that he was incapable of stating that plaintiff would sustain any future wage loss attributable to her accident. He did testify that *if* plaintiff lost the last five years of her work life at her present position, i.e., if she did not work from age 60 to age 65, she would lose approximately $150,000 in earnings. However, this testimony was given by way of example and was not a prediction that plaintiff would in fact be unable to work during that period. Also, although plaintiff's physician testified that it was inevitable that she would develop arthritis in her ankle and that "when the arthritis does eventually develop, as it becomes painful, it will limit her ability to be on her feet all day; you know, stand, walk, work and those types of things," he never opined precisely when this arthritis would commence or to what degree, if any, it would affect her future earnings. In the absence of any expert opinion that a disability from work will result from the accident, the jury's award of $5,000 per year for future wage loss is too speculative to withstand judicial scrutiny and must be remitted. The trial court abused its discretion by denying remittitur of the amount awarded for future lost wages after 1998. Accordingly, we reverse the trial court's denial of remittitur and remand for recalculation of the judgment. See *Franzel v Kerr Mfg Co*, 234 Mich App 600, 613; 600 NW2d 66 (1999); *Jenkins v Raleigh Trucking Services, Inc*, 187 Mich App 424, 430; 468 NW2d 64 (1991).

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

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[3] Our Supreme Court has rejected the "shock the conscience" standard for resolving a motion for remittitur. *Palenkas, supra* at 533. Instead, the trial court is to determine whether the jury's award of damages is an amount that the evidence will support. *Id*. at 531-532; *Phinney v Perlmutter*, 222 Mich App 513, 538; 564 NW2d 532 (1997); see MCR 2.611(E)(1). However, taking the court's statements in context, we conclude that the trial court utilized the correct standard, concluding that the jury's award of damages was supported by the evidence.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck