STATE OF MICHIGAN

COURT OF APPEALS

ELAINE HOTCHKIN, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED June 8, 2001
v	No. 215338 Oakland Circuit Court
RON HUREN, Defendant-Appellant/Cross-Appellee.	LC No. 95-500535-NO

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

PER CURIAM.

This personal injury case is before us on remand from the Supreme Court for consideration as on leave granted. 459 Mich 883 (1998). Defendant appeals from the judgment for plaintiff and from the imposition of mediation sanctions. Plaintiff cross-appeals from the finding of comparative negligence and from the reduction of attorney fees. We reverse and remand for a new trial.

I. Facts

On September 18, 1994, defendant was landscaping his residence and requested plaintiff, his friend,[1] to help move a large rock that weighed 792 pounds. When plaintiff saw the rock she initially declined to help defendant and instructed defendant that he should ask someone else for help. Plaintiff eventually agreed to hold a dolly while defendant attempted to strap the rock onto the dolly. The rock shifted weight, bringing the dolly down and throwing plaintiff to the ground. Plaintiff suffered a serious back injury and was hospitalized for nine days. Shortly after the accident, defendant signed a statement admitting to negligence. The statement provided:

> I just received an attorney's notice to sue me. I can tell you that Elaine Hotchkin did suffer a serious back injury when I used poor judgment and told her to grab hold of a heavy boulder to help me with my landscaping. The boulder was too

[1] While plaintiff was in the hospital recuperating from her injury, defendant and plaintiff became engaged to be married. The litigants married in August 1995, separated in March 1996, and divorced in November 1996.

heavy for me to hold and I should have known it would be too heavy for her to hold. She heard a pop in her back at the time and consequently spent nine and a half days in the hospital. She said doctors found three bulging disks and her sacroiliac hooped [sic] out of place.[2]

Plaintiff filed suit on July 13, 1995, alleging that defendant was negligent in allowing plaintiff to participate in defendant's efforts to move the rock and negligent in his efforts to move the rock. Plaintiff did not assert a claim of premises liability. The jury returned a verdict in favor of plaintiff via a special verdict form.[3] The verdict form provided:

FORM OF VERDICT

We, the jury, answer the questions submitted as follows:

Elaine Hotchkin was either a volunteer or an invitee:

Q.1: Based on the definitions provided; on 9/18/94, was Elaine Hotchkin a volunteer helping Mr. Huron [sic]?

A.1: No (Yes or No)

If your answer is "Yes", go to question 2; if your answer is "No", go to question 3.

Q.2: Did Ron Huron's [sic] conduct amount to willful and wanton misconduct?

A.2: _____ (Yes or No)

If your answer is "Yes", go to question 5; if your answer is "No", do not answer any further questions.

Q.3: Based on the definitions provided; on 9/18/94, was Elaine Hotchkin an invitee, helping Mr. Huron [sic] as he specifically directed and requested; and not primarily for a social visit? (If you find her to have been an invitee, go on to next question.)

A.3: Yes (Yes or No)

Q.4: Was Ron Huron [sic] negligent?

A.4: Yes (Yes or No)

If your answer is "No", do not answer any further questions.

[2] Although defendant acknowledged signing the letter, he claimed it was drafted by plaintiff's father and that he signed it only because plaintiff's family was upset with him. Nonetheless, defendant testified at trial that the contents of the statement were true.

[3] It appears that the verdict form was constructed and stipulated to by the parties.

If your answer is "Yes", go to next question.

Q.5: Did Elaine Hotchkin sustain injury?

A.5: Yes (Yes or No)

If your answer is "No", do not answer any further questions.

If your answer is "Yes", go to next question.

Q.6: Was Ron Huron's [sic] negligence a proximate cause of injury to Elaine Hotchkin?

A.6: Yes (Yes or No)

If your answer is "No", do not answer any further questions.

If your answer is "Yes", go to next question.

DAMAGES TO THE PRESENT DATE

Q.7. What is the total amount of Elaine Hotchkin's damages to the present date for pain and suffering? (9/18/94 through 8/14/97)

A.7: $20,000.00

FUTURE DAMAGES

Q.8: What is the total amount of Elaine Hotchkin's damages for future pain and suffering?

A.8: Total damages for future life expectancy of 43.08 years for future pain and suffering: $94,345.20 $6 a day

Q.9: What is the total amount of Elaine Hotchkin's damages for future medical expenses?

A.9: Total damages for future medical expenses for Elaine Hotchkin's 43.08 future years: $15,724.20 $1 a day

Q.10: What is the total amount of Elaine Hotchkin's damages for future loss of earning capacity?

A.10: $-0-

COMPARATIVE NEGLIGENE/ALLOCATION OF FAULT

Q.11: Was Elaine Hotchkin negligent?

A.11: Yes (Yes or No)

If your answer is "Yes", go to question No. 12

If your answer is "No," DO NOT ANSWER ANY FURTHER QUESTIONS.

Q.12: Was Elaine Hotchkin's negligence a proximate cause of her injury?

A.12: Yes (Yes or No)

If your answer is "Yes", go to question No. 13

If your answer is "No", do not answer any further questions.

Q.13: Using 100% as the total, and considering the nature of the conduct and the extent to which each party's [sic] caused or contributed to Elaine Hotchkin's injury, enter the percentage of fault attributable to:

A.13: Ron Huron [sic] 70%

A.13: Elaine Hotchkin 30%

_____

Signature of Foreperson

Please note that the Judge will reduce the total amount of Elaine Hotchkin's damages entered in questions (7) through ten (10) by the percentage of fault attributable to Elaine Hotchkin, if any, entered in question number 13.

Defendant moved for a directed verdict during trial and a motion for judgment notwithstanding the verdict post trial. Both motions were denied.

II. Analysis

Defendant argues that trial court's instructions to the jury regarding the definition of an invitee were erroneous. This Court reviews claims of instructional error de novo. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). We review jury instructions in their entirety to determine whether they fairly and accurately presented the applicable law and the parties' theories. *Meyer v Center Line*, 242 Mich App 560, 566; 619 NW2d 182 (2000). It is error to instruct a jury on a matter that is not sustained by the evidence or the pleadings. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997).

In the present case, while plaintiff did not plead a premises liability claim, there was evidence at trial to support instructions on the issue. *Murdock, supra*. Defendant requested that

the trial court instruct the jury on the definition of invitee as provided by SJI2d 19.01.[4] The court instead gave a special instruction requested by plaintiff, which was based on *Leveque v Leveque*, 41 Mich App 127, 130-131; 199 NW2d 675 (1972). The trial court instructed the jury:

> Where a homeowner invites a person to their [sic] home, and the principle [sic] purpose of the visit is to benefit the homeowner, not a social visit, then the person invited over is a business invitee.

In *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591; 614 NW2d 88 (2000), our Supreme Court clearly set forth what must be shown to establish invitee status in Michigan:

> In harmonizing our cases, we conclude that the imposition of additional expense and effort by the landowner, requiring the landowner to inspect the premises and make them safe for visitors, must be directly tied to the owner's commercial business interests. It is the owner's desire to foster a commercial advantage by inviting persons to visit the premises that justifies the imposition of a higher duty. In short, we conclude that the prospect of pecuniary gain is a sort of quid pro quo for the higher duty of care owed to invitees. Thus, we hold that the owner's reason for inviting persons onto the premises is the primary consideration when determining the visitor's status: In order to establish invitee status, a plaintiff must show that the premises were held open for a *commercial* purpose. [*Id*. at 604.]

In the present case, the trial court's supplemental instruction, based on *Leveque* was broader than the definition of an invitee set forth in *Stitt*. Applying the *Stitt* definition of an invitee to the facts of this case, we conclude that the jury should not have considered whether plaintiff was an invitee.[5] Defendant did not invite plaintiff onto his premises to further his commercial business interests. Rather, defendant simply solicited help from a friend in moving a large rock to landscape his residence. Although plaintiff testified that she expected some compensation for her services, by way of lunch or gas money, the request to move the rock was unconnected to defendant's commercial business interests. Therefore, there was no evidence from which invitee status could be inferred, and plaintiff was, as a matter of law, not an invitee. *Id*.

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[4] We do not conclude that the trial court erred by failing to charge the jury with SJI2d 19.01. That standard instruction is based on 2 Restatement, Torts, 2d, § 332, p 176, which provides for two forms of invitees; public invitees and business visitors. As discussed *infra*, our Supreme Court has established that only business visitors are invitees. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 604; 614 NW2d 88 (2000). The Supreme Court has not conferred invitee status to persons invited to enter public lands.

[5] Plaintiff's reliance on *Hottmann v Hottmann*, 226 Mich App 171, 175; 572 NW2d 259 (1997) is unfounded. The comment in *Hottmann* regarding the definition of an invitee was not essential to the resolution of that case. Thus, it is obiter dictum and does not have the force of an adjudication. *Edelberg v Leco Corp*, 236 Mich App 177, 183; 599 NW2d 785 (1999). Moreover, the portion of *Hottmann* relied upon by plaintiff is inconsistent with, and contrary to, our Supreme Court's holding in *Stitt*.

We conclude that, as a matter of law, plaintiff was a licensee. A landowner's duty to a licensee is only to warn of hidden dangers about which the landowner knows or should know. There is no duty owed to a licensee to make the premises safe. *Stitt, supra* at 596. Because it cannot reasonably be argued that moving the large rock involved a hidden danger, judgment for defendant is appropriate as a matter of law as it relates to any premises liability claim. See *Jackson v Saginaw Co*, 458 Mich 141, 146; 580 NW2d 870 (1998). Defendant simply did not owe plaintiff a duty to warn of the dangers associated with moving a 792 pound rock in the manner proposed by defendant. We recognize that this case was not pleaded as a premises liability claim, but rather as a case involving ordinary negligence. However, given that the trial court provided an erroneous instruction on the definition of invitee and the jury's verdict was predicated on its finding that plaintiff was an invitee,[6] the jury verdict must be set aside.

On remand, the issue whether plaintiff was a volunteer may not be considered in deciding whether defendant was negligent because the volunteer doctrine has been abolished by our Supreme Court. *James v Alberts*, __ Mich __; __ NW2d __ (Docket No. 114454, issued 5/15/01).[7]

Given that the jury verdict is vacated and a new trial is necessary, we need not consider defendant's remaining issue regarding mediation sanctions or plaintiff's issues on cross-appeal.

Reversed and remanded. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Michael R. Smolenski
/s/ Hilda R. Gage

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[6] The verdict form limited the question of defendant's negligence to whether he was liable under a premises liability theory. The form provides: "If you find [plaintiff] to have been an invitee, go on to next question." The next question being: "Was [defendant] negligent?" We, therefore, conclude that the jury's verdict was premised on the finding that plaintiff was an invitee.

[7] We note that the statement on the verdict form that: "[Plaintiff] was either a volunteer or an invitee" was erroneous. Until its recent abrogation in *James*, the volunteer doctrine provided that an employer was not liable for the negligent acts of an employee who injured a third person having the status of a volunteer. *Ryder Truck Rental, Inc v Urbane*, 228 Mich App 519, 523; 579 NW2d 425 (1998). The volunteer doctrine applied in situations involving ordinary negligence, and was not limited to claims of premises liability. The term "invitee" as it relates to a negligence claim, however, only applies to premises liability actions. Consequently, the verdict form was erroneous insofar as it stated, as a matter of fact, that plaintiff was either a volunteer or an invitee. Prior to the abrogation of the volunteer doctrine, plaintiff could have been either, neither or both an invitee and a volunteer.