STATE OF MICHIGAN

COURT OF APPEALS

ROBERT E. THOMAS and CAROLYN J. THOMAS, Plaintiffs-Appellants, V LAKEVIEW MEADOWS, LTD., Defendant-Appellee.	UNPUBLISHED November 27, 2001 No. 226035 Calhoun Circuit Court LC No. 98-002864-NO

Before: Fitzgerald, P.J. and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiffs appeal by right the jury's no cause of action verdict in this slip and fall case. We affirm.

This case involves plaintiff Robert Thomas' claim that he fell in defendant's parking lot. Plaintiffs first contend that the court erred in granting defendant's motion in limine to exclude the testimony of plaintiffs' proposed safety expert, Walter Cygan. We disagree.

Whether to qualify and admit the testimony of a proposed expert witness are in the trial court's discretion, and the court's decision will not be reversed on appeal absent an abuse of that discretion. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 620; 600 NW2d 66 (1999). An abuse of discretion will be found only if an unprejudiced person considering the facts on which the trial court acted would say that there was no justification or excuse for the ruling made. *Id.*, quoting *Cleary v Turning Point*, 203 Mich App 208, 210; 512 NW2d 9 (1994).

MRE 702 provides:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Cygan's opinion that there were icy spots in other areas of defendant's parking lot was mere speculation as no evidence in the record supported his conclusion. Cygan had not studied the parking lot to determine whether it was level and was unfamiliar with its dimensions; moreover, there was no evidence regarding other patches of ice. Testimony that is purely

speculative should be excluded. *Phillips v Deihm*, 213 Mich App 389, 402; 541 NW2d 566 (1995). Thus, this portion of Cygan's testimony was properly excluded.

Additionally, we agree with the trial court that the remainder of Cygan's opinions simply did not require expertise. There are three prerequisites to the admission of expert testimony: (1) the witness must be an expert; (2) there must be facts in evidence that require or are subject to examination and analysis by a competent expert; and (3) there must be knowledge in a particular area that "belongs more to an expert than to the common man." *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 215; 457 NW2d 42 (1990), quoting *O'Dowd v Linehan*, 385 Mich 491, 509-510; 189 NW2d 333 (1971). The party proffering the expert bears the burden of convincing the trial court that the expert has specialized knowledge that will assist the factfinder in understanding the evidence or determining a fact in issue. *Davis v Link, Inc*, 195 Mich App 70, 74; 489 NW2d 103 (1992). Plaintiffs failed to carry this burden.

Our review of the record indicates that Cygan's opinions could be reduced to the following: (1) that ice resulting from thawing and refreezing is unreasonably dangerous because it develops where an ordinary person would not expect to find it; (2) people usually look fifteen to twenty feet ahead while walking; (3) plaintiff never saw the spot of ice that was covered by a light dusting of snow; (4) a thaw and a refreeze occurred before the accident according to the weather report; (5) another vehicle parked near plaintiff may have blocked the view of the ice; and (6) there would have been other icy spots in the parking lot caused by the thaw and refreeze on the evening and the morning preceding the fall. While Cygan may have specialized areas of knowledge, for example, involving workplace safety issues, we conclude that his testimony in this case was unnecessary and would not have assisted the trier of fact. *Jack Loeks Theatres, Inc v Kentwood*, 189 Mich App 603, 611; 474 NW2d 140 (1991), vacated in part on other grounds 439 Mich 968; 483 NW2d 365 (1992).

Plaintiffs rely on *Drake v K-Mart Corp*, unpublished opinion per curiam of the Court of Appeals (Docket No. 189099, issued 12/20/96), in which this Court recognized Cygan's safety expertise, to show that Cygan should qualify as an expert. The trial court in the present case, however, did not dispute that Cygan could qualify as an expert regarding certain safety issues and that his expertise would be helpful in some circumstances. The court simply found that the facts underlying this case did not call for specialized knowledge, and that indeed Cygan's proferred testimony would not be the type of specialized testimony required of an expert. We agree with the trial court.

This was a rather ordinary negligence case in which plaintiffs alleged in their complaint that defendant had a duty to plaintiff as a business invitee to exercise reasonable care to protect him from injury from a dangerous condition, but that it negligently maintained its parking lot, thereby allowing water and ice to occur, which proximately and directly caused plaintiff to slip, fall, and seriously injure himself. In cases of ordinary negligence, the jury is competent to decide what a reasonable person would do, and so expert testimony is inadmissible. *Bishop v St John Hospital*, 140 Mich App 720, 724-725; 364 NW2d 290 (1984). In the present case, the jury could determine whether plaintiffs' allegations were true without the assistance of any expert.

Plaintiffs also rely on *Anton v State Farm Mutual Auto Ins Co*, 238 Mich App 673; 607 NW2d 123 (1999), as support for the proposition that Cygan's testimony should have been admitted. We find *Anton* inapposite to this case because *Anton* involved the determination of

whether an expert's proposed testimony was derived from a "recognized scientific knowledge." *Id*. at 675-682. No similar issue exists in this case because all of Cygan's "opinions" were derived from common sense and common knowledge. There were no scientific "methodology" or "principles" underlying his analysis, nor were they "supported by appropriate objective and independent validation." *Id*. at 678, quoting *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485, 491-492; 566 NW2d 671 (1997). Despite plaintiffs' characterization of Cygan's opinions as "expert" or "specialized," none of these opinions stemmed from Cygan's safety engineering background.

Plaintiffs also rely on *Berryman v K-Mart Corp*, 193 Mich App 88, 100; 483 NW2d 642 (1992), for the proposition that Cygan had the "credentials to render opinions in terms of safety analysis" and refer to Cygan's curriculum vitae. In so doing, however, plaintiffs again overlook the basis for the court's ruling. As mentioned previously, the court did not find that Cygan was not qualified as an expert; rather, it found that Cygan's expertise did not apply to the facts of this case, and thus, would not aid the jury—a conclusion with which we agree. Furthermore, we note that Cygan's testimony regarding the phenomenon of water thawing and refreezing and the likelihood that the icy patch in fact underwent that transformation before plaintiff's fall, were subjects well explained by meteorologist witness James R. Nobile during his testimony. Thus, Cygan's testimony would have been redundant in this regard.

Next, plaintiffs argue that the trial court erred in excluding the testimony of plaintiff Carolyn Thomas regarding a conversation she had with Flora Thomas the day after Robert Thomas' accident. Specifically, plaintiffs argue that the statement constituted a present sense impression exception to hearsay within the meaning of MRE 803. We disagree. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998).

Hearsay is inadmissible unless it falls within one of the exceptions set forth in the rules of evidence. MRE 802. Hearsay is a statement offered to prove the truth of the matter asserted. MRE 801(c). The declarant in this situation is Flora Thomas and the statement at issue (i.e., the matter asserted) is that she reported plaintiff's fall to Dottie Wright, (i.e., Carolyn Thomas would testify that Flora told her that she reported the fall to Wright). It is therefore hearsay because it was offered to prove that the report was indeed made. Thus, it is inadmissible unless it falls within a recognized exception. Plaintiffs assert that it is admissible as a present sense impression.

MRE 803(1) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (1) **Present Sense Impression**. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

Again, the hearsay statement is what Flora Thomas told Carolyn Thomas. The event being described is the reporting of the fall to Wright. Thus, the statement to Carolyn Thomas

must have been made at the time Flora Thomas perceived herself making the report to Wright. The very absurdity of that formulation is apparent. The statement was made to Carolyn Thomas at some time after Flora Thomas told Wright of plaintiff's fall. It seems difficult at best to perceive oneself making a report of an event to another person.

Furthermore, to establish the foundation for the admission of a hearsay statement under the present sense impression exception, the statement must be corroborated by other evidence that assures the reliability of the statement. *People v Hendrickson*, 459 Mich 229, 238 (Kelly, J.), 249 (Brickley J., concurring in part and dissenting in part); 586 NW2d 906 (1998). In this case, there is no evidence to corroborate the event, i.e., Flora Thomas' report of the fall to Dottie Wright.

Furthermore, plaintiffs' focus on whether Flora Thomas informed defendant through Dottie Wright of the accident "immediately thereafter" is misplaced. Defendant does not take issue with the timeliness of Thomas' report to management. Although the timeliness of a statement can be relevant to whether it qualifies as a present sense impression, see *Tobin v Providence Hospital*, 244 Mich App 626, 640; 624 NW2d 548 (2001), because the exception does not apply to this statement, the timeliness issue is immaterial. For these reasons, it was not an abuse of discretion for the court to exclude Carolyn Thomas' testimony regarding what Flora Thomas told her.

Next, plaintiffs argue that the court committed error by allowing defendant's attorney to read a passage from an unidentified opinion from this Court in closing argument. We note that although plaintiffs take issue with defense counsel quoting language from a case during closing argument, plaintiffs frame their question in terms of an error by the court, but also provide the standard of review for attorney misconduct. We conclude that neither an error by the court nor attorney misconduct occurred.

In *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982), our Supreme Court set forth the following rules for analysis of an attorney misconduct claim:

> When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted.

Furthermore, an attorney's comments during trial warrant reversal where "they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 191-192; 600 NW2d 129 (1999).

In this case, the comments were preserved by objection. We conclude that defense counsel's comments did not indicate a deliberate course of conduct aimed at preventing a fair and impartial trial, did not deflect the jury's attention from the issues involved, nor did they have a controlling influence on the verdict. *Id.* Thus, his conduct was not improper.

Defense counsel repeatedly emphasized that the statement that he read was not intended to be a statement of law but rather a statement of common sense. To the extent that counsel's quotation suggested to the jury that wintertime hazards are common and that residents of snowy areas should be aware of such hazards, counsel added nothing by reading the passage to what he had already argued during the presentation of his theory of the case, which was that plaintiff had a duty to notice the ice and to walk carefully in wintertime. After reviewing the record, we cannot conclude that defense counsel's actions had a controlling influence on the verdict. Furthermore, the court clearly instructed the jury that the attorneys' comments were not evidence. Moreover, the court's detailed instructions regarding proximate cause, ordinary care, and negligence made it clear what plaintiffs needed to prove to establish their claim. There is no basis upon which we may assume that the jury disregarded the court's detailed instructions in this regard and relied instead upon defense counsel's quoted passage, and no attorney misconduct occurred. Therefore, the court did not abuse its discretion in allowing defense counsel to read the passage.

We affirm.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey