STATE OF MICHIGAN

COURT OF APPEALS

TAMIKA COTTRELL,

Plaintiff-Appellee,

v

HOLIDAY INN SOUTHFIELD and GRANDVIEW HOTEL LIMITED PARTNERSHIP, d/b/a HOLIDAY INN SOUTHFIELD,

Defendants-Appellants.

UNPUBLISHED
February 14, 2008

No. 275295
Oakland Circuit Court
LC No. 2006-071719-NO

Before: Gleicher, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

Defendants appeal as of right from a judgment in plaintiff's favor following a jury trial in this premises liability action involving a slip and fall. Defendants also challenge an earlier order denying their summary disposition motion in which they argued that the danger was open and obvious as a matter of law. We affirm.

Plaintiff slipped on wet tile in front of an ice machine while a guest at defendants' hotel. Plaintiff testified at her deposition that she did not see that the glossy, blue-green tile was wet until after she had slipped and fallen on her ankle, breaking it. Only while being helped up after her fall could she see that the tile was wet. She admitted that she was looking ahead as she walked to avoid some on-coming children and was not looking down in front of her feet, but her testimony clearly reflects that the water simply was not visible without knowing right where to look and just what to look for. Plaintiff's ex-boyfriend, Ronald Madison, testified at his deposition that he could not see the water on the tile until he bent over to help plaintiff to her feet. He testified that the first indication he received that there was any water on the tile was the moisture he felt on plaintiff's clothing. Plaintiff's niece, Tiffany Smith, testified that several hours earlier she alerted a hotel staff member that she saw children throwing ice around the room. She showed him the area and indicated that it should be cleaned up. At trial, these witnesses testified in accordance with their sworn, pre-trial statements. Plaintiff also produced an expert witness who personally visited the site of the fall and testified at trial that water on that type of surface was undetectable, and that the fall could have been prevented if a relatively inexpensive absorbent mat had been placed in front of the ice machine to collect water from fallen ice cubes.

Defendants first argue that the trial court should have granted their motions for summary disposition and directed verdict because the water on which plaintiff slipped was open and obvious as a matter of law. We disagree. We review de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Like the trial court, we draw all reasonable inferences in plaintiff's favor, and we do not make factual determinations or credibility assessments, which are better left to a jury. *Skinner v Square D Co*, 445 Mich 153, 161-162; 516 NW2d 475 (1994). "Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger on casual inspection." *Teufel v Watkins*, 267 Mich App 425, 427; 705 NW2d 164 (2005). Therefore, to survive defendants' motion, plaintiff was required to produce "sufficient evidence to create a genuine issue of material fact that an ordinary user upon casual inspection could not have discovered the existence" of the slippery spot on the tile floor. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

Here, plaintiff presented evidence that the water simply was not visible or otherwise detectable until plaintiff stepped in it and slipped. From plaintiff's and Madison's testimony, the jury could reasonably infer that a casual inspection would not have revealed the water on the glossy tile floor. To hold otherwise would require the trial court to find directly contrary to the witnesses' testimony, either by making an impermissible adverse inference or by improperly disparaging their credibility. Because plaintiff presented evidence from which a jury could reasonably determine that the hazardous situation was invisible (not open and obvious), the question was properly reserved for the jury's ability to infer the facts and determine the credibility of the witnesses. *Skinner, supra*. Therefore, the trial court correctly denied defendants' motion for summary disposition, because the wet and slippery tile was not, as a matter of law, open and obvious. At trial, the testimony of plaintiff's witnesses substantially reflected the evidence presented in response to defendants' motion for summary disposition. Therefore, plaintiff demonstrated a genuine issue of material fact suitable for review by a jury, and the trial court did not err by denying defendants' motion for a directed verdict. See *Sniecinski v Blue Cross & Blue Shield*, 469 Mich 124, 131; 666 NW2d 186 (2003).

Defendants next argue that the trial court abused its discretion by allowing a safety expert to testify on plaintiff's behalf because they claim that he was not properly qualified and he did not first formerly seek permission to inspect the property. We disagree. Defendants failed to present any legal argument that the witness's inspection of the evidence was improper, and they do not point to any authority on appeal, either. Therefore, the trial court did not abuse its discretion by rejecting this challenge to the witness's testimony. Similarly, apart from medical malpractice specialties, the law does not require expert witnesses to have any specialized training in the exact setting that was the site of the injury, but instead leaves the issue to the trial court to determine if the "scientific, technical, or other specialized knowledge will assist the trier of fact." MRE 702. Here, the trial court did not abuse its discretion by allowing the testimony of plaintiff's safety expert, who had relevant specialized knowledge about ice machines and their related safety concerns, merely because he had not worked particularly in the hotel industry.

Defendants next argue that the trial court erred by instructing the jury about an inapplicable exception to the open and obvious doctrine and otherwise prejudiced defendants' case by making inappropriate comments. We disagree. As an initial matter, the trial court's comments were not directed exclusively at defense counsel and did not reflect any preconceived

notions about the case. Moreover, the judge rarely commented in front of the jury, and the comments made did not deal directly with any material issues, so we are not persuaded that the verdict reflected the judge's, rather than the jury's, opinion in the case. See *Keefer v C R Bard, Inc*, 110 Mich App 563, 577; 313 NW2d 151 (1981).

Regarding the jury instructions, a little context is helpful. Defendants first argued that the case should be dismissed on the basis of summary disposition because the wet floor was an open and obvious danger as a matter of law. That motion was correctly denied because a material question of fact about the visibility of the water existed. Midway through trial, and before the close of plaintiff's proofs, the parties and the trial court collaborated on the jury instructions. During the hearing, defendants raised the issue about a lack of factual support for the "special features" portion of the "open and obvious" instruction, M Civ JI 19.03. Defendants sought to deviate from the model instruction by excluding any reference to special features and unreasonable risks of harm because, according to them, the facts did not warrant any legal conclusion that the area contained any special aspects. See generally *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). The trial court initially denied defendants' argument as one that might require it to conduct a factual review akin to a summary disposition or directed verdict motion. See M Civ JI 19.03 and its official comment. However, the trial court considered the issue carefully and told defense counsel to bring in any case law that supported its argument for striking the paragraphs and otherwise deviating from the model instruction. The record does not reflect that defendants ever addressed the issue of the jury instructions again, except to announce their unreserved consent to them before the jury. Instead, defendants moved for a directed verdict at the close of the plaintiff's proofs, arguing again that the danger was clearly open and obvious as a matter of law. The trial court correctly denied this motion.

We are not persuaded that the trial court's inclusion of a "special aspects" instruction in this case warrants reversal of the jury's verdict. We review de novo the content of a trial court's jury instructions, *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000), but the trial court must use requested model jury instructions unless they misstate the law or simply do not apply. MCR 2.516(D)(2). We review for abuse of discretion a trial court's determination that the facts of a case warrant instruction on a particular area of law. *Clark v Kmart Corp*, 249 Mich App 141, 150; 640 NW2d 892 (2002). "We will only reverse for instructional error where failure to do so would be inconsistent with substantial justice." *Case*, *supra*.

In this case, defendants' objection to the instructions amounted to a mid-trial motion for directed verdict on any issue of the danger's "special aspects." Defendants never raised this argument elsewhere as a stand-alone issue, see M Civ JI and its official comment, and their objection to including the "special aspects" instruction only addressed the "severity of harm" feature of the "special aspects" analysis and ignored the "uniquely high likelihood of harm" portion of the "special aspects" inquiry. *Lugo*, *supra*. Moreover, defendants were free to argue to the jury that the facts of the case simply did not support a finding that any special features or aspects existed, and the predominant issue presented to the jury was unmistakably whether, if a reasonable person had been paying proper attention, he or she could have seen the water on the tile before slipping on it. Therefore, we are not persuaded that the trial court abused its discretion by overruling defendants' objection to the standard instruction.

Finally, defendants suggest that they received information after the close of trial that, if it had been discovered earlier and presented at trial, the jury verdict would have been different. Defendants argue that we should rely on this belated evidence to reverse the trial court's denial of their dispositive motions. However, even if we were persuaded that the vague and inconclusive information would have changed the verdict, our review of those issues is limited to the facts that were before the trial court. See *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Moreover, defendants never moved for new trial or relief from judgment on the basis of this "new" evidence, MCR 2.611(A)(1)(f), MCR 2.612(C)(1)(b), and we are not persuaded that they could have succeeded on these grounds or that we otherwise need to review this issue to prevent manifest injustice. See *Herald Co v Kalamazoo*, 229 Mich App 376, 390; 581 NW2d 295 (1998).

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly