STATE OF MICHIGAN

COURT OF APPEALS

AMANDA BERRY, a MINOR, by FRIDA BERRY and MOHAMED BERRY, as NEXT FRIENDS, Plaintiff-Appellant,	UNPUBLISHED January 12, 2012
v	No. 300737 Wayne Circuit Court
DEARBORN HEIGHTS MONTESSORI, INC., Defendant-Appellee.	LC No. 08-101552-NO

Before: DONOFRIO, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff, a minor, by her next friends Frida Berry and Mohamed Berry, appeals as of right the circuit court's judgment of no cause of action following a jury trial in this premises liability action. We affirm.

On appeal, plaintiff raises three issues. First, plaintiff contends that the circuit court erred in denying her motion for judgment notwithstanding the verdict ("JNOV") because the evidence clearly showed liability lay with defendant, Dearborn Heights Montessori, Inc. A circuit court's decision on a motion for JNOV is reviewed de novo. *Prime Financial Serv LLC v Vinton*, 279 Mich App 245, 255; 761 NW2d 694 (2008). "The trial court should grant a JNOV motion only when the evidence and all legitimate inferences viewed in a light most favorable to the nonmoving party fails to establish a claim as a matter of law." *Unibar Maintenance Services, Inc v Saigh*, 283 Mich App 609, 618; 769 NW2d 911 (2009), citing *Morales v State Farm Mutual Automobile Ins Co*, 279 Mich App 720, 733; 761 NW2d 454 (2008). The jury verdict must stand if reasonable jurors could have honestly reached different conclusions. *Genna v Jackson*, 286 Mich App 413, 417; 781 NW2d 124 (2009). Further, JNOV should be granted only when there was insufficient evidence presented to create an issue for the jury. *Sniecinski v Blue Cross and Blue Shield of MI,* 469 Mich 124, 131; 666 NW2d 186 (2003); *Heaton v Benton Constr Co*, 286 Mich App 528, 532; 780 NW2d 618 (2009).

Plaintiff argues that JNOV was appropriate because defendant was negligent as a matter of law. We disagree. We note that plaintiff sought recovery from defendant solely on a premises liability theory of negligence.[1] In considering plaintiff's motion for JNOV, the circuit court had to construe the evidence in a light most favorable to Dearborn Heights Montessori, Inc. and determine whether the facts presented to the jury precluded judgment for defendant as a matter of law. *Merkur Steel Supply Inc v Detroit,* 261 Mich App 116, 123; 680 NW2d 485 (2004). If reasonable minds could differ, the question is one for the jury, and JNOV is not proper. *Foreman v Foreman,* 266 Mich App 132, 136; 701 NW2d 167 (2005). Considering the evidence in the light most favorable to defendant, there was sufficient evidence for this issue to be decided by the jury, and thus JNOV was inappropriate.

The parties agree that plaintiff met her burden of going forward with evidence on the elements of her premises claim. At trial, plaintiff argued that the stage was a dangerous condition that posed an unreasonable risk of harm. To establish that the stage was a dangerous condition, plaintiff relied on Tammy Bourque's testimony that the stage was not a safe place for children to play. Dearborn Heights Montessori, Inc., on the other hand, argued that the stage was not a dangerous condition on the premises that posed an unreasonable risk of harm. It asserted that the stage was an ordinary stage that could be found in schools throughout the country.

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[1] In plaintiff's reply brief, she asserts that her complaint asserted both a premises liability claim and ordinary negligence claim. It is well established that the gravamen of an action is determined by reading the complaint as a whole and looking beyond procedural labels to determine the exact nature of the claim. *Adams v Adams*, 276 Mich App 704, 711; 742 NW2d 399 (2007). The law distinguishes between claims resulting from premises liability and ordinary negligence. *James v. Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001). "In a premises liability claim, liability emanates merely from the defendant's duty as an owner, possessor, or occupier of land." *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005). An action sounds in premises liability when an injury develops from a condition of the land, rather than from an activity or conduct that created the condition. *James*, 464 Mich at 18-19. In contrast, liability with respect to an ordinary negligence claim stems from the basic rule of the common law which "imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others." *Clark v. Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967).

In this case, plaintiff asserted that she fell from the stage, a condition on the premises. She asserted that the stage was a dangerous condition that posed an unreasonable risk of falling. Plaintiff alleged that Dearborn Heights Montessori Inc. did nothing to protect invitees from falling from the stage. In the complaint, plaintiff did not allege any action taken by Dearborn Heights Montessori Inc. that caused plaintiff to fall off the stage. Rather, it was plaintiff's conduct of climbing onto and playing on the stage that caused her to fall. That is, defendant's conduct did not produce the resulting harm. Furthermore, during closing arguments, plaintiff's counsel argued that the stage was a dangerous condition that posed an unreasonable risk of harm. The circuit court also instructed the jury on premises liability. Therefore, we conclude that plaintiff's cause of action is solely one of premises liability.

A photograph of the stage was presented to the jury. Several witnesses also described the stage. The stage was located in the school's gymnasium and was on one end of the gymnasium. The stage was accessible by stairs on either side. It was elevated approximately three and a half feet from the gymnasium tiled floor. There was no evidence that the stage was defective or had any hidden dangers. There was also no evidence that the stage violated any regulations, statutes, codes or ordinances.

In a premises liability case, the jury is charged with determining whether a defect on the premises amounts to an unreasonable dangerous condition. See *Bertrand v Alan Ford, Inc.*, 449 Mich 606, 616-617; 537 NW2d 185 (1995). Further, "[i]f the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide." *Id.* at 617. We conclude that reasonable minds viewing this evidence could differ with respect to whether the stage was a dangerous condition on the premises that caused an unreasonable risk of harm. Accordingly, judgment notwithstanding the verdict was properly denied.

Next, plaintiff argues that she is entitled to a new trial because the verdict was against the great weight of the evidence. We disagree. This Court reviews a circuit court's decision on a motion for a new trial for an abuse of discretion. *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34-35; 609 NW2d 567 (2000). An abuse of discretion occurs when a court chooses an outcome that is not within the range of principled outcomes. *McManamon v Redford Charter Twp*, 273 Mich App 131, 138; 730 NW2d 757 (2006).

A new trial may be granted when a verdict is against the great weight of the evidence, MCR 2.611(A)(1)(e), but a verdict should be overturned under this rule only when it is "manitfestly against the clear weight of the evidence." *Ellsworth v Hotel Corp of America*, 236 Mich App 185,194; 600 NW2d 129 (1999). The circuit court cannot substitute its judgment for that of the factfinder, and the jury's verdict should not be set aside if there is competent evidence to support it. *Id.* When a party challenges a jury's verdict as being against the great weight of the evidence, this Court must give substantial deference to the judgment of the trier of fact. If there is any competent evidence to support the jury's verdict, this Court must defer to the jury's assessment of the witnesses' credibility. *Allard v State Farm Ins Co*, 271 Mich App 394, 406; 722 NW2d 268 (2006). The jury's verdict must be upheld, even if it is inconsistent, if there is any interpretation of the evidence that could logically explain the jury's findings. *Id.* at 406-407. Further, a jury's verdict should not be overturned if there is a logical explanation for the verdict when considering the manner in which the legal principles were argued and applied in the context of the present case. *Bean*, 462 Mich at 31-32; *Allard*, 271 Mich App at 407.

Here, the circuit court did not abuse its discretion in denying plaintiff's motion for a new trial because there was competent evidence to support the jury's verdict that defendant was not negligent under a premises liability theory. While both parties presented competent evidence in support of their theories of the case, the jury accepted the defense theory. Accordingly, the verdict was not against the great weight of the evidence, and the circuit court did not abuse its discretion in denying plaintiff's motion for a new trial on this ground.

Plaintiff additionally contends she was denied a fair trial because Dearborn Heights Montessori, Inc.'s counsel improperly injected argument and testimony regarding the Dearborn

Heights Montessori Parents' Association's and Frida's potential liability, and thus, she contends she is entitled to a new trial. We disagree. Again, we review the circuit court's denial of plaintiff's motion for a new trial for an abuse of discretion. *Bean*, 462 Mich at 34-35.

Plaintiff filed a motion for a new trial pursuant to MCR 2.611(A)(1)(a) and (g). A new trial may be granted whenever the substantial rights of all or some of the parties are materially affected by an order of the court, which denied the moving party a fair trial. MCR 2.611(A)(1)(a). A new trial may also be granted when a party's "substantial rights are materially affected" because of an "[e]rror of law occurring in the proceedings, or mistake of fact by the court." MCR 2.611(A)(1)(g). In this case, the trial court entered a pretrial order stating:

> Defendant's affirmative defenses of "open and obvious" and/or comparative negligence as they related to [plaintiff] and her claims are stricken and that Defendant is barred from raising such affirmative defenses at trial.
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> . . . Defendant's affirmative defense of the third-party or non-fault of the former Defendants Dearborn Heights Montessori Parents Association and the individual Parents Association Board Members is stricken and that Defendant is barred from raising such affirmative defense at trial.

The circuit court also ordered the following:

> . . . defendant's affirmative defense that [Frida Berry's] alleged negligence is a defense as to [plaintiff's] claim is stricken and that defendant shall be barred from arguing at trial that Frida Berry's actions or inactions had any bearing on [plaintiff's] claims.

Plaintiff argues that the trial court allowed testimony and argument from Dearborn Heights Montessori Inc.'s counsel that violated the pretrial orders. However, after careful review of the transcript, we conclude that counsel did not violate the pretrial orders. Counsel did not argue that the Parents' Association or Frida were liable for plaintiff's injuries. Indeed, several times throughout the trial, references to the Parents' Association and Frida were made, but no assertion was ever made that these non parties were responsible for plaintiff's injuries.

Instead, the Parents' Association was mentioned when the parties and the witnesses described the Family Game Night flyer given to plaintiff that advertised the event. The flyer was subsequently admitted into evidence and it readily identified the Parents' Association. At trial, Frida was asked questions regarding her observations the night of the incident, and Frida admitted that she did not see plaintiff fall. Subsequently, defense counsel properly argued that Frida did not see plaintiff fall because she was not paying attention. See *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 514; 556 NW2d 528 (1996) (holding that an argument is proper if there is evidence presented at trial to support the inference). The record reveals that Dearborn Heights Montessori Inc.'s counsel never argued that the Parents' Association or Frida bore any responsibility for plaintiff's injury, and therefore, the trial court's pretrial orders were not violated and no error of law occurred.

Plaintiff also argues that the repeated references to the Parents' Association and Frida denied her a fair trial because the references prejudiced the jury and deflected its attention from the issues involved. We disagree.

In *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996), this Court held:

> When reviewing asserted improper comments by an attorney, we first determine whether the attorney's action was error and, if it was, whether the error requires reversal. An attorney's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. Reversal is required only where the prejudicial statements of an attorney reflect a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved. [citations omitted.]

In this case, counsel's actions were not erroneous. As discussed above, Dearborn Heights Montessori Inc.'s counsel made no argument or comment that implied that the Parents' Association or Frida were responsible for plaintiff's injuries. Further, counsel's statements do not appear to be indicative of "a deliberate course of conduct aimed at preventing a fair and impartial trial," nor do the comments "reflect a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved." *Hunt*, 217 Mich App at 95. In any case, any error and resulting prejudiced was cured by the trial court's curative instructions. The trial court provided the following instructions:

> The [P]arents['] [A]ssociation is not a defendant in this case. You are to determine, Ladies and Gentlemen, whether the Montessori school, Dearborn Heights Montessori School was negligent in any way with respect to the injuries sustained by [plaintiff].
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> * * *
>
> I think I've made it clear. If I haven't already, this case is not about the parents, Mr. and Mrs. Berry. It's not about the parents association. There's only one defendant in this case and that is the school itself, so please disregard the mention of parents watching.

The trial court also instructed the jury that it should only consider the evidence presented at trial and that the arguments, statements, and remarks of the attorneys are not evidence and should be disregarded. Plaintiff was not denied a fair trial because defense counsel's references did not prejudice the jury or deflect its attention from the issues involved.

Finally, plaintiff relies on *Lapasinskas v Quick*, 17 Mich App 733; 170 NW2d 318 (1969), and contends that Dearborn Heights Montessori Inc.'s counsel deliberately injected the issue of parental negligence at trial, and therefore a new trial should have been granted.

In *Lapasinskas*, a two year child was struck by a car. *Id*. at 734. The child's father filed a cause of action individually and as the child's next friend against the defendant driver. *Id*. at 734-735. The defendant's answer asserted as an affirmative defense that the accident was caused by the child running out from behind parked cars into the defendant's vehicle and that the father

was negligent in failing to keep his child off the street. *Id*. at 735. The plaintiff filed a motion in limine requesting an order "directing defendants and their counsel, to refrain from any reference, suggestion, statement, testimony, argument or insinuation charging or implying negligence on the part of [the father] or any other person as constituting negligence, guarding (sic), interfering with or limiting damages recoverable in this action." *Id*. The trial court denied the request, but struck the affirmative defense asserting negligence by the father. *Id*. Nonetheless, the trial court instructed the parties' counsels to follow the law with respect to the admission of evidence. *Id*.

In *Lapasinskas*, during opening statements, the defense counsel commented on the father's proximity to his child when the incident occurred and implied that the father was responsible for failing to watch his son. *Lapasinskas*, 17 Mich App at 736. During his closing argument, the defense counsel

> referred to the fact that the child's father was only a short distance from him and that he was supposed to be watching the child ('Yeh, I'll watch [the child]) but that he had not been very attentive as the last time he saw [the child] was 8 minutes before the accident. (This is the father who is watching [the child]. He didn't see him for 8 minutes). At the conclusion of his argument he reiterated the impermissible innuendo (I will ask you something: If this situation is that dangerous, what should the father have done? If anybody, it seems to me, if anybody would ask anybody whose fault the accident is) at which point argument was broken off by [the] plaintiff's objection which was sustained by the court. [*Id*.]

The *Lapasinskas* Court ordered a new trial because the defense counsel improperly injected the child's father's purported negligence into the case. *Id*.

This case is distinguishable from *Lapasinskas* because defense counsel did not inject Frida's purported negligence into the case. The record reflects that the testimony and evidence referencing or mentioning Frida simply examined her observations at Family Game Night. Unlike the defense counsel in *Lapasinskas*, defense counsel never stated or implied that Frida was responsible for plaintiff's injuries. Further, defense counsel did not argue that Frida was supposed to watch plaintiff at the event. However, we note that, during closing arguments, defense counsel stated, "[T]he fact of the matter is, [Frida] did not see [plaintiff] fall off the stage because she wasn't paying attention to her." Plaintiff challenges this statement because it infers that Frida had a responsibility to watch plaintiff and failed to do so. This statement was not improper because it was supported by Frida's testimony that someone called her name and, while she looked away, plaintiff fell. This comment did not improperly inject Frida's alleged negligence into the case because defense counsel never argued or asserted that Frida was in any way responsible for plaintiff's injuries or responsible for plaintiff's supervision at the event. That is, defense counsel did not argue or imply that Frida's failure to watch plaintiff caused her injuries. Counsel's statement did not cast fault onto Frida, rather it accurately summarized Frida's testimony that she did not see plaintiff fall from the stage. Further, unlike the defense counsel in *Lapasinskas*, Dearborn Heights Montessori Inc.'s counsel did not make an impermissible innuendo regarding parental responsibility. Instead, defense counsel made the following suggestion:

> You [the jury] have to find my client [Dearborn Heights Montessori, Inc.] did something unreasonable, was negligent. I submit to you respectfully, that they did nothing wrong is this case. Keep this - - keep that question in your mind when you go back to deliberate. What is it that Dearborn Heights Montessori did wrong?

We conclude that the record does not support plaintiff's contention, and thus, the trial court correctly denied plaintiff's motion for a new trial.

Affirmed.

/s/ Pat M. Donofrio
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause