STATE OF MICHIGAN

COURT OF APPEALS

EVA M. ATKINSON,

Plaintiff-Appellant,

v

SUMMIT PLACE MALL,

Defendant-Appellee.

UNPUBLISHED
March 31, 1998

No. 198388
Oakland Circuit Court
LC No. 95-493729-NI

Before: Doctoroff, P.J., and Reilly and Allen*, JJ.

PER CURIAM.

This action arises out of a slip and fall on ice in defendant's mall parking lot. Plaintiff appeals as of right from a judgment entered by the trial court after a jury ruled in favor of defendant. We affirm.

Plaintiff argues on appeal that the trial court erred in refusing to allow a non-party witness to testify as to a subsequent remedial measure. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993).

Where measures are taken after an event which, if taken previously would have made the event less likely to occur, evidence of these "subsequent remedial measures" is not admissible to prove negligence or culpability in connection with the event. MRE 407. This is based on the policy that owners may be discouraged from making repairs or taking action that might prevent future injury if evidence of those subsequent remedial actions could be held against them at a later date. *Denolf v Frank L Jursik Co*, 395 Mich 661, 667; 238 NW2d 1 (1976). However, because this policy consideration is not applicable where imposition of liability is not sought against the person taking the remedial action, MRE 407 is generally not grounds for exclusion of evidence of a subsequent remedial measure taken by a third party who was not involved in the action and where evidence of the action taken is otherwise relevant. *Id.* at 669-670; *Muilenberg v Upjohn Co*, 169 Mich App 636, 647; 426 NW2d 767 (1988); *Hadley v Trio Tool Co*, 143 Mich App 319, 327; 372 NW2d 537 (1985).

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Therefore, evidence of subsequent remedial measures performed by nonparties may be admissible if relevant to the issues of the case.

However, our Supreme Court limited its holding in *Denolf* to situations where the remedial action was relevant, would not offend policy considerations regarding encouraging repairs, and was not undertaken at the direction of a party plaintiff. *Denolf*, *supra* at 669-670; *Hadley*, *supra* at 327. In the present case, the proposed testimony does not meet this standard. As the agent of the shopping mall, the maintenance company acted under the direction and control of a party in its maintenance of the mall, including the implementation of any subsequent remedial measures. More importantly, the admission of evidence that the maintenance company initiated subsequent remedial measures would seriously offend the overriding policy considerations of MRE 407. The maintenance company was the party responsible for the parking lot maintenance at the time of plaintiff's fall. They were also the party who took subsequent measures, as would be testified to by the employee-witness, to improve the safety of the parking lot and avoid future injuries. The trial court correctly determined that, under the facts of the case, the maintenance company came within the protection of MRE 407. We find no abuse of discretion in refusing to allow the testimony into evidence.

Plaintiff also argues on appeal that the trial court erred in giving the jury an instruction regarding defendant's duty to remove a natural accumulation of snow and ice. This Court reviews jury instructions in their entirety for an abuse of discretion. *Bordeaux v Celotex Corp*, 203 Mich App 158, 168-169; 511 NW2d 899 (1993). There is no error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. *Id*.

During trial, plaintiff objected to SJI2d 19.05, arguing that it applied only to a natural accumulation of ice and snow and that plaintiff's injury was due to an unnatural accumulation of ice and snow. As a result, the trial court modified the instruction to the jury as follows:

> *If you find that there is a natural accumulation of snow and ice*, it is the duty of the defendant to take reasonable measures within a reasonable period of time after an accumulation of snow and ice to diminish the hazard of injury to the plaintiff.

Nevertheless, plaintiff argues on appeal that the instruction, even as modified, is not relevant to the facts of the case because it applies only to naturally occurring conditions. We disagree.

A standard jury instruction is not substantive law. *In re Condemnation of Private Property*, 211 Mich App 688, 692; 536 NW2d 598 (1995). It is the responsibility of the trial court to determine whether the statement of law in the instruction is correct. *Id.*; *Scalabrino v Grand Trunk WR Co*, 135 Mich App 758, 763; 356 NW2d 258 (1984). This Court has stated, "It is beyond peradventure that the owners of a shopping center have a duty to their business invitees to exercise reasonable care to diminish the hazards of ice and snow accumulation." *Bauer v City of Garden City*, 139 Mich App 354, 356; 362 NW2d 280 (1984). As the owner of a commercial parking lot, defendant owed plaintiff a duty of reasonable care. *Id*. This duty required that defendant take reasonable measures within a reasonable time to diminish the hazard of injury to an invitee after an accumulation of ice and snow.

Orel v Uni-Rak Sales Co, Inc., 454 Mich 564, 567; 563 NW2d 241 (1997); *Quinlivan v The Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 261; 235 NW2d 732 (1975).

Cases following *Quinlivan* have determined that a defendant's duty of reasonable care in an invitor-invitee context is not limited to the initial accumulation of ice and snow. *Anderson v Wiegand*, 223 Mich App 549, 557-558; 567 NW2d 452 (1997). *Anderson* was similar to the case at bar in that the plaintiff fell on plowed snow that had melted and had then refrozen. *Id*. at 557-558. In *Anderson*, this Court determined that, during the winter months, the forces of nature can be expected to reassert themselves on a regular basis. *Id*. at 558. Such hazards include melted snow runoff refreezing into ice patches. *Id*. Under *Quinlivan*, an invitor must take reasonable steps within a reasonable time to diminish these types of hazards as well. *Id*. Therefore, we find that the refreezing of the melting wind rows in the case at bar was a natural accumulation subject to the *Quinlivan* standard of reasonable measures within a reasonable time to diminish the hazard of injury to plaintiff. Accordingly, the instruction was proper and adequately and fairly presented plaintiff's theory of the case that there was not a natural accumulation.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Maureen Pulte Reilly
/s/ Glenn S. Allen, Jr.