STATE OF MICHIGAN

COURT OF APPEALS

NORMA KELLY,

Plaintiff-Appellee,
Cross-Appellant,

v

BUILDERS SQUARE, INC.,

Defendant-Appellant,
Cross-Appellee.

UNPUBLISHED
July 31, 1998

No. 199501
Washtenaw Circuit
LC No. 94-1276-NO

Before: McDonald, P.J., and O'Connell and Smolenski, JJ.

PER CURIAM.

Plaintiff sued defendant, alleging that its negligence caused injuries she sustained while in one of its stores when several box fans, packaged in cardboard boxes, fell from a stack and hit plaintiff in the shoulder and chest. A jury found defendant's negligence proximately caused plaintiff's injuries and awarded her medical costs of $10,227. The trial court granted plaintiff's motion for a partial new trial on noneconomic damages because the jury failed to award plaintiff any noneconomic damages. Following a second jury trial, plaintiff was awarded $150,000. Defendant appeals as of right, and plaintiff raises one issue on cross-appeal by leave granted. We affirm.

Defendant first argues the trial court erred in denying its motion for directed verdict. This Court reviews the grant or denial of a directed verdict de novo. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). We view the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in favor of the nonmoving party. *Id*. Directed verdicts are only appropriate when no factual question exists upon which reasonable minds may differ. *Id.*

Defendant contends it was entitled to a directed verdict because plaintiff failed to introduce evidence that defendant knew or should have known the unsafe condition existed. We disagree. Proof of notice is only required where the unsafe condition is caused by something

other than the active negligence of the storekeeper or the storekeeper's employees. *Berryman v K Mart*, 193 Mich App 88, 92; 483 NW2d 642 (1992), citing *Serinto v Borman Food Stores*, 380 Mich 637, 640-641; 158 NW2d 485 (1968). In this case, plaintiff introduced evidence that supported a legitimate inference that defendant or its employees created the condition that caused the fans to fall; therefore she was not required to prove notice. *Berryman, supra* at 93. Plaintiff testified the fans fell on her while she walked down the aisle of defendant's store. Plaintiff's husband testified that the aisle of the store was approximately six feet wide and that the fans were stacked approximately ten to twelve feet high. Plaintiff stated she was not reaching to get a fan when they fell, nor had she brushed up against the stack or touched them in any other way. She also testified that she did not hear anyone else around the area in which the fans were stacked. In light of this evidence, the jury could legitimately infer that the fans fell because they were stacked in an unsafe manner and that defendant and its employees were responsible for stacking the fans. This inference was legitimate because there was sufficient evidence introduced to take the inferences "out of the realm of conjecture." *Berryman, supra* at 92.

Defendant next argues the trial court erred in allowing plaintiff to introduce testimony that the day following the accident, defendant put a rope around the top of the stack of fans involved in the accident. The evidence was not admitted to show defendant's negligence, but instead it was introduced for the purpose of showing another, safer way to display the fans was feasible. MRE 407. Accordingly, the trial court did not abuse its discretion in admitting the testimony. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993).

Next, defendant argues the trial court erred in granting plaintiff's motion for a partial new trial on the issue of noneconomic damages.[1] This Court reviews the trial court's decision to grant a new trial limited to damages for an abuse of discretion. *Flonew v Dalman*, 199 Mich App 396, 406; 502 NW2d 725 (1993). Here, the trial court did not abuse its discretion where the jury did not award plaintiff any noneconomic damages despite its implicit finding that defendant's negligence proximately caused her injuries and despite the trial court's instruction to the jury on the damages issue. See *Fordon v Bender*, 363 Mich 124; 108 NW2d 896 (1961); *Mosley v Dati*, 363 Mich 690; 110 NW2d 637 (1961). The trial court observed there was extensive and credible testimony about plaintiff's medical treatment and the permanency of her injuries. The trial court also noted that the defense focused on whether defendant was negligent and whether defendant's negligence was the proximate cause of plaintiff's damages. Under these circumstances, we find the trial court did not abuse its discretion in granting a partial new trial.

Finally, defendant argues the trial court erred by granting mediation sanctions to plaintiff with respect to both jury awards. However, defendant has abandoned this issue by failing to cite any authority in support of its position. *Neal v Oakwood Hospital Corp*, 226 Mich App 701,722; 575 NW2d 68 (1997). In any event, the trial court properly awarded plaintiff actual costs and attorney fees from both trials because the ultimate result was more favorable to plaintiff than the mediation evaluation and both trials were necessitated by defendant's rejection of the evaluation. See *Severn v Sperry Corp*, 212 Mich App 406, 416-417; 538 NW2d 50 (1995).

On cross-appeal, plaintiff argues the trial court erroneously refused to instruct the jury with respect to the res ipsa loquitur doctrine. We need not address this issue in light of our decision to affirm the trial court's denial of defendant's motion for directed verdict.

Affirmed.

/s/ Gary R. McDonald
/s/ Michael R. Smolenski

[1] Defendant raises a similar issue in its fourth question presented but does not make any additional argument in the body of its brief. Therefore, we only address the argument defendant makes in section III of its brief. See *Meagher, supra* at 718.