STATE OF MICHIGAN

COURT OF APPEALS

JOAN BUSH,

Plaintiff-Appellant/Cross-Appellee,

v

DETROIT SYMPHONY ORCHESTRA HALL, INC.,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
May 29, 2001

No. 220351
Wayne Circuit Court
LC No. 97-738176-NO

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

PER CURIAM.

Plaintiff appeals by right from a judgment of no cause for action entered in favor of defendant in this premises liability action. Defendant cross-appealed, arguing that the trial court erred in failing to grant defendant's motion for summary disposition. While on defendant's premises attending a children's concert with her granddaughter, plaintiff fell down some steps near a sales boutique and ruptured her Achilles' tendon. Plaintiff contends that the trial court erred and should have granted her motion for a new trial because the verdict was against the great weight of the evidence. We disagree and affirm.

Plaintiff first contends that the trial court abused its discretion in failing to admit evidence that a young girl almost fell down the stairs in question on the same day as plaintiff's accident. The trial court did, however, admit evidence of a similar accident that occurred two days before plaintiff's accident, but ruled that the same-day incident was not sufficiently documented to allow into evidence. The young girl who almost fell down the steps was never identified, and the individual who witnessed the incident did not testify. The only evidence of the incident was a notation in a report. Moreover, plaintiff conceded that it was impossible to know whether the incident occurred before or after plaintiff's accident.

In *Freed v Simon*, 370 Mich 473, 475; 122 NW2d 813 (1963), the Michigan Supreme Court held:

> [E]vidence of prior accidents has always been admissible to show defendant's notice or knowledge of the defective or dangerous condition alleged to have caused the accident, and that the rule now seems to be established that evidence of

> prior accidents at the same place and arising from the same cause is admissible not only to show defendant's notice or knowledge of the defective or dangerous condition alleged to have caused the accident, but to show the defendant's negligence on the theory defendant, having notice or knowledge of the defect, is held to the duty of exercising such care as would a reasonably prudent person having such notice or knowledge.

The dispositive factor in this determination was plaintiff's concession that she was unable to show whether the same-day incident occurred before or after her own accident. The *Freed* decision clearly states that evidence of *prior* accidents is admissible to demonstrate notice or knowledge of a defective or dangerous condition. The obvious prerequisite to admitting such evidence is to prove that the incident occurred before the accident at issue. Because plaintiff failed in this regard and did not offer the testimony of the person who witnessed the incident, the trial court did not abuse its discretion in refusing to admit the evidence of the same-day incident.

Plaintiff next contends that the trial court erred by refusing to allow plaintiff to impeach defendant's interrogatory answer that stated that no changes had been made to the position of the boutique. Although during the course of discovery defendant indicated in its answers to interrogatories that the boutique was not moved after plaintiff's accident, one of defendant's employees, Ted Wedepohl, in a subsequent pretrial deposition, testified that the boutique was moved away from the stairs after plaintiff's accident.

Based on the contradictory claims, plaintiff sought to introduce the answers to the interrogatories and the deposition testimony of Wedepohl to impeach the veracity of the interrogatories. Defendant moved in limine to exclude the deposition testimony of Wedepohl under MRE 407, governing evidence of subsequent remedial measures, and based on MRE 403, unfair prejudice. Defendant argued that it would be inappropriate for Wedepohl's testimony to be used to impeach the interrogatories because the answer to the interrogatory was inadmissible under MRE 407. The trial court held that Wedepohl's deposition testimony was more prejudicial than probative and ruled that Wedepohl's deposition testimony was not admissible for that purpose.

MRE 407 provides:

> When, after an event, measures are taken which, if taken previously would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The policy against the introduction of subsequent remedial measures encourages persons or entities to "improve their products, property, services and customs without risk of prejudicing any court proceeding and consequently delaying implementation of improvements." *Smith v E R Squibb & Sons, Inc,* 405 Mich 79, 92; 273 NW2d 476 (1979).

This Court has held that evidence of a subsequent remedial measure is admissible as impeachment when the opposing party has denied making a repair. *Ellsworth v Hotel Corp of America,* 236 Mich App 185, 189; 600 NW2d 129 (1999). Defendant argues, and this Court agrees, that there was no evidence admitted at trial that defendant denied moving the boutique after the accident. The interrogatories were never admitted into evidence. Plaintiff intended to impeach the answers provided to the interrogatories with Wedepohl's deposition testimony. However, an obvious prerequisite to impeachment is having evidence already admitted to impeach. Because the denial of a subsequent remedial measure was never admitted into evidence, there was nothing for plaintiff to impeach. Therefore, the trial court did not abuse its discretion in refusing to admit Wedepohl's deposition testimony for the limited purpose of impeaching defendant's interrogatory answers.

Plaintiff next contends that the trial court abused its discretion in failing to grant a new trial on the basis that the jury's verdict was against the great weight of the evidence. This Court reviews the trial court's denial of a motion for a new trial for an abuse of discretion. *Morinelli v Provident Life and Accident Ins Co,* 242 Mich App 255, 261; 617 NW2d 777 (2000). Substantial deference is given to a trial court's determination that a verdict was not against the great weight of the evidence. *Id.*

In this case, plaintiff demonstrated the following relevant facts: the area around the boutique was crowded; neither plaintiff nor her granddaughter saw the stairs before the accident; there were no railings or signs to indicate the presence of the stairway; no usher was stationed at the stairway at the time of plaintiff's accident; plaintiff took a small step backwards and fell down the stairs; and plaintiff's fall resulted in a ruptured Achilles' tendon that required surgery to repair. Plaintiff's expert, Walter Cygan, opined that the boutique was positioned too close to the stairs, and patrons were unable to see the danger. He also stated that the stairway should have had a handrail on either side and possibly one in the middle to warn patrons of the descent. Cygan further testified that signs advising of the stairs or the stationing of an usher placed at the stairs would have been appropriate. Cygan opined that plaintiff's conduct was reasonable and that the condition was not open and obvious.

Defendant contended that the stairs were an open and obvious condition such that it did not have a duty to warn plaintiff. While an invitor must warn of hidden defects, there is generally no duty to warn of open and obvious conditions. *Hughes v PMG Building, Inc,* 227 Mich App 1, 10; 574 Mich 691 (1997). A danger is open and obvious if it is reasonable to expect a person of ordinary intelligence to discover the danger upon casual inspection. *Id.* However, even if a danger is open and obvious, a possessor of land may still have a duty to protect invitees against foreseeably dangerous conditions. *Bertrand v Alan Ford, Inc,* 449 Mich 606, 610-611; 537 NW2d 185 (1995). In *Bertrand, supra* at 611, the Supreme Court stated:

> [T]he rule generated is that if the particular activity or condition creates a risk of harm only because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger. On the other hand, if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor

is required to undertake reasonable precautions. The issue then becomes the standard of care and is for the jury to decide.

Plaintiff contends that even if the stairs were an open and obvious condition, the unrefuted testimony proves that the risk of harm remained unreasonable pursuant to *Bertrand.* However, according to *Bertrand,* "the issue then becomes the standard of care and is for the jury to decide." *Bertrand, supra*. Here, the jury was able to consider the testimony and the evidence admitted at trial. The various photographs depicting the stairs and the adjacent boutique were the key evidence admitted at trial. From these photographs alone, the jury could have determined that the danger posed by the stairs was open and obvious, and the risk of harm was not unreasonable. Thus, the trial court did not abuse its discretion in denying plaintiff's motion for a new trial. *Morinelli, supra*. For these reasons and considering the substantial deference to be given a trial court's determination that a verdict was not against the great weight of the evidence, this Court holds that reversal is unwarranted. *Id.*

Plaintiff next contends that the trial court erred in failing to grant a new trial on the basis of defense counsel's alleged misconduct, a result of which plaintiff was denied a fair trial. During voir dire, defense counsel indicated that defendant was a nonprofit institution that solicits money from the community to support its operations. Defense counsel then inquired whether any of the prospective jurors had any strong feelings against an institution that uses tax dollars for its support and solicits money from the public. Plaintiff's counsel objected, and the trial court sustained the objection.

Plaintiff argued that defense counsel's questions during voir dire inappropriately misled the jury by implying that a verdict in favor of plaintiff would ultimately be paid by the jury as part of the taxpaying public. Although it could be inferred from defense counsel's question that any verdict for plaintiff might be born by the taxpayers and/or donors, defense counsel did not make a direct appeal to the jurors. Moreover, defense counsel ceased his line of inquiry when the trial court sustained plaintiff's objection.

In order to preserve an issue of attorney misconduct for appeal, the aggrieved party must object and request a curative instruction or a motion for a mistrial. *Stitt v Holland Abundant Life Fellowship (On Remand),* 243 Mich App 461, 465-466; 624 NW2d 427 (2000), quoting *Reetz v Kinsman Marine Transit Co,* 416 Mich 97, 102-103; 330 NW2d 638 (1982). Here, plaintiff objected to the alleged inappropriate questions during voir dire, but did not request a curative instruction or move for a mistrial. The trial court did not err by failing to sua sponte order a mistrial.

Defendant cross-appealed arguing that the trial court erred in denying its motion for summary disposition. In view of our decisions on the main appeal, we need not address defendant's issue.

We affirm.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey