STATE OF MICHIGAN

COURT OF APPEALS

DANNY JOE CRAMPTON,

Plaintiff-Appellee,

v

BOSTLEMAN CORPORATION,

Defendant/Cross-Plaintiff-Appellant,

and

HASSIG & SONS, INC.,

Defendant/Cross-Defendant.

UNPUBLISHED
June 7, 2002

No. 226120
Wayne Circuit Court
LC No. 98-807776-NO

Before: Bandstra, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

In this negligence action stemming from injuries suffered by plaintiff after stepping into an open refrigeration pit at a grocery store construction site, defendant Bostleman Corporation appeals as of right a jury verdict in plaintiff 's favor.[1] We affirm.

On appeal, defendant first argues that the trial court's jury instructions denied it a fair trial. Claims of instructional error are reviewed de novo. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Jury instructions are reviewed in their entirety rather than extracted piecemeal to establish error in isolated portions. *Id.* "Even if somewhat imperfect, instructions do not constitute error requiring reversal if, on the whole, the theories of the parties and the applicable law are adequately and fairly presented to the jury." *Id.* Reversal is not required unless the failure to reverse would be inconsistent with substantial justice. *Id.*; see also MCR 2.613(A).

In challenging the trial court's instructions, defendant first argues that the trial court erred in reading SJI2d 6.01(a), which permits the jury to infer that evidence controlled but not

[1] Plaintiff voluntarily dismissed his claims against defendant Hassig & Sons, Inc., which does not take part in this appeal.

produced by a party would have been adverse to that party. We find no error in the trial court's reading of this instruction.

SJI2d 6.01(a) should be given when (1) the evidence at issue was under the control of the party who failed to produce it and the evidence could have been produced by that party, (2) no reasonable excuse for the failure to produce the evidence was given, and (3) the evidence would have been material, not cumulative, and was not equally available to the opposite party. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 193; 600 NW2d 129 (1999). In this case, the evidence at issue, i.e., that regarding the date on which lighting at the construction site was operative, was under defendant's control as defendant was the general contractor at the construction site. The daily job reports that were produced showed that defendant kept track of the progress of construction and, as noted by the trial court, defendant offered no reasonable excuse for failing to produce the evidence. The evidence was also material, as the adequacy of lighting at the site was a part of both plaintiff's negligence theory and defendant's theory of defense. Moreover, there is nothing to suggest that evidence concerning the lighting was cumulative, or that it was equally available to plaintiff. Therefore, we conclude that the instruction was appropriately given under the facts of this case.[2]

In reaching this conclusion we reject defendant's claim that testimony indicating that various skilled trades were working on the construction project on the date of plaintiff's injury was sufficient to show that permanent lighting was both operational and adequate on that day and that, therefore, the instruction was not warranted. Contrary to defendant's assertion, neither the testimony of plaintiff's expert, Edward Gluklick, nor that of Arnold Hassig supports this argument. Although Gluklick opined that the work listed in defendant's job report would require lighting, he also pointed out that the report does not indicate that the work was being done in the area in which plaintiff was injured. Similarly, Hassig only opined that the work being done on the site, not necessarily where plaintiff was injured, would require lighting. Hassig specifically stated that he had no knowledge of the lighting conditions on the date plaintiff was injured.

Similarly, neither defendant's answer to plaintiff's interrogatories indicating that "[p]ermanent lighting was operable," nor plaintiff's testimony that his view of the pit was not obstructed by physical objects, offered sufficient information concerning the date on which permanent lighting was operative or the adequacy of such lighting on the day of the accident. Accordingly, the trial court did not err in providing SJI2d 6.01(a).

Defendant also argues that the trial court erroneously provided SJI2d 19.02, 19.03, and 19.10, concerning the duties owed by one who possesses or is otherwise in control of land, to the jury. Defendant argues that these instructions were improper because plaintiff offered no evidence as to the nature and extent of control exercised by defendant over the project in comparison to that retained by the owner. Although a general contractor is not generally liable for the negligence of a subcontractor, a general contractor may be liable for a subcontractor's negligence when it retains control of the work. *Johnson v Turner Construction Co*, 198 Mich

---

[2] Because the instruction was appropriate under the criteria outlined in *Ellsworth*, *supra*, we reject defendant's assertion that the instruction was read to the jury as punishment for defendant's failure to appear at trial.

App 478, 480; 499 NW2d 27 (1993). A general contractor may similarly be held liable "if it fails to reasonably guard against readily observable, avoidable dangers in the common work areas that create a high degree of risk to a number of workers." *Id.* Here, the instruction was not improper because it presented elements of plaintiff's claim that defendant controlled the premises and encompassed the evidence presented at trial. The daily job reports show that defendant regulated the subcontractors at the site. Also, a memorandum from defendant's meeting in April 1995 shows that the subcontractors were present and instructed by defendant. Accordingly, the law encompassed by SJI2d 19.02 and 19.03 was applicable, and the instructions were, therefore, appropriate.

SJI2d 19.10, which provides that one in control of land may not delegate his duties to another, was also appropriately given. Defendant argues that it did not argue or present evidence that it delegated its responsibility. However, there was evidence that several subcontractors were working on the construction site. Because this evidence raised a question of fact regarding whether defendant was responsible for the work or work areas of these subcontractors, the instruction was appropriate.

Defendant also argues that the trial court's refusal to give defendant's requested special jury instructions on notice and the open and obvious danger rule requires reversal. However, a requested instruction need not be given if it would neither add to an otherwise balanced and fair jury charge nor enhance the jury's ability to decide the case intelligently, fairly, and impartially. *Johnson v Corbet*, 423 Mich 304, 326-327; 377 NW2d 713 (1985). Here, the trial court provided instruction on notice. Specifically, the trial court instructed the jury that "a possessor of land has a duty to exercise ordinary care to protect someone . . . from unreasonable risk[s] of injury that *were known to the possessor or that should have been known to the possessor in the exercise of ordinary care*." The trial court also provided instruction on the open and obvious danger rule when it informed the jury that a possessor must warn an invitee of dangers that are known or that should have been known to the possessor, "unless those dangers are open and obvious." These instructions comport with those found in SJI2d 19.03. Accordingly, we do not conclude that the trial court erred in refusing to give defendant's additional instructions on these matters. *Case, supra*.

Defendant next argues that the trial court erred in denying defendant's motion for a new trial based on the great weight of the evidence. Specifically, defendant argues that the jury's award of non-economic damages is not supported by the evidence. We disagree. We review a trial court's decision whether to grant 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 the decision was so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Id*.

A new trial may be granted on some or all of the issues if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e); *Domako v Rowe*, 184 Mich App 137, 144; 457 NW2d 107 (1990). However, the trial court must not substitute its judgment for that of the factfinder, and thus a jury's verdict should not be set aside if there is competent evidence to support it. *Ellsworth, supra* at 194. Moreover, "'it is fundamental that every attempt must be made to harmonize a jury's verdicts. Only where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside.'" *Clark v Seagrave Fire*

Apparatus, Inc, 170 Mich App 147, 153; 427 NW2d 913 (1988), quoting *Granger v Fruehauf Corp*, 429 Mich 1, 9; 412 NW2d 199 (1987).

In this case, plaintiff testified that the injury, which occurred in 1995, was initially "very painful" and that he still walks with a limp and experiences pain when he walks or drives his truck. Plaintiff's treating physician similarly testified that the first year after surgery, which also occurred in 1995, would be the most difficult, and confirmed that plaintiff 's pain could continue forever and possibly require future surgery. Although we agree with defendant that it seems somewhat illogical that, faced with this testimony, the jury limited its award of non-economic damages to the year 1999, the evidence nonetheless supports an award for such damages during that year. Given such support, we do not conclude that the verdict is "so logically and legally inconsistent that [it] cannot be reconciled." *Id*. In any event, as the trial court pointed out, the illogic in the jury's award appears to be in defendant's favor as an award for past non-economic damages and future non-economic damages beyond 1999 was not included despite evidence that plaintiff experienced pain and suffering at the time of and immediately after his injury, and could continue to experience such pain and suffering for the rest of his life. Accordingly, we find no abuse of discretion in the trial court's denial of defendant's motion for a new trial.

Defendant finally argues that the trial court erred in denying defendant's motion to exclude the testimony of plaintiff 's expert, Edward Gluklick. We disagree. A trial court's determination whether a witness is qualified to render an expert opinion is reviewed for an abuse of discretion. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 620; 600 NW2d 66 (1999).

Plaintiff alleged that defendant negligently caused or allowed a hazardous condition on the construction site that resulted in plaintiff 's injury. Gluklick was retained by plaintiff to offer expert testimony concerning the safety of the construction site. A person may be qualified to testify as an expert witness by virtue of his knowledge, skill, experience, training, or education in the subject matter of the testimony. MRE 702; *Mulholland v DEC International Corp*, 432 Mich 395, 403; 443 NW2d 340 (1989). Here, Gluklick testified that he worked from 1947 to 1977 as a general contractor, building commercial, industrial, and government buildings. He further indicated that from 1975 to 1990, he was a vice-president of an engineering program that provides construction consulting services and claims analysis. From 1990 to the present, Gluklick has been the president of Gluck Group, which performs construction consulting and claims analysis. Although Gluklick did not obtain a formal degree, he has taken courses and taught courses about the administration and conduct of construction as it is presently practiced and has enforced safety standards in his business as a general contractor. Based on this testimony, the trial court did not abuse its discretion in denying defendant's motion because Gluklick was qualified to testify on construction site safety matters based on his extensive experience as a general contractor and construction safety matters.

In any event, we note that defendant did not bring its motion to exclude Gluklick's testimony until the second day of trial. "A party must move to strike an expert within a reasonable time after learning the expert's identity and basic qualifications." *Cox v Flint Bd of Hosp Managers (On Remand)*, 243 Mich App 72, 80; 620 NW2d 859 (2000), lv granted 465 Mich 943; 639 NW2d 805 (2002). Failure to timely do so results in forfeiture of the issue. *Id.* A party may not sabotage another party by depleting the substance of the case without warning. *Id.* In this case, defendant was aware of Gluklick's field of expertise as early as September 15, 1998, when plaintiff filed his witness list. However, defendant did not take issue with Gluklick's

qualifications until after a jury had been picked. Accordingly, even if Gluklick lacked qualification, the trial court did not abuse its discretion because of the untimeliness of defendant's motion.[3]

We affirm.

/s/ Richard A. Bandstra
/s/ Michael R. Smolenski
/s/ Patrick M. Meter

[3] Defendant also argues that the trial court abused its discretion in denying its motion because Gluklick relied on defendant's safety procedures, which were not implemented until after plaintiff's injury. This argument is not persuasive in light of the above analysis and for two other reasons. First, defendant did not object to the admission of the safety procedures at trial. Second, the procedures referred to in Gluklick's opinion do not have any bearing on whether Gluklick was qualified.