STATE OF MICHIGAN

COURT OF APPEALS

GINA EVANS and TODD EVANS, Plaintiffs-Appellees, v PAUL MCBRIDE and JULIE MCBRIDE, Defendants-Appellants.	UNPUBLISHED December 2, 2008 No. 279382 Macomb Circuit Court LC No. 2005-000129-NO

Before: Gleicher, P.J., and Kelly and Murray, JJ.

PER CURIAM.

Defendants, Paul McBride and Julie McBride, appeal as of right from a judgment awarding plaintiffs, Gina Evans and Todd Evans, $231,625.41 following a jury trial. We affirm.

This premises liability action arises from an incident in which plaintiff Gina Evans was injured when she fell through an access hole that was covered with drywall in an unfinished attic. In a prior appeal, this Court affirmed the trial court's earlier order denying defendants' motion for summary disposition, *Evans v McBride*, unpublished opinion per curiam of the Court of Appeals, issued September 5, 2006 (Docket No. 267985), on the ground that "there [was] a genuine question of material fact whether . . . the drywall panel through which plaintiff fell was hidden to an average person of ordinary intelligence given all the circumstances." *Id.*, slip op at 2. The case proceeded to trial on plaintiffs' claims for premises liability and loss of consortium, and a jury found in favor of plaintiffs on both claims. Thereafter, the trial court denied defendants' motion for judgment notwithstanding the verdict ("JNOV") or a new trial.

I

A. Premises Liability to Licensees

In premises liability cases, as in other negligence cases, a plaintiff must introduce evidence sufficient to establish that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach was a proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages. *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 60; 680 NW2d 50 (2004). "Whether a defendant owes an actionable legal duty to

a plaintiff is a question of law." *Spikes v Banks*, 231 Mich App 341, 355; 586 NW2d 106 (1998). "Whether [defendant] breached her duty to plaintiff is a question of fact for a jury." *Id.*

The duty owed by a landowner to a person present on the premises depends on the visitor's status. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). In this case, it is undisputed that Gina was a social guest in defendants' home and, therefore, she was a licensee. *Id*. Thus, the following rule applies:

> A landowner owes a licensee a duty *only to warn* the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit. [*Id*. (emphasis added; citation omitted).]

The duty to warn licensees extends to hidden dangers that involve an unreasonable risk of harm. *Burnett v Bruner*, 247 Mich App 365, 370; 636 NW2d 773 (2001). Otherwise, a licensee "is expected to take the premises as the possessor himself uses them," with no more precautions taken than the possessor takes for himself and his family. *Id*. at 370-371 (citation omitted). Thus, defendants here did not have a duty to repair the access hole or make it safe. Compare *Stitt*, *supra* at 597 (duty owed to invitees).

As stated above, negligence is the breach of a duty of care. See *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). Therefore, because the only duty owed by defendants to Gina in this case was a duty to warn of known hidden dangers, the only actionable negligence was defendants' failure to warn.

At trial, it was undisputed that Julie did not warn Gina about the hole. It was also undisputed that defendants were aware of the hole. Instead, defendants disputed whether the hole was an unreasonably dangerous "hidden danger" that triggered their duty to warn.

B. Jury Instructions

Defendants argue that the trial court erred in instructing the jury that it could infer negligence from defendants' violation of various building code ordinances.

Claims of instructional error are reviewed de novo, *Ward v Consolidated Rail Corp*, 472 Mich 77, 83; 693 NW2d 366 (2005), with the jury instructions considered as a whole rather than piecemeal, *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000); *Bordeaux v Celotex Corp*, 203 Mich App 158, 169; 511 NW2d 899 (1993). Even if jury instructions are somewhat imperfect, reversal is not required if, on balance, the instructions given fairly and adequately apprised the jury of the applicable law and the parties' theories. *Case*, *supra* at 6; *Bordeaux*, *supra* at 169. Further, instructional error does not require reversal unless failure to reverse would be inconsistent with substantial justice. *Ward*, *supra* at 84; *Case*, *supra* at 6.

In this case, the trial court instructed the jury in accordance with M Civ JI 19.06, which accurately reflects the duties owed to Gina as a licensee, and then gave an instruction based on M Civ JI 12.03. The 19.06 instruction reads as follows:

> The Defendants are liable for physical harm caused to [plaintiff] by a condition on the premises if, but only if:
>
> A: The Defendant knew or should have known of the condition, and should have realized that it involved an unreasonable risk of harm to [plaintiff] and should have expected that she would not discover or realize the danger, and,
>
> B: The Defendant failed to warn [plaintiff] of the danger, and
>
> C: [Plaintiff] did not know or have reason to know of the danger.

The instruction based on M Civ JI 12.03 reads as follows:

> The Township of Chesterfield has building codes with respect to occupied and unoccupied spaces. The residential building code 2000 was adopted by Chesterfield Township and Section R105.1 of the code requires a permit for the installation of the subject doorway into the storage space.
>
> The unguarded scuttle hole through which Gina Evans fell was not covered with a weight-bearing floor and was in violation of Section 1003.2.12 of the Michigan Building Code 2000, and Section 315.3 of the 1995 CABO.
>
> If you find that the Defendant violated this ordinance before or at the time of the occurrence, such violation is evidence of the negligence which you should consider together with all the other evidence in deciding whether defendant was negligent. If you find that the Defendant was negligent, you must then decide whether such negligence was a proximate cause of the injury to plaintiff.

The instruction based on M Civ JI 19.06 was accurate and applicable to this case. However, the instruction based on M Civ JI 12.03 allowed the jury to infer that defendants were negligent if they violated various building code ordinances. The trial court erred in giving M Civ JI 12.03 because, as discussed above, the only actionable duty that defendants owed to Gina was a duty to warn. *Stitt*, *supra* at 596. In other words, because defendants did not have an affirmative duty to repair the hole or make it safe, it was improper to instruct the jury that it could infer that defendants were negligent if the jury found that defendants violated building code ordinances that related to repairing or guarding the hole by leaving the hole exposed, failing to place a guard around it, or by failing to install sufficient lights.

Despite this error, however, there are two reasons why upholding the verdict would not result in a substantial injustice. *Case*, *supra*. First, had the trial court not stated that the code violations could be evidence of negligence, the instruction otherwise would have been proper in light of the "dangerous condition" element of plaintiffs' case.[1] To instruct the jury in this type of

[1] For example, there would be no error if the trial court had limited the instruction to informing
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case that there are building codes that address how to safely guard a hole is not improper as it informs the jury as to local laws addressing the potential hazards of these situations. Second, the entire trial was focused on the condition of the hole at and just prior to the accident, as it was undisputed that Julie did not warn Gina about the hole. Rather, defendants disputed whether the hole was a "hidden" danger and whether Gina should have known or had reason to know of the danger. Thus, while the erroneous instruction may have been somewhat confusing on the issue of negligence, it had no bearing on any *disputed* issue and did not affect the jury's consideration of any *disputed* issue. Therefore, we conclude that the error was harmless because failure to reverse on this basis would not be inconsistent with substantial justice.

C. Evidence of Ordinance Violations

Defendants also argue that the trial court erred in allowing Sean Short and Raymond Rieli to testify that defendants violated various building code ordinances.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). Preliminary issues of admissibility are reviewed de novo, but it is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Id*. "An error in the admission or the exclusion of evidence . . . is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A); see also MRE 103(a).

Although defendants objected to the admissibility of Short's testimony concerning ordinance violations, they did not object to Rieli's testimony on this basis. Therefore, the latter issue is unpreserved and we review the issue for plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

As indicated previously, the only disputed issue was whether the hole was an unreasonably dangerous "hidden" condition that triggered a duty to warn licensees such as Gina. Rieli and Short testified that defendants violated township ordinances by not obtaining a permit to install the door to the storage area, and by failing to repair the access hole or place a guard around it. In part, this testimony pertains to a duty to repair or make the hole safe which, as discussed above, does not exist in this case. However, as with the jury instruction, the testimony was also relevant to whether the condition itself was unreasonably dangerous, thereby triggering a duty to warn. Rieli and Short both testified that the purpose of a building code ordinance is to protect the health, safety, and welfare of the public. The ordinance requirements that a hole be covered or guarded were intended to promote safety. The jury could infer that defendants' violation of such ordinances rendered the access hole unreasonably dangerous.

Whether the access hole was an unreasonably dangerous hidden condition was a disputed issue in this case. Because Rieli and Short's testimony was relevant to resolving this issue, the

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the jury about the code requirements and to permitting the jury to consider, in determining whether a dangerous condition existed such that a duty to warn arose, whether defendants complied with the ordinances.

trial court did not abuse its discretion in allowing Short to testify concerning defendants' ordinance violations, and Rieli's testimony did not constitute plain error.

D. Failure to Plead an Ordinance Violation

Defendants also challenge the trial court's decision to allow plaintiffs to introduce evidence of an ordinance violation in the absence of such an allegation in their complaint.

As noted by defendants, in *Cassibo v Bodwin*, 149 Mich App 474, 476-477; 386 NW2d 559 (1986), this Court held:

> Whereas a violation of an ordinance is only evidence of negligence, violation of a statute creates a rebuttable presumption of negligence. In addition, courts are required to take judicial notice of all statutes of the state.[2] Thus, it is not a fatal defect to fail to plead a statute if the pleadings set forth sufficient facts to show a claim based on the statute. An amendment to plead the statute is, therefore, in the nature of procedural "housekeeping." [citations omitted; footnote supplied.]

In the present case, plaintiffs did not allege any ordinance violations in their complaint. *Cassibo*, however, is distinguishable in two respects. First, the question of whether defendants violated any ordinances had been at issue since early in this case, while in *Cassibo* it was sprung on the defendant the day before trial. *Id*. at 477. Specifically, here defendants' interrogatory answers indicated that, as of September 2005, defendants had retained an expert on the issue of ordinance violations. Additionally, defendants addressed the issue of ordinance violations in their reply brief in support of their motion for summary disposition. The issue was also addressed in defendants' brief to this Court in their prior appeal. Second, the plaintiffs in *Cassibo* attempted to use an ordinance violation as the sole act of negligence, *id. at* 476, whereas here plaintiffs invoked the ordinance to lay the foundation (i.e., that the hole was a dangerous condition) to argue that defendants' breached their duty to warn, and therefore were negligent. For these reasons, *Cassibo* does not impact the outcome of this issue.

II

Defendants next argue that it was improper to allow Rieli to testify that defendant acted unreasonably in failing to warn Gina about the access hole because expert testimony on that issue was not necessary.

Under MRE 702, the testimony of a qualified expert is admissible "[i]f the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand evidence or to determine a fact in issue . . . ." Expert testimony is inadmissible, and unhelpful "when it merely deals with a proposition that is not beyond the ken of common knowledge." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 790; 685 NW2d 391 (2004) (citation omitted).

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[2] Courts are also permitted to take judicial notice of municipal ordinances. MRE 202(a)(2).

We believe that, in light of all the evidence, the jury was capable of determining for itself whether Julie acted unreasonably by failing to warn Gina about the access hole, and that expert testimony on that particular issue was not necessary. However, reversal is not required. Paul admitted that he knew that the access hole was dangerous, which is why the storage room was kept locked. Further, Julie agreed that if someone did not know that the access hole was there, she would not know to avoid it. She also agreed that she would have warned Gina about the hole if she had realized that Gina was behind her. Because defendants' own testimony established that the condition was dangerous, the condition was not likely to be noticed by a person unfamiliar with it and was one about which Julie would have warned a person accompanying her, and because Rieli's testimony was not critical to the disputed issue of whether Julie should have realized that Gina had followed her into the storage area, his testimony did not affect the outcome. Therefore, reversal is not required.

III

We also reject defendants' argument that the trial court erred in allowing Rieli to testify about whether Gina had sufficient time to perceive the access hole in the floor and avoid it because there was no showing that Rieli's testimony on this issue was reliable.

In *Gilbert*, *supra* at 780 n 46, our Supreme Court adopted the requirements of *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), concerning the reliability of expert testimony. MRE 702 was then amended to provide:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Under *Daubert* and MRE 702, the trial court's role is to determine "whether the opinion is rationally derived from a sound foundation." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008) (quotation and citation omitted). An expert's opinion evidence is not admissible if it is based on "subjective belief or unsupported speculation." *Id*. at 218 (citation omitted). However, "a party may waive any claim of error by failing to call this gatekeeping obligation to the court's attention." *Craig v Oakwood Hosp*, 471 Mich 67, 80-82; 684 NW2d 296 (2004).

In this case, before defendants objected, Rieli testified concerning what perception-reaction time is, how it fits in with accident reconstruction, and how long it is for most people. Defendants objected only when Rieli was asked, in particular, whether Gina had an opportunity to perceive and avoid the hole, after Julie turned to the right. However, the record discloses that Rieli's opinion was rationally derived from a sound foundation and the evidence presented at trial. Therefore, admission of his testimony did not amount to an abuse of discretion.

IV

Defendants' final argument is that the trial court erred in denying their motion for JNOV because there was insufficient evidence to prove that Gina fell as a result of a "hidden" condition.

This Court reviews de novo a trial court's decision on a motion for JNOV. *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005). "The appellate court is to review the evidence and all legitimate inferences in the light most favorable to the nonmoving party [to determine whether a question of fact existed]. Only if the evidence so viewed fails to establish a claim as a matter of law should the motion be granted." *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000).

At trial, Gina testified that she followed Julie into the storage room, staying close behind her. The room was somewhat dark, although there was natural light coming through a window at one end. Gina was looking around and did not see the hole. When Julie turned to the right, Gina took one or two steps straight ahead. Gina fell into the hole only a second after Julie turned to the right. Using photographs as visual aids, Rieli testified that when a person is walking closely behind another, at approximately an arm's length away, their view of the ground is obscured, even if the person in front is a relatively small woman. In Rieli's opinion, after Julie moved to the side, Gina did not have enough time to perceive the hole, react, and avoid it.

Viewed in a light most favorable to plaintiffs, the evidence was sufficient to enable a reasonable jury to find by a preponderance of the evidence that the access hole was a "hidden" danger. Thus, the trial court did not err in denying defendants' motion for JNOV.[3]

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray

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[3] We reject defendants' unpreserved argument that in determining whether Gina should have discovered the access hole, it is improper to consider whether Julie's body obstructed Gina's view, because Julie is not part of the premises. As indicated previously, a landowner has a duty to warn licensees of known dangerous conditions when "the licensee does not know or have reason to know of the dangers involved." *Stitt*, *supra* at 596. Thus, if some activity of the landowner would prevent a licensee from knowing or having reason to know of a dangerous condition, a duty to warn may arise.