STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of JEFF DEISING.

PAMELA LEMMER, as Personal Representative for the Estate of JEFF DEISING,

Plaintiff/Appellant-Cross Appellee,

v

TRANSPORT REPAIR SERVICES, INC.,

and

RZ PROPERTIES, LLC,

Defendants/Appellees-Cross Appellants.

UNPUBLISHED
September 24, 2013

No. 304482
Kent Circuit Court
LC No. 09-011988-NO

Before: SHAPIRO, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

Plaintiff, Pamela Lemmer, as personal representative for the estate of Jeff Deising, appeals by right from the jury verdict that found no cause of action in her wrongful death negligence claim against defendants, Transport Repair Services, Incorporated and RZ Properties, LLC. Because the jury's verdict was not against the great weight of the evidence and because the trial court did not err in instructing the jury or commit reversible evidentiary error, we affirm.

This appeal arises from the death of Jeff Deising, aged 41. On September 19, 2007, Deising was hired as a temporary day laborer by Weather Shield Roofing Company through Labor Ready, an agency that supplies temporary labor. Defendants retained Weather Shield to repair a leaking commercial flat roof in Grand Rapids. Defendant RZ Properties owns the building, and defendant Transport Repair Services is the tenant. The roof was comprised of four layers. The lowest layer, the roof deck, provided the primary weight-bearing structure of the roof. Above it were: a layer of asphalt, a layer of insulation, and at the top, a rubber layer made of a product known as modified bitumen. During the work, a section of the roof collapsed and Deising fell approximately 16 feet onto the concrete floor below. He was severely injured and died on October 6, 2007.

Plaintiff initiated this wrongful death action, alleging that defendants were negligent by failing to maintain the premises in a reasonably safe condition, failing to provide a safe workplace, failing to adequately inspect for hazards, and failing to warn Deising of the risks associated with walking on the roof. Defendants filed a notice of nonparty fault, claiming that Weather Shield was responsible for Deising's death. On plaintiff's motion, the trial court struck the notice.

Defendants moved the court for summary disposition and plaintiff moved for partial summary disposition. On September 10, 2010, the trial court denied both motions. We denied defendants' applications for leave to appeal the trial court's rulings on their notice of nonparty fault and motion for summary disposition.[1]

After a four-day trial, six of seven jurors returned a verdict that defendants were not negligent in Deising's death. On May 23, 2011, the court denied plaintiff's motion for a new trial. Plaintiff appealed by right.

Ronald Zimmerman, the sole owner of RZ Properties, and the president of Transport Repair Services, testified that the roof had been leaking for approximately one year before he hired Weather Shield. Zimmerman testified that he showed a Weather Shield salesman the interior locations of the various leaks. Weather Shield then prepared a contract, signed by Zimmerman, to remove and replace the top two layers – the modified bitumen and the insulation. The contract did not provide for Weather Shield to conduct any repairs to the roof deck itself. Zimmerman testified that he had no idea that the roof deck had deteriorated to the point that it posed a hazard.

Dennis Fowler, the Weather Shield service technician in charge of defendants' job, testified that he arrived at the job site by himself and began to remove the rubber layer, leaving the insulation and the layers below it in place. Approximately an hour later, Deising and David Lopez, another temporary day laborer, arrived to help Fowler continue to remove the rubber layer. After Fowler and Lopez carried rolls of modified bitumen across the roof without incident, Deising attempted to carry another roll.[2] A four-foot-by-four-foot section of the roof collapsed and Deising fell to the concrete floor below. At the time of the accident, only the rubber layer had been removed, and the structural roof deck was completely unexposed.

Fowler testified that no one at Weather Shield expressed any concerns over the safety of the roof deck. He believed that if there had been any concerns about it, he would have been informed and likely not sent to the job. He further affirmed that he believed the roof was safe, that there was no way to foresee the accident, and that a more thorough investigation and

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[1] *Deising v Transport Repair Servs, Inc*, unpublished orders of the Court of Appeals, entered January 14, 2011 (Docket Nos. 298102, 300090 & 300488). These trial court rulings are the basis of defendants' cross-appeal. Because we affirm the jury's verdict, we decline to address the cross-appeal.

[2] Modified bitumen comes in approximately 100-pound rolls, three feet wide and 33 feet long.

inspection would not have revealed the deteriorated roof deck. Even in the aftermath of the accident, he never became aware of anyone connected with Weather Shield that knew or believed the roof deck's condition posed a danger.

The owner of Weather Shield, James Bush, was called as a witness by plaintiff. He testified that he became intimately familiar with defendants' roofing project only after Deising's fall. After viewing the scene of the accident, Bush concluded that the roof deck deterioration was caused by at least one year of water damage. He explained that prior to the commencement of a roofing job, a Weather Shield estimator inspects the roof and takes a core sample that goes as far as the upper portion of the roof deck. However, Bush stated it was highly unlikely that a core sample would have revealed the damage to the inner layers of defendants' roof deck. Moreover, the standard test for roof deck integrity would not have revealed the amount of weight defendants' deck could support. Bush concluded that, "There is no investigation I know of that could be done to determine the structural integrity of that four-by-four spot" through which Deising fell.

Plaintiff first argues that the trial court erred in refusing to issue her requested supplemental jury instruction.[3]

> "Generally, a trial court may give an instruction not covered by the standard instructions as long as the instruction accurately states the law and is understandable, concise, conversational, and nonargumentative." *Central Cartage Co v Fewless*, 232 Mich App 517, 528; 591 NW2d 422 (1998); see also MCR 2.516(D)(4). But a trial court need not give a supplemental instruction if doing so would not "enhance the ability of the jury to decide the case intelligently, fairly, and impartially." *Central Cartage*, 232 Mich App at 528. Even if a requested supplemental instruction accurately states the law, a trial court does not abuse its discretion in rejecting it if the supplemental instruction adds nothing to an otherwise balanced and fair jury charge. *Beadle v Allis*, 165 Mich App 516, 527; 418 NW2d 906 (1987). [*Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 629; 792 NW2d 344 (2010).]

Regarding defendants' premises liability and duties owed to Deising, the trial court gave the following instruction, modeled on M Civ JI 19.03:

> [A] possessor has a duty to use ordinary care to protect an invitee from risk of harm from a condition on the possessor's premises or place of business, namely, an unsafe roof deck, if – and I'm going to stop here for a minute and say that Jeff Deising was an invitee, and, also, the possessor in this matter was the defendant corporations, and then – if, one, the risk of harm is unreasonable, and, two, the

[3] We review a trial court's decision on supplemental jury instructions for an abuse of discretion. *Guerrero v Smith*, 280 Mich App 647, 660; 761 NW2d 723 (2008). A court abuses its discretion when its decision falls outside the range of principled outcomes. *Nelson v Dubose*, 291 Mich App 496, 500; 806 NW2d 333 (2011).

> possessor knows or in the exercise of ordinary care should know of the unsafe roof deck condition and should realize that it involves an unreasonable risk of harm to an invitee.
>
> In determining whether the possessor should know of the condition, you should consider the character of the unsafe roof deck condition and whether the condition existed for a sufficient length of time that a possessor exercising ordinary care would discover the condition.

Plaintiff requested the trial court include the following supplemental jury instruction:

> I instruct you that in the context of this case, the duty to use ordinary care on the part of the Defendants includes the duty to inspect their premises and/or warn invitees of all such conditions which they know about or discover through their inspections.

Plaintiff's requested instruction was not an inaccurate statement of law. A "property owner in control of the premises" owes invitees "a duty to inspect the premises for hazards that might cause injury." *Price v Kroger Co of Mich*, 284 Mich App 496, 500; 773 NW2d 739 (2009). This "duty encompasses not only warning an invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards." *Id*. (Quotation marks and citations omitted).

However, it was not error to refuse a specific failure to warn instruction for two reasons. First, the given instructions described defendants' duty to protect invitees from known hazards or those which would have been discovered if defendants exercised ordinary care. Despite not employing the word "inspect," the issued instructions accurately described the applicable law, particularly defendants' duty to protect invitees from known hazards and hazards which would have been discovered through the exercise of ordinary care, i.e., inspection.

Second, plaintiff's claim that defendants failed to warn Deising is not supported by the record. Plaintiff argues that defendants should have informed Deising of the locations of the roof leaks. However, Zimmerman testified that he pointed out the leaks to a Weather Shield salesman. Moreover, Bush testified that the interior location of a roof leak gives little indication of the actual exterior source of the leak. He also stated that interior leaks do not typically indicate a deteriorated structural roof deck. Additionally, plaintiff did not establish that the location of Deising's fall corresponded with an interior roof leak. Accordingly, the trial court did not abuse its discretion in refusing to issue plaintiff's requested supplemental instruction that added "nothing to an otherwise balanced and fair jury charge." *Alpha Capital Mgt, Inc*, 287 Mich App at 629.

Plaintiff next argues that the trial court committed two evidentiary errors.[4] First, that the court allowed inadmissible hearsay testimony, and second, that the court erred in striking the indemnity clause in the contract between Transport Repair Services and Weather Shield.

Over plaintiff's hearsay objection, Bush testified that he asked several other roofing professionals whether Weather Shield could have or should have done anything differently to prevent the accident and whether they should do anything different in the future to prevent another accident. After the court overruled the objection, Bush stated that, "They all answered the same way, 'We don't know of anything you could have done differently. We don't know of anything you need to do differently procedurally in the future. There is no test. There is no procedure that you should have done. There is none that you can do.'" The testimony constituted hearsay, MRE 801, and no exception appears to apply, MRE 803; MRE 804. Accordingly, the trial court should have excluded Bush's testimony. MRE 802.

However, this error was ultimately harmless. Bush, plaintiff's witness, owned and operated a roofing company for 30 years. He testified that there was no test or inspection that could have revealed that defendants' roof posed a danger to Deising or the other Weather Shield employees. Bush's inadmissible statements that other roofing professionals agreed with this lends credibility to his conclusion. However, his opinion is uncontroverted in the record. Fowler, another experienced roofer, testified that he was also unaware of any test that could have revealed the extent of the deterioration of defendants' roof deck. Given the absence of any evidence that defendants or Weather Shield could have known of the danger posed by the roof deck, the erroneous admission of Bush's hearsay testimony was harmless and does not require reversal. See *Guerrero*, 280 Mich App at 655.

Plaintiff next argues that the trial court abused its discretion in granting defendants' motion in limine to exclude the following indemnity clause contained in the contract between Weather Shield and Transport:

> The owner agrees to indemnify, defend and hold Weather Shield harmless from all costs, damages, expenses, lawsuits or claims, including collection fees, claims for subrogation, attorney's fees, or costs of remediation or restoration, by any party(s) arising from or relating to the performance of the work described in this proposal; the presence or disturbance of asbestos or other hazardous substance; the present or future growth or presence of mold or other biological growth within the roof assembly or building envelope; damages to the building or its contents resulting from damage to the roof by acts of God or others; leaks due to water trapped within an existing roof system; or leaks in any area of the existing roof where Weather Shield has not performed tear off or installation work.

[4] We review a trial court's decisions on the admission of evidence for an abuse of discretion. *KBD & Assoc, Inc v Great Lakes Foam Technologies, Inc*, 295 Mich App 666, 676; 816 NW2d 464 (2012).

The trial court correctly found the clause irrelevant. MRE 402. The issue at trial was whether defendants were negligent in Deising's death. Whether Weather Shield was negligent was not relevant to that determination. MRE 401. Moreover, the clause did not affect the duties owed to Deising by Weather Shield or defendants. The indemnification clause pertains to the reimbursement of damages, not the underlying liability. To admit the indemnification clause into evidence could have confused the jury as to defendants' duties to Deising and potential liabilities to plaintiff. Thus, the trial court did not abuse its discretion by excluding the clause from the trial.

Plaintiff next argues that the trial court erred in denying her motion for new trial because the jury's verdict was against the great weight of the evidence.[5]

> When a party challenges a jury's verdict as against the great weight of the evidence, this Court must give substantial deference to the judgment of the trier of fact. If there is any competent evidence to support the jury's verdict, we must defer our judgment regarding the credibility of the witnesses. The Michigan Supreme Court has repeatedly held that the jury's verdict must be upheld even if it is arguably inconsistent, if there is an interpretation of the evidence that provides a logical explanation for the findings of the jury. 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. [*Allard v State Farm Ins Co*, 271 Mich App 394, 406-407; 722 NW2d 268 (2006) (quotation marks, brackets, footnotes, and citations omitted).]

Defendants, as premises owner and possessor, owed a duty to Deising. See *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). However, contrary to plaintiff's assertion, the great weight of the evidence in this case did not support a finding that defendants breached that duty. The deteriorated roof deck was undoubtedly an unsafe condition. However, there was no evidence presented to establish that defendants were aware of, should have been aware of, or even could have been aware of, that unsafe condition. Zimmerman's uncontradicted testimony established that he was unaware of any structural deficiencies to the roof deck. Bush and Fowler, experienced roofing professionals, testified unequivocally that no test exists that could have revealed the deteriorated deck prior to the accident. Plaintiff offered no evidence to support the conclusion that any further inspection or care by defendants could have revealed the roof deck deterioration or prevented Deising's death. Thus, the jury's verdict was not against the great weight of the evidence and the trial court did not abuse its discretion in denying plaintiff's motion for a new trial on those grounds.

Lastly, plaintiff argues that the trial court's cumulative errors operated to deny her a fair trial. "[A]t times, the cumulative effect of a number of minor errors may require reversal." *Stitt v Holland Abundant Life Fellowship* (*On Remand*), 243 Mich App 461, 471; 624 NW2d 427

[5] We review a trial court's ruling on a motion for a new trial for an abuse of discretion. *Allard*, 271 Mich App at 406.

(2000). In this case, the only error was the admission of Bush's hearsay testimony. However, that error was harmless.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck