STATE OF MICHIGAN

COURT OF APPEALS

PADRAIC I. MULLIN,

Plaintiff/Appellant/Cross-Appellee,

and

LUISA C. MULLIN,

Plaintiff-Appellant,

v

HAYMAN COMPANY d/b/a HAYMAN MANAGEMENT COMPANY,

Defendant/Appellee/Cross-Appellant,

and

L.A. FLOORS, INC.,

Defendant.

UNPUBLISHED
September 20, 1996

No. 182745
LC No. 92-232892 NO

Before: Cavanagh, P. J., and Murphy and C.W. Simon, Jr.,* JJ.

PER CURIAM.

Plaintiffs appeal as of right the jury trial verdict awarding plaintiff, Padraic Mullin, $200,000 against defendant Hayman Company on his negligence claim and awarding no damages to plaintiff, Luisa Mullin, on her loss of consortium claim, as well as the trial court order reducing the award to Padraic Mullin by fifty percent due to comparative negligence. We affirm.

The present case arose when Padraic Mullin fell in the lobby of the Professional Plaza Building, which is owned and operated by defendant, Hayman Company. Defendant L.A. Floors, Inc., had just

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* Circuit judge, sitting on the Court of Appeals by assignment.

completed a carpet installation job on April 3, 1992, and Padraic Mullin apparently fell over a roll of carpet left in the lobby of the building.

Plaintiffs first argues on appeal that defense counsel's reference to plaintiffs' expert witness, Dr. Robert Ancell, as a "hired gun" requires a new trial. We disagree.

When reviewing asserted improper conduct by a party's lawyer, this Court must first determine whether the lawyer's action was error and, if so, whether the error requires reversal. *Wilson v General Motors Corporation*, 183 Mich App 21, 26; 454 NW2d 405 (1990). A lawyer's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. Reversal may also be required where counsel's remarks were such as to deflect the jury's attention from the issues involved and where they had a controlling influence upon the verdict. *Id*.

We do not believe the conduct of defense counsel in the present case requires a new trial. Defense counsel's characterization of Dr. Ancell as a "hired gun" was an isolated event and there were no accusations that the witness was lying. *Wolak v Walczak*, 125 Mich App 271; 335 NW2d 908 (1983). Defense counsel's conduct did not rise to the level of abuse which has been held to require a new trial in other cases. See *Kern v St Luke's Hospital Ass'n of Saginaw*, 404 Mich 339; 273 NW2d 75 (1978); *Wayne Co Bd of Rd Comm'rs v GLS LeasCo*, 394 Mich 126; 229 NW2d 797 (1975). Furthermore, the jury was instructed to disregard the term "hired gun' at the end of defense counsel's closing argument, and the jury was later instructed that the statements and arguments of counsel are not evidence.

Plaintiffs next argue that the trial court abused its discretion by failing to grant a new trial based on the change in Earl McMahen's trial testimony as compared to his deposition testimony. We disagree.

First, Earl McMahen's deposition testimony that the carpet was "about a foot away from the door" does not substantially differ from his trial testimony that the carpet was "a little bit more than a foot away" from the door. Second, McMahen testified at both the deposition and trial that Padraic Mullin had papers in his hands as he was exiting the stairway. It was only when defense counsel specifically asked McMahen at trial how Mullin was holding the papers that McMahen revealed that Mullin was holding the papers out in front of him and looking at the papers. At the deposition, plaintiffs' counsel did not question McMahen as to how Mullin was holding the papers. Third, at his deposition, McMahen testified that he "couldn't say for sure" whether he saw Padraic Mullin in the lobby prior to the accident. At trial, McMahen testified that Padraic Mullin was in the lobby on the morning of April 3, 1992, prior to his fall. However, this inconsistency is not significant in light of McMahen's trial testimony that, although Padraic Mullin was in the lobby on the morning of April 3, 1992, he was not in the area where the carpet was located and did not walk by the carpet.

Earl McMahen was cross-examined concerning these inconsistencies. Furthermore, a party claiming a new trial on the ground of surprise must indicate surprise because of the testimony at the time

the testimony is given. *Marderosian v Stroh Brewery Co*, 123 Mich App 719, 727; 333 NW2d 341 (1983). In the present case, plaintiffs did not claim to be surprised by Earl McMahen's testimony at the time it was given. Therefore, the trial court's denial of plaintiffs' motion for new trial was not an abuse of discretion.

Plaintiffs' third argument is that the trial court abused its discretion by refusing to grant additur. We disagree.

When deciding a motion for additur the trial court must determine whether the verdict is "so clearly or grossly inadequate and so contrary to the great weight of the evidence pertaining to damages sustained by the plaintiff as to shock the judicial conscience." *Burtka v Allied Integrated Diagnostic Services, Inc*, 175 Mich App 777, 780; 438 NW2d 342 (1989). There is no absolute standard by which to measure awards for personal injuries and such awards, particularly those for pain and suffering, rest within the sound judgment of the trier of fact. *Bosak v Hutchinson*, 422 Mich 712, 736; 375 NW2d 333 (1985). However, a jury verdict which ignores uncontroverted out-of-pocket expenses is inadequate as a matter of law and must be reversed. *Zinchook v Turkewycz*, 128 Mich App 513, 518; 340 NW2d 844 (1983).

In the present case, defendant contested Padraic Mullin's damages through the cross-examination of Dr. DeSilva and Dr. Ancell. As to Luisa Mullin's claim for loss of consortium, the jury was free to reject her testimony, even if it stood uncontradicted. *Baldwin v Nall*, 323 Mich 25, 29; 34 NW2d 539 (1948). Luisa Mullin did not testify to any out-of-pocket expenses. The jury award does not "shock the judicial conscience." We do not believe the trial court's denial of plaintiffs' motion for additur was an abuse of discretion.

Plaintiffs next argue that they are entitled to a new trial because the jury verdict was inconsistent in two major respects. Plaintiffs first argue that the jury verdict exonerating defendant L.A. Floors, Inc., but finding defendant Hayman Company liable, was inconsistent. Second, plaintiffs argue that the jury verdict was inconsistent because it found in favor of plaintiff, Luisa Mullin, on her loss of consortium claim, but awarded her no damages.

The general rule is that where a verdict in a civil case is inconsistent and contradictory, it will be set aside and a new trial granted. *Beasley v Washington*, 169 Mich App 650, 657-658; 427 NW2d 177 (1988). However, every attempt should be made to harmonize a jury's verdicts and "[o]nly where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside." *Granger v Fruehauf Corp*, 429 Mich 1, 9; 412 NW2d 199 (1987).

In the present case, as an invitor, Hayman Company had a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land that the landowner knows or should know the invitees will not discover, realize, or protect themselves against. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). If an owner or possessor of land owes a duty, the owner or possessor may not delegate that duty to another to avoid liability. *Kendzorek v Guardian Angel Catholic Parish*, 178 Mich App 562, 565; 444 NW2d 213 (1989).

What constitutes reasonable care under the circumstances must be determined by the jury from the facts of the case. *Bertrand, supra*, 449 Mich 613.

Thomas Noel testified that he offered to remove the carpet roll from the lobby, but that Stanley Watson declined his offer. From this testimony, the jury could reasonably find that defendant L.A. Floors, Inc., acted reasonably, while defendant Hayman Company did not. The jury's verdict was not inconsistent.

We also find that the jury verdict was not inconsistent with respect to Luisa Mullin's claim for loss of consortium. "Jury verdicts which find negligence on the part of a defendant but award no damages are not new to our jurisprudence . . . . In the simplest terms, it merely means that there has been the invasion of another's rights, but that no damage, or minuscule damage, flowed from the wrongful act." *Riggs v Szymanski*, 62 Mich App 610, 615; 233 NW2d 670 (1975).

Generally, "[a] jury may disbelieve the most positive evidence, even when it stands uncontradicted." *Baldwin v Nall*, 323 Mich 25, 29; 34 NW2d 539 (1948). However, when a jury finds in favor of a party, it is the duty of the jury to assess damages in accordance with the evidence, and a verdict which ignores a prevailing party's uncontroverted out-of-pocket expenses is inadequate as a matter of law and must be reversed. *Zinchook v Turkewycz*, 128 Mich App 513, 518; 340 NW2d 844 (1983).

Under Michigan law, a husband or wife may recover for loss of consortium when his or her spouse is injured by the negligence of a third party. *Oldani v Lieberman*, 144 Mich App 642, 645; 375 NW2d 778 (1985). In the present case, the jury could have found from Luisa Mullin's testimony that while Padraic Mullin was injured by Hayman Company's negligence, Luisa Mullin did not prove loss of consortium damages. Furthermore, Luisa Mullin did not testify as to any out-of-pocket expenses. Therefore, the jury's verdict was not inconsistent.

Plaintiffs' final claim is that the jury's finding that Padraic Mullin was fifty percent negligent was contrary to the great weight of the evidence. We disagree.

The test is whether the verdict is against the overwhelming weight of the evidence. *Heshelman v Lombardi*, 183 Mich App 72, 76; 454 NW2d 603 (1990). This Court gives deference to the trial court's opportunity to hear the witnesses and its consequent unique qualification to assess credibility. *Kochoian v Allstate Ins Co*, 168 Mich App 1, 11; 423 NW2d 913 (1988). Furthermore, a trial court's determination that a verdict is not against the great weight of the evidence will be given substantial deference by this Court. *Arrington v Detroit Osteopathic Hospital Corp* (*On Remand*), 196 Mich App 544, 560; 493 NW2d 492 (1992).

An adult plaintiff has a duty to exercise reasonable care for his or her own safety. *Berry v J & D Auto Dismantlers, Inc*, 195 Mich App 476, 484; 491 NW2d 585 (1992). In the present case, Earl McMahen testified that Padraic Mullin was reading papers as he was walking toward the carpeting.

Furthermore, Thomas Noel testified that the carpet roll was approximately three feet high, and both Noel and Earl McMahen testified that, because of its size, they believed the carpet roll to be an obvious danger. Based on this testimony, we hold that the jury's finding that Padraic Mullin was fifty percent negligent was not against the great weight of the evidence.

We now turn to defendant Hayman Company's cross-appeal. Defendant argues that the trial court erroneously denied defendant's motion for judgment notwithstanding the verdict where plaintiffs failed to prove the causation element of their negligence claim. We disagree.

In reviewing a trial court's denial of a motion for judgment notwithstanding the verdict, this Court examines the testimony and all reasonable inferences that may be drawn from it in the light most favorable to the nonmoving party. *Thorin v Bloomfield Hills Bd of Education*, 203 Mich App 692, 696; 513 NW2d 230 (1994). If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this court may substitute its judgment for that of the jury, and judgment notwithstanding the verdict should be denied. *Thorin, supra*, 203 Mich 696.

In the present case, the jury could reasonably infer from Earl McMahen's eyewitness testimony and from the photographs depicting the location of the carpeting that the roll of carpeting was the cause of Padraic Mullin's fall. The trial court properly denied Hayman Company's motion for judgment notwithstanding the verdict.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Charles W. Simon, Jr.