STATE OF MICHIGAN

COURT OF APPEALS

JAMACE BALOGH, Personal Representative of the Estate of JOSEPH BALOGH,

Plaintiff-Appellee,

v

CHURCHILL SQUARE APARTMENTS,

Defendant-Appellant.

UNPUBLISHED
March 21, 1997

No. 188232
Oakland Circuit Court
LC No. 93-463012

Before: Doctoroff P.J., and MJ Kelly and Young, JJ.

PER CURIAM.

Following a jury trial, the trial court entered judgment for plaintiff in the amount of $1,125,000, and subsequently entered an order denying defendant's motion for judgment notwithstanding the verdict, new trial or remittitur. Defendant appeals as of right. We affirm.

Plaintiff brought a negligence action against defendant following the death of her father Joseph Balogh, alleging that defendant breached its duty to Balogh, a tenant of defendant apartment complex, by failing to remove snow and ice from its parking lot.

Defendant first argues that the trial court erroneously denied its motion for a directed verdict. Defendant contends that there was insufficient evidence from which the jury could have reasonably determined that it was more likely than not that defendant's failure to remove snow and ice from its parking lot caused Balogh's injuries. Defendant claims that the theory that Balogh sustained his injuries by slipping and falling on ice was merely speculation and conjecture. We disagree.

In deciding if the trial court erred in denying a motion for a directed verdict, we view the evidence and all legitimate inferences that may be drawn in a light most favorable to nonmoving party. *Hunt v Freeman*, 217 Mich App 92, 98-99; 550 NW2d 817 (1996). 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. *Id.* at 99. Furthermore, directed verdicts are viewed with disfavor in negligence cases. *Id.*[1]

In Michigan, a premises owner must maintain the property in a reasonably safe condition and the owner has a duty to exercise due care to protect invitees from conditions that might result in injury. *Hammack v Lutheran Social Services*, 211 Mich App 1, 5; 535 NW2d 215 (1995).

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he:
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger. [*Id*. at 5-6.]

It is insufficient to submit to the jury a causation theory that, while factually supported, is, at best, just as possible as another theory. *Scott v Illinois Tool Works*, 217 Mich App 35, 39-40; 550 NW2d 809 (1996). Rather, the plaintiff must present substantial evidence from which a jury may conclude that, more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. *Id*. at 40. However, if there is evidence which points to any one theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence. *Id*.

Arnold David Ragan testified that, when he found Joseph Balogh at approximately 9:00 a.m. on March 2, he noticed blood on Balogh's shirt collar, which he believed was coming out of his ear. Ragan and his wife, Camilia, both testified that Balogh was not responsive. They further stated that the parking lot was covered with ice and described it as "treacherous." They noticed that one of the policemen responding to the scene almost slipped on the ice. Around noon, the ice had melted and they found a puddle of blood behind Balogh's car. A further witness, Sandra McCutcheon, testified that the condition of defendant's parking lot was "treacherous" to the point that she was afraid that she would fall.

The paramedic who attended to Balogh, Kevin St. Peter, also testified that the parking lot was essentially covered with ice and "pretty slick." He was slipping while walking to Balogh's vehicle. He noted a laceration on the back of Balogh's head and found some blood on the back rest of Balogh's car seat. St. Peter also found drops of blood on a patch of ice located behind Balogh's car. He opined that Balogh slipped on the ice and struck his head on the ground.

Bruce Kopitz testified that the last time Nutri-Turf plowed defendant's parking lot before Balogh's injury was on February 21, 1993. Nutri-Turf did not apply any salt or deicer to the parking lot during the winter of 1993 before March 2. Meteorologist Paul Gross opined that the ice present in defendant's parking lot was a result of thawing and refreezing the night before Balogh's injury, and that the application of salt or deicer would have been effective at combating the ice on the morning of March 2.

Garel Rice, the owner of the apartment complex, stated that he applied salt when it was needed during the months of February and March 1993. John Wisner and Jerard Detloff, residents of the Churchill Square Apartments, testified that they did not have any problems with snow or ice and had never slipped on ice in defendant's parking lot. However, the jury was entitled to weigh the witnesses' credibility and believe the testimony of the other witnesses who stated that the parking lot was slippery due to ice. Credibility determinations are committed to the jury as the trier of fact. *McCalla v Ellis*, 180 Mich App 372, 382; 446 NW2d 904 (1989).

Moreover, Dr. Jose Yanez, Balogh's regular physician, testified that Balogh did not have any trouble walking or standing and had never suffered from a blackout, seizure or loss of consciousness. Although Balogh had experienced dizziness when Dr. Yanez placed him on a certain type of medication to control his blood pressure, Dr. Yanez subsequently changed that medication. Balogh's multiple sclerosis did not require treatment or therapy. In addition, Balogh's daughter stated that she was not aware that her father had any problems with dizziness, blackouts or sudden falls.

Therefore, we believe that plaintiff presented substantial evidence from which a jury could conclude that, more likely than not, but for defendant's failure to ameliorate the ice in the parking lot on the morning of March 2, 1993, Balogh's injuries would not have occurred. Although no witnesses saw Balogh slip and fall on the ice, the presence of ice on the parking lot, the drops of blood on the ice behind his car and the laceration on the back of his head, along with the fact that he was found unalert sitting in his car, established a logical sequence indicating that he slipped and fell on the ice behind his car. Despite defendant's assertion that there are other theories of how Balogh injured himself that are just as plausible as his slipping on ice, the evidence does not support any other theory.

Defendant also argues that it cannot be held liable for Balogh's injuries because there was no evidence that it could have eliminated the ice present in the parking lot on the morning of March 2. In support of its contention, defendant points to the testimony of Paul Gross and Bruce Kopitz in which they stated that "salting could not have eliminated all of the ice." However, Kopitz testified that as of March 2, 1993, Nutri-Turf had not applied salt or deicer to defendant's parking lot, but that a regular application of salt or deicer would have likely eliminated the ice. Gross also testified that application of salt would have been effective at combating the ice on the morning of March 2. Therefore, there was evidence presented that defendant's failure to salt its parking lot was the reason that it was icy. Accordingly, because there was sufficient evidence from which the jury could determine that it was more likely than not that defendant's failure to clear snow and ice from its parking lot caused Joseph Balogh's injuries, the trial court properly denied defendant's pre-verdict and post-verdict motion.

Defendant next argues that the trial court abused its discretion in allowing the admission of Joseph Balogh's unredacted medical records which contained the statement that Balogh slipped and fell on ice. We review a trial court's evidentiary rulings for an abuse of discretion. *Mina v General Star Indemnity Co*, 218 Mich App 678, 687; 551 NW2d 1 (1996). An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion. *Id*. at 687-688.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). MRE 803(4) states:

> The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

The declarant must have the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and the statement must be reasonably necessary to the diagnosis and treatment of the patient. *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996).

We find that that the unredacted medical records were admissible pursuant to 803(4). Defendant concedes that the statement that Balogh slipped on ice was not made to his physician by Balogh or plaintiff (Balogh's daughter). It is logical to conclude that a police officer one of the medical personnel who transported Balogh to the hospital made the statement to the physician. It is also uncontested that nobody witnessed Balogh fall or saw how he sustained his head injury. Thus, it may also be concluded that whomever told the doctor that Balogh fell, did so as a matter of deduction.[2] Rather, it does not seem relevant who informs the doctor of information that is necessary to provide medical diagnosis or treatment. Kevin St. Peter testified that, as a paramedic, it is important to know the mechanism of injury in order to know what type of injuries to look for. Therefore, the statement that Balogh hit his head on ice was made to the physician for purposes of medical treatment or medical diagnosis and was reasonably necessary to such diagnosis and treatment. Accordingly, the trial court did not abuse its discretion in admitting the unredacted medical records of Joseph Balogh which included the statement that he hit his head when he slipped and fell on ice.

Defendant also argues that the trial court abused its discretion in allowing paramedic Kevin St. Peter to give expert testimony on the mechanism of Balogh's injury. The qualification of a witness as an expert and the admissibility of the expert's testimony are within the trial court's discretion. *Dean v Tucker*, 205 Mich App 547, 550; 517 NW2d 835 (1994). An abuse of discretion will be found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *Berryman v Kmart Corp*, 193 Mich App 88, 98; 483 NW2d 642 (1992).

MRE 702 provides:

> If the court determines that recognized 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.

Thus, a witness may be qualified to give expert opinion testimony where the witness' skill, knowledge, training, experience, or education will assist the trier of fact. *Froede v Holland Ladder Manufacturing Co*, 207 Mich App 127, 138; 523 NW2d 849 (1994). The limits of an expert's knowledge are properly considered in weighing the expert's testimony, rather than in determining the admissibility of his testimony. See *Woodruff v USS Great Lakes Fleet, Inc*, 210 Mich App 255, 260; 533 NW2d 356 (1995); *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 175; 530 NW2d 772 (1995). Moreover, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." MRE 704.

St. Peter testified that he had the skill, training and education to determine the mechanism of injury. Moreover, St. Peter's testimony assisted the jury with the determination of a fact in issue, namely, whether Balogh sustained his injuries as a result of slipping on ice in defendant's parking lot. Although defendant claims that the jury was just as capable as St. Peter of concluding whether Balogh slipped on ice, that does not bar St. Peter from giving his opinion pursuant to MRE 704. Additionally, St. Peter was a paramedic, trained in that field, and he attended to Balogh and viewed the parking lot and area behind his car on the morning of March 2. Therefore, the trial court did not abuse its discretion in admitting the expert testimony of St. Peter regarding the mechanism of Balogh's injury.

Defendant further asserts that meteorologist Paul Gross was not qualified to render an expert opinion regarding methods to ameliorate snow and ice. In doing so, defendant contends that Gross's only qualification on how to ameliorate snow and ice was that he lived in the area his entire life. However, defendant clearly ignores the testimony of Gross, in which he stated that his knowledge was based on his scientific background and his work as a meteorologist and reporter. Moreover, Gross' testimony assisted the jury in determining whether defendant acted reasonably in regard to the removal of snow and ice from its parking lot on March 2, 1993. Thus, the trial court did not abuse its discretion in allowing the testimony of Paul Gross as an expert in the methods of snow and ice removal.

Defendant next argues that there was insufficient evidence to establish that it failed to exercise reasonable care in the removal of snow and ice from its parking lot because there was no indication that defendant had notice of the ice. In its motion for JNOV, defendant argued that there was insufficient evidence from which the jury could have determined that it failed to exercise reasonable care in the removal of snow and ice from its parking lot. Thus, we review that argument in the context of denial of JNOV. *Scott, supra* at 39-41. In deciding whether to grant a motion for a new trial or judgment notwithstanding the verdict, the trial court must examine the testimony and all legitimate inferences that may be drawn from the testimony in a light most favorable to the nonmoving party. *Knight v Gulf &*

Western Properties, Inc, 196 Mich App 119, 128; 492 NW2d 761 (1992). The trial court's decision is reviewed to determine if there were material issues of fact upon which reasonable minds could have differed. *Id*. When the evidence is such that reasonable jurors could have disagreed, neither this Court nor the trial court may substitute its judgment for that of the jury. *Id*. JNOV should be granted only when there is insufficient evidence presented to create an issue for the jury. If the evidence is such that reasonable minds could differ, the question is for the jury, and JNOV is improper. *Constantineau v DCI Food Equipment, Inc*, 195 Mich App 511, 514-515; 491 NW2d 262 (1992).

A landowner's obligation to an invitee is to take reasonable measures within a reasonable time after the accumulation of snow to diminish the hazard of injury. *Morrow v Boldt*, 203 Mich App 324, 328; 512 NW2d 83 (1994). Sandra McCutcheon testified that she complained to defendant's owner, Garel Rice, regarding the lack of snow removal and icy condition of the parking lot on several occasions. She stated that the parking lot was so treacherous that her friends refused to visit her. She personally slipped on the ice, but caught herself before falling down. Rice acknowledged that he received complaints from McCutcheon, but stated that he did not take her seriously because she complained about "everything."

Because Rice acknowledged that he received complaints from McCutcheon regarding the "treacherous" condition of the parking lot, there was sufficient evidence from which the jury could determine that defendant had notice of the icy condition of its parking lot. Furthermore, it is logical to conclude that defendant knew, or by the exercise of reasonable care, should have realized that its parking lot was covered with ice on the morning of March 2, 1993. Paul Gross testified that on the night before Balogh's injuries, the temperature dropped to a point sufficient for the melted snow and ice on the ground to refreeze. As the owner of an apartment complex, Rice would have known that tenants would need to walk through the parking lot to get to their cars in the morning.

Although Rice testified that he and his son applied salt or deicer to the parking lot as needed, Bruce Kopitz testified that he was not authorized to apply salt or deicer to defendant's parking lot during the winter of 1993, until March 10. Both Kopitz and Gross testified that the application of salt or deicer would have alleviated the icy condition of the parking lot. The jury was entitled to weigh Rice's credibility and determine that he did not apply salt or deicer to the parking lot when he knew or should have known that the parking lot would be icy on the morning of March 2. *McCalla*, *supra* at 382. Thus, there was sufficient evidence to establish that defendant failed to act reasonably in removing ice from its parking lot. Accordingly, the trial court properly denied defendant's motion for JNOV.

Finally, defendant argues that the following instruction by the trial court was improper because it was not supported by the evidence:

> You must consider whether any act of defendant created an unnatural accumulation of snow or ice, which increased or contributed to the hazards of ice forming or accumulating on defendant's property, which caused plaintiff's injuries.

Defendant contends that because it had a duty to remove snow and ice pursuant to the natural accumulation doctrine, it did not also have a duty under the unnatural accumulation doctrine. We disagree. The determination whether an instruction is accurate and applicable to a case is within the sound discretion of the trial court. *Luidens v 63rd District Court*, 219 Mich App 24, 27; 555 NW2d 709 (1996). There is no error requiring reversal if, on balance, the theories and the applicable law were adequately and fairly presented to the jury. *Id*. MCR 2.516(D)(2) requires that standard jury instructions be given when they are applicable, accurately state the law, and are requested by a party. *Id.*

Defendant does not provide any support for its contention that it cannot have a duty under both the natural and unnatural accumulation doctrines. The cases relied upon by defendant involve the liability of governmental agencies or property owners for land abutting their property. Historically, the "natural accumulation" rule has been used to preclude a plaintiff's recovery against a governmental unit and against a private land owner for ice and snow on adjoining public sidewalks. *Mendyk v Michigan Employment Securities Commission*, 94 Mich App 425, 430-431; 288 NW2d 643 (1979), overruled in part by *Kueppers v Chrysler Corp*, 108 Mich App 192; 310 NW2d 327 (1981). However, governmental agencies and private landowners could be liable under the unnatural accumulation doctrine, whereby the party has taken steps to alter the natural accumulation of snow and ice. A private property owner has a duty to exercise reasonable care to its invitee to remove natural accumulations of snow and ice to diminish the hazard of injury to the invitee. *Mendyk*, *supra* at 430-431. Thus, defendant in this case agrees that it had a duty to remove the natural accumulations of snow and ice from its parking lot. However, we found no authority that defendant did not also have a duty to remove any unnatural accumulations of snow and ice that created a hazard to its tenants.

Garel Rice testified that when Nutri-Turf plowed the snow in the parking lot, they had difficulty getting under the carport, and would therefore sometimes leave a strip of snow behind the cars. Bruce Kopitz testified that defendant did not allow Nutri-Turf to use chains on its plows, which created "hard pack," an uneven surface of compact snow, in the parking lot. Because there was testimony that the plowing of snow left hard pack in the parking lot and created a strip of snow behind the carport, there was evidence to support the jury instruction regarding unnatural accumulation. Accordingly, the trial court did not abuse its discretion in instructing the jury that defendant could be liable for the hazards created by the unnatural accumulation of snow and ice.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Michael J. Kelly
/s/ Robert P. Young, Jr.

[1] Defendant states: "The question presented by this appeal is whether [the] circumstantial evidence was sufficient to sustain plaintiff's burden of proof." Defendant's main assertion is that the jury used impermissible conjecture and speculation to hold it liable for Balogh's injuries. In doing so, defendant claims, without clearly separating its arguments, that the trial court erred in denying its motion for

summary disposition, directed verdict, JNOV and new trial. Because review of a motion for summary disposition, directed verdict and JNOV require this Court to view the evidence in a light most favorable to plaintiff and determine whether reasonable minds could have differed, we do not separately analyze each of the motions, but use the standard for denial of a directed verdict to conclude that the jury was entitled to determine that defendant was liable for Balogh's injuries. See *Scott v Illinois Tool Works*, 217 Mich App 35, 39-41 (1996). Moreover, denial of a motion for a new trial is reviewed to determine whether the trial court abused its discretion in finding that the overwhelming weight of the evidence did not favor the losing party. *Id*. at 40-41.

[2] Although defendant argues that this fact should bar the admission of the statement, it does not point to any authority in support of its contention that a statement made to medical personnel by an unknown person, other than the patient, when that person has not witnessed the injury, may not be admitted pursuant to MRE 803(4). A party may not leave it to this Court to search for authority to sustain or reject the party's position. *American Transmission v Attorney General*, 216 Mich App 119, 121; 548 NW2d 665 (1996).