STATE OF MICHIGAN

COURT OF APPEALS

MARIO MORRI,

Plaintiff-Appellant,

v

DESIGN/BUILD ASSOCIATES, INC.,

Defendant-Appellee,

and

WALDENBOOK COMPANY, INC.,

Defendant.

UNPUBLISHED
September 5, 1997

No. 192209
Oakland Circuit Court
LC No. 91-419162-NO

Before: Markey, P.J., and Jansen and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from the jury judgment in his favor in this negligence action. The jury found that defendant[1] Design/Build Associates, Inc. was liable, but also found that plaintiff was seventy percent comparatively negligent. We affirm.

Defendant was a general contractor hired to construct a Waldenbook store. Plaintiff was a laborer for Lifa Construction, a subcontractor hired by defendant to construct masonry walls. On October 4, 1990, plaintiff was injured when a wall that he was constructing fell on him. Following an eight-day jury trial, the jury found defendant liable for plaintiff's injuries, which totaled $506,737.35, but also found that plaintiff was seventy percent comparatively negligent. The trial court accordingly entered judgment in favor of plaintiff for $152,021.21. Plaintiff subsequently moved for a new trial or judgment notwithstanding the verdict (JNOV), which the trial court denied.

I

Plaintiff first argues that the trial court erroneously refused to give proposed supplemental instructions stating that defendant's assumption of the duty to brace the walls made it liable and that

defendant's violation of Michigan Occupational Safety and Health Act (MIOSHA) safety standards was evidence of its negligence.

The determination whether supplemental instructions are applicable and accurate is within the trial court's discretion. *Koester v Novi,* 213 Mich App 653, 664; 540 NW2d 765 (1995. This Court reviews instructions in their entirety and does not extract them piecemeal. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 515; 556 NW2d 528 (1996). Reversal is not required if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. *Id*. Moreover, when the standard instructions do not properly cover an area, a trial court is required to give requested supplemental instructions if they properly inform the jury of the applicable law. *Koester, supra* at 664. However, it is error to instruct the jury on a matter not supported by the evidence. *Id.* We review the trial court's decision to not give the requested supplemental instruction to determine if this decision was inconsistent with substantial justice. *Johnson v Corbet,* 423 Mich 304, 326; 377 NW2d 713 (1985).

We find that the trial court's refusal to give the requested supplemental instructions was not inconsistent with substantial justice because the trial court's instructions, as a whole, adequately and fairly presented the applicable law and theories of the parties to the jury. With respect to the voluntary assumption of a duty instruction, the trial court instructed the jury that defendant would be liable for Lifa's failure to brace the walls if defendant effectively retained control over the work involved or if it failed to take reasonable precautions against readily avoidable dangers in the common work area. Moreover, we note that the jury specifically found that defendant retained control over the work of Lifa and that defendant was negligent. Thus, any error in failing to give the requested voluntary assumption of a duty instruction was clearly harmless.

With respect to the requested MIOSHA violation instruction, if defendant violated the MIOSHA rules in not bracing the masonry walls, then that would be evidence of defendant's negligence. See *Zalut v Andersen & Associates, Inc,* 186 Mich App 229, 235; 463 NW2d 236 (1990). There was contradictory testimony regarding whether bracing of the masonry walls was solely the responsibility of Lifa. The trial court instructed the jury that defendant would be liable for Lifa's failure to brace the walls if defendant failed to take reasonable precautions against readily observable and avoidable dangers that occurred in a common work area. Further, although the trial court did not instruct the jury that it could find defendant liable on the basis of its own failure to brace the masonry walls, it did instruct the jury that defendant would be liable for Iifa's failure to brace the walls if defendant effectively retained control over the work involved or if it failed to take reasonable precautions against readily avoidable dangers in the common work area.

Again, we note that the jury found that the area where the masonry wall collapsed on plaintiff was a common work area, that defendant retained control over Lifa's work, and that defendant was negligent. Therefore, there is no indication that had the court given the jury the instructions requested by plaintiff, the jury would have concluded differently than it did. Accordingly, any error in not giving the requested instruction by plaintiff regarding violations of MIOSHA regulations was harmless.

Therefore, we conclude that the failure of the trial court to give plaintiff's requested supplemental jury instructions was not inconsistent with substantial justice.

II

Plaintiff also argues that the trial court abused its discretion in admitting the testimony of Edward Offer in which he opined that the duty to brace the walls fell upon Lifa and was not delegable to defendant. The qualification of a witness as an expert and the admissibility of the expert's testimony are within the trial court's discretion. *Phillips v Mazda Motor Mfg (USA) Corp,* 204 Mich App 401, 412; 516 NW2d 502 (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 Mfg Co,* 207 Mich App 127, 138; 523 NW2d 849 (1994). 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.

Edward Offer was a safety and loss control consultant concerning construction site and plant accident prevention and safety. He was president of the Southeastern Michigan Chapter of the American Society of Safety Engineers and a member of the Michigan Construction Safety Institute. He was on four advisory committees for the Michigan Department of Labor Safety Standards. He was involved in the "rule making aspect" of those committees. Offer was the safety director for Detroit Edison, and it was his function to interpret and enforce various MIOSHA regulations. He testified that the sole responsibility for bracing of a masonry wall lies with the masonry contractor, which is a nondelegable duty. He also testified that even if the general contractor wanted to brace the walls, the responsibility remains with the subcontractor.

Offer had specialized knowledge concerning safety standards in the construction industry. His testimony regarding the responsibility to brace masonry walls assisted the jury in determining whether defendant was liable for plaintiff's injuries. Offer's testimony that the duty to brace masonry walls was on the subcontractor and was not delegable to the contractor was not inadmissible simply because it embraced an ultimate issue to be decided by the trier of fact. MRE 704. Therefore, the trial court did not abuse its discretion in admitting Offer's expert testimony.

Plaintiff also claims that the trial court abused its discretion in prohibiting him from questioning Offer about defendant's insurance carrier because the testimony would have established that Offer was a biased witness. However, plaintiff does not explain, and it is not clear from the record, the nature of the information he was trying to elicit from Offer; nor does he explain how that information would have shown that Offer was a biased witness. Therefore, plaintiff has abandoned this issue by failing to argue the merits of his allegation of error. *Froling v Carpenter*, 203 Mich App 368, 373; 512 NW2d 6 (1994).

Accordingly, the trial court did not abuse its discretion in allowing Edward Offer to testify that he believed Lifa could not delegate its duty to brace the masonry walls to defendant and in prohibiting plaintiff from questioning Offer about defendant's insurance carrier.

III

Plaintiff last argues that the trial court erroneously denied his motion for JNOV or a new trial because there was no evidence from which the jury could determine that plaintiff was seventy percent comparatively negligent for his injuries.

The standard of review for a JNOV requires view of the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Orzel v Scott Drug Co*, 449 Mich 550, 557; 537 NW2d 208 (1995). Only if the evidence so viewed fails to establish a claim as a matter of law, should a motion for JNOV be granted. *Id.* at 558. Further, 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 new trial may be granted if a verdict is against the great weight of the evidence or contrary to law, or if an error of law has occurred in the proceedings. MCR 2.611(A)(1)(e), (g). The trial court's function on a motion for new trial is to determine whether the overwhelming weight of the evidence favors the losing party. *Arrington v Detroit Osteopathic Hospital*, 196 Mich App 544, 564; 493 NW2d 492 (1992). The appellate court is to determine whether the trial court abused its discretion in making such a finding. *Id.* A trial court's determination that a verdict is not against the great weight of the evidence will be given substantial deference by the appellate court. *Id.* at 560. A trial court's determination that at verdict is against the great weight of the evidence will be given somewhat less deference to insure that the trial court did not invade the province of the jury. *Id.* In either situation, the reviewing court must engage in an in-depth analysis of the record on appeal. *Id.*

The jury returned a verdict in favor of plaintiff, finding that defendant was negligent and liable for plaintiff's injuries. However, the jury also found that plaintiff was seventy percent comparatively negligent, and the trial court accordingly reduced plaintiff's damage award. Because plaintiff was apparently confused by the jury's verdict, shortly after the jury returned its verdict, the matter was recalled, and the jury foreperson explained that, "[I]t was the opinion of the jury that the liability primarily rested in the hands of Lifa Construction and that the way the form was set up and we had to

distribute among the two Defendants and [plaintiff], and so [plaintiff], as part of Lifa and his coworkers, we assigned the preponderance of the responsibility."

Plaintiff claims that the jury improperly apportioned seventy percent of the blame on him, where the jurors actually believed the blame belonged to Lifa. However, we note that once a jury has been polled and discharged, its members may not challenge mistakes or misconduct inherent in the verdict. *Hoffman v Spartan Stores, Inc*, 197 Mich App 289, 291; 494 NW2d 811 (1992), citing *Hoffman v Monroe Public Schools*, 96 Mich App 256, 261; 292 NW2d 542 (1980). After that point, oral testimony or affidavits by the jurors may only be received on extraneous or outside errors (such as undue influence by outside parties), or to correct clerical errors or matters of form. *Hoffman v Spartan Stores, Inc, supra*, at 291. Faulty reasoning is not clerical error. *Id*. at 294. Therefore, this Court may not rely on the statement of the jury foreperson in determining whether the trial court erred in denying plaintiff's motion for JNOV or new trial and must instead determine whether there was insufficient evidence presented to create an issue for the jury whether plaintiff was comparatively negligent or whether the verdict was against the great weight of the evidence.

We believe that the jury could have found plaintiff to be negligent if it determined that he should have known that standing next to the unbraced wall in the windy conditions was dangerous and that he should have left the area. Based on the fact that plaintiff had been in the construction business for fifteen years, the jury could reasonably determine that plaintiff was comparatively negligent for working near the unsafe wall. Because there was evidence to sustain the jury's determination that plaintiff was comparatively negligent, the trial court properly denied plaintiff's motion for JNOV or a new trial.

Finally, to the extent that plaintiff claims that the trial court erred in giving an instruction on comparative negligence, plaintiff did not object to this instruction at trial. Therefore, this issue is not preserved for appellate review. MCR 2.516(C).

Affirmed.

/s/ Jane E. Markey
/s/ Kathleen Jansen

[1]In this opinion, "defendant" will refer solely to Design/Build Associates because Waldenbook Company is not a party to this appeal.