STATE OF MICHIGAN

COURT OF APPEALS

HEATHER M. NEAL,

Plaintiff-Appellee,

and

SCOTT NEAL,

Plaintiff,

v

WAL-MART STORES, INC.,

Defendant-Appellant.

UNPUBLISHED
October 31, 1997

No. 200263
Chippewa Circuit Court
LC No. 95-001716-NI

Before: Murphy, P.J., and Hood and Bandstra, JJ.

PER CURIAM.

In this premises liability case, defendant appeals as of right from a judgment for plaintiff Heather M. Neal in the amount of $183,343.46. The judgment was based on a jury determination that plaintiff suffered $365,000 in damages due to an injury to her wrist but that plaintiff was fifty-five percent comparatively negligent when she slipped and fell at defendant Wal-Mart's Sault Ste. Marie store. We affirm.

Defendant first argues that the trial court erred when it denied defendant's motion for a new trial, maintaining that the verdict was against the great weight of the evidence in that plaintiff failed to establish that defendant had breached a duty of care. We disagree. We review a trial court's decision not to grant a new trial where it was alleged that the verdict was against the great weight of the evidence by determining whether the trial court abused its discretion. *Miller v Ochampaugh*, 191 Mich App 48, 60-61; 477 NW2d 105 (1991). We must give deference to the trial court's ability to judge the weight and credibility of the testimony and must not substitute our judgment for that of the jury unless the record reveals a miscarriage of justice. *Id*. at 61. It is well established that a premises owner breaches

its duty of care and is subject to liability for physical harm caused to its invitees by a condition on the land only if it: (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; (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. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). Thus, a claim that a business invitor has breached its duty to an invitee has been premised on three theories: (1) failure to warn; (2) negligent maintenance; or (3) defective physical structure. *Id*. at 610. The first two theories are pertinent to the present case. An invitor's duty of reasonable care requires reasonable measures to be taken within a reasonable amount of time after an accumulation of snow and ice to diminish the hazard of injury to the invitee. *Anderson v Wiegard*, 223 Mich App 549, 555; __ NW2d __ (1997).

Defendant's policy in regard to such conditions appears to be reasonable, if followed. However, plaintiff's testimony described a situation that seems to indicate that the policy was not followed and defendant's standard of care was not met. Defendant presented no evidence to sufficiently contradict plaintiff's version of the conditions as they existed on the day of the incident. We find no abuse of discretion in the trial court's denial of defendant's motion for a new trial. Based on the record before us, we decline to substitute our judgment for that of the jury.

Next, defendant argues that the trial court erred when it denied defendant's motion for a new trial or remittitur, maintaining that the jury award was clearly excessive and not supported by the evidence. Remittitur is justified if the award of damages is greater than the highest amount the evidence will support. *Palenkas v Beaumont Hospital*, 432 Mich 527, 531-532; 443 NW2d 354 (1989). The following objective inquiries are appropriate to determine if an award is excessive: (1) whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; (2) whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; and (3) whether the amount actually awarded is comparable to awards in similar cases within the state and in other jurisdictions. *Id.* at 532-533.

In the present case, there was no indication that the verdict was the result of improper methods such as prejudice, passion or partiality. Moreover, this award is within the limits of what reasonable minds would deem just for the type of injury sustained. Plaintiff's injury is permanent in nature. Subsequent to her pan intercarpal (wrist fusion) surgery, she forever lost forty percent of her wrist's mobility. Moreover, she has suffered the painful effects of reflex sympathetic dystrophy and carpal tunnel syndrome. Plaintiff's productivity in her chosen occupation as an administrative assistant has been deeply affected and will no doubt affect future earning potential. Finally, plaintiff's enjoyment of certain activities has been curtailed by the injury such as horseback riding competitions and playing the piano. In light of these damages, it appears that reasonable minds could deem this award just compensation. Finally, this award is comparable to the award in *Scott v Illinois Tool Works, Inc*, 217 Mich App 35, 46; 550 NW2d 809 (1996), a products liability case in which a unionized quality control inspector was awarded $1,041,064.48 after a defective product injured his wrist necessitating wrist fusion surgery. See also *Hampton v Master Products, Inc*, 84 Mich App 767, 769, 774; 270 NW2d

514 (1978) (a deaf mute was awarded $55,000 [in 1978 dollars] after a slip and fall that caused an impacted fracture of her wrist and continuous pain). Thus, it appears that plaintiff's lesser award of $365,000 for a similar type of injury fits within an acceptable range of awards for similar types of injuries. Accordingly, the trial court did not abuse its discretion when it denied remittitur.

Affirmed.

/s/ William B. Murphy
/s/ Richard A. Bandstra

Hood, J., not participating.