

STATE OF MICHIGAN
COURT OF APPEALS

JOHN McCURDY,

Plaintiff-Appellee,

and

CHRYSLER CORPORATION,

Intervening Plaintiff-Appellee,

v

INDUSTRIAL EXCAVATING, INC.,

Defendant-Appellant.

UNPUBLISHED

January 6, 1998

No. 197973

Macomb Circuit Court

LC No. 93-000080-NI

Before: Bandstra, P.J., and Cavanagh and Markman, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment entered for plaintiff in the amount of \$375,000 and an order denying defendant's motion for judgment notwithstanding the verdict, new trial, or remittitur. We affirm.

Defendant first argues that the verdict was against the great weight of the evidence and a new trial should be granted because no testimony was presented contradicting defendant's claim that defendant's employees salted the parking lot to Chrysler's satisfaction. We disagree. We review the trial court's grant or denial of a motion for new trial for an abuse of discretion. *Scott v Illinois Tool Works, Inc*, 217 Mich App 35, 41; 550 NW2d 809 (1996). We defer to the trial court's opportunity to hear the witnesses and its unique qualification to assess credibility. *Kochoian v Allstate Ins Co*, 168 Mich App 1, 11; 423 NW2d 913 (1988).

As part of a prima facie case of negligence, a plaintiff must prove that the defendant owed him a duty. *Ross v Glaser*, 220 Mich App 183, 186; 559 NW2d 331 (1996). Defendant argues that it owed a duty to Chrysler, which it fulfilled, but that it did not owe a duty to plaintiff. However, this Court

in *Courtright v Design Irrigation, Inc.*, 210 Mich App 528, 531; 534 NW2d 181 (1995), held that § 324A of the Second Restatement of Torts is a correct statement of Michigan law. That section provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking. [*Id.*, (citing 2 Restatement Torts, 2d, § 324A, p 142).]

As in *Courtright*, defendant in this case undertook to perform a duty that was owed by another to a third party. Defendant undertook to salt the employee parking lot, a duty that was owed by Chrysler to plaintiff. These facts fit within § 324A(b) of the 2 Restatement Torts, 2d. See, also, *Talucci v Archambault*, 20 Mich App 153; 173 NW2d 740 (1969).

Defendant's duty was one that accompanies every contract, a common-law duty to perform with ordinary care the thing agreed to be done. *Home Ins Co v Detroit Fire Extinguisher Co, Inc.*, 212 Mich App 522, 529; 538 NW2d 424 (1995). Those persons foreseeably injured by the negligent performance of a contractual undertaking are owed a duty of care. *Talucci*, *supra* at 161. It was foreseeable that plaintiff, an employee of Chrysler who had parked in the employee parking lot for a year, would be injured if the snow and ice were not properly removed pursuant to the contractual agreement between defendant and Chrysler. Therefore, defendant owed a duty of due care to plaintiff.

To establish a prima facie case of negligence, after plaintiff has established that a duty was owed, plaintiff must prove that defendant breached that duty. *Gross v General Motors Corp*, 448 Mich 147, 162; 528 NW2d 707 (1995). Whether defendant breached the duty that it owed was a matter of credibility of the witnesses. In this case, there was conflicting testimonial evidence regarding whether defendant adequately salted the employee parking lot. Because the question of credibility should be left for the factfinder and there is evidence to support the jury's finding that defendant was negligent and thus breached the duty it owed plaintiff, we cannot conclude that the trial court abused its discretion in not setting aside the jury's verdict. *King v Taylor Chrysler-Plymouth, Inc.*, 184 Mich App 204, 210; 457 NW2d 42 (1990).

Next, defendant argues that the jury award of \$268,000 for non-economic damages was excessive and the trial court should have ordered a new trial or remittitur. We disagree. This Court reviews a trial court's decision regarding remittitur for an abuse of discretion. *Scott*, *supra* at 45. We must defer to a trial court's decision regarding remittitur because of the trial court's superior ability to view the evidence and evaluate the credibility of the witnesses. *Phillips v Deihm*, 213 Mich App 389,

404; 541 NW2d 566 (1995). The power of remittitur should be exercised with restraint. *Hines v Grand Trunk W R Co*, 151 Mich App 585, 595; 391 NW2d 750 (1985). The proper consideration is whether the jury award was supported by the evidence. *Phillips, supra*. This decision must be based on objective criteria relating to the actual conduct of the trial or the evidence presented. *Weiss v Hodge (After Remand)*, 223 Mich App 620, 637; 567 NW2d 468 (1997).

Plaintiff presented evidence that he underwent three operations on the shoulder he injured when he fell in the employee parking lot. Even after the third surgery, the orthopedic surgeon who performed the operations was concerned that the repairs to plaintiff's shoulder may not endure. As a result of the accident, plaintiff did not work for over three and a half years. Based on this uncontested evidence, the jury's award was within a range that reasonable minds would deem just compensation. Therefore, we conclude that the trial court did not abuse its discretion by not ordering a new trial or remittitur.

Lastly, defendant argues that the trial court abused its discretion by permitting plaintiff to introduce expert testimony by defendant's employee and plaintiff's expert regarding the effectiveness of salt on snow and ice. We disagree. Absent an abuse of discretion, the qualification of a witness as an expert and the admissibility of his testimony will not be reversed on appeal. *Phillips, supra* at 401. An abuse of discretion will be found only if an unprejudiced person would say that there was no justification or excuse for the ruling made, considering the facts on which the trial court acted. *Berryman v K Mart Corp*, 193 Mich App 88, 98; 483 NW2d 642 (1992).

The trial court may qualify a witness as an expert if it 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. *McDougall v Eliuk*, 218 Mich App 501, 504; 554 NW2d 56 (1996). A witness may be qualified as an expert by knowledge, skill, experience, training, or education. MRE 702; *Mulholland v DEC Int'l Corp*, 432 Mich 395, 403; 443 NW2d 340 (1989). The critical question is whether the expert testimony will aid the factfinder in making the ultimate decision in the case. *King, supra* at 215.

At the time of trial, defendant's employee had worked in the snow removal business for approximately thirteen years. As a result, he became familiar with the effect of salt when placed on ice. We find that defendant's employee's experience in the snow removal business gave him specialized knowledge that assisted the jury to understand the evidence to determine whether the employee parking lot had been salted.

Plaintiff's expert was a meteorologist at a local television station. He took three semesters of chemistry while he was earning his degree in meteorology. He testified that during his chemistry courses, he learned about the properties of salt. This education is sufficient to justify the trial court's decision to qualify him as an expert in this area. The extent of a witness' expertise is relevant to the weight of the testimony, not its admissibility. *Woodruff v USS Great Lakes Fleet, Inc*, 210 Mich App 255, 260; 533 NW2d 356 (1995). Although defendant argues that the evidence regarding the amount of snow and ice that the expert relied on in giving his opinion was erroneous, the expert's interpretation of facts are issues regarding the weight to be given the testimony by the jury. See *id.* We conclude that

the trial court did not abuse its discretion in qualifying the two witnesses as experts and in letting the jury decide the extent of the witnesses' expertise.

We affirm.

/s/ Richard A. Bandstra

/s/ Mark J. Cavanagh

/s/ Stephen J. Markman