STATE OF MICHIGAN

COURT OF APPEALS

MATT NUBERG, Personal Representative of the Estate of BETTY LEE NUBERG, Deceased,

Plaintiff-Appellee/Cross-Appellant,

v

STEVEN DALSTRA and JEANELLE DALSTRA,

Defendants-Appellants/Cross-Appellees.

UNPUBLISHED
March 3, 1998

No. 200267
Kent Circuit Court
LC No. 92-078749 NO

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

PER CURIAM.

Plaintiff's decedent, Betty Lee Nuberg, died as the result of head injuries sustained when she fell on the basement stairs of defendants, her daughter and son-in-law. Plaintiff, Nuberg's husband and personal representative of her estate, brought this wrongful death action. A first trial resulted in a mistrial. Following a second trial, a jury found defendants liable and returned a verdict awarding plaintiff $1,000,000. The award was reduced to $200,000, however, based on the jury's finding that Nuberg was eighty percent comparatively negligent. Plaintiff was also awarded attorney fees and costs. The trial court subsequently denied defendants' motions for JNOV, new trial, and remittitur, as well as plaintiff's motion for additur. Defendants appeal as of right. Plaintiff cross-appeals. We affirm.

Nuberg went to defendants' tri-level home on March 31, 1992, to cook and do laundry for her daughter, defendant Jeanelle Dalstra. Dalstra's mother-in-law had died that day, and Dalstra had spent the day arranging a funeral. At about 9:30 p.m., Nuberg was carrying clothes up from the basement when she fell backwards on the stairs and struck her head on the basement floor. She was knocked unconscious and died three days later without ever regaining consciousness. Plaintiff contended that Nuberg's fall was caused by the dangerous condition of the basement stairway. The defense was that Nuberg's fall was caused by her extreme intoxication.

On appeal, defendants first argue that the trial court should have granted a directed verdict or JNOV in their favor because the basement stairway was an open and obvious danger. The owner of a premises has the duty to exercise due care to protect an invitee from dangerous conditions. *Riddle v*

McLouth Steel Products Corp, 440 Mich 85, 96; 485 NW2d 676 (1992); *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). Further, if the dangerous conditions are hidden or latent, the owner of the premises has the obligation to warn the invitee of the dangers. *Riddle, supra*, p 96. There is, however, no absolute duty to warn of open and obvious dangers. *Id.*, pp 96-97. Thus, the open and obvious danger doctrine serves to obviate the duty to warn of patently dangerous conditions. It does not, however, obviate the duty to exercise reasonable care to protect the invitee from dangerous conditions. *Bertrand, supra*, p 613.

The application of the open and obvious danger doctrine to cases involving steps was discussed in *Bertrand*. *Bertrand* instructs that the dangers associated with typical stairs are open and obvious, and therefore, as a matter of law, premises owners do not owe a duty to warn of their dangers. Nor will they have breached the duty of exercising reasonable care because typical steps do not present an unreasonable risk of harm from which to protect an invitee. *Bertrand* also indicates that the dangers associated with atypical stairs may not be open and obvious, and that, if reasonable minds could differ on the question whether the atypical condition is open and obvious, then the duty to warn question is for the jury to decide. Furthermore, the jury must decide if the dangers of atypical stairs create an unreasonable risk of harm despite their obviousness. 449 Mich 616-617.

Because defendants' stairway is not a typical set of stairs, under *Bertrand* the question is whether reasonable minds could differ in finding that the unique configuration of the steps and stairwell was open and obvious. The test for determining whether a dangerous condition is open and obvious is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Here, plaintiff's experts opined that the primary problem with the stairs, aside from a "ledge" at the top, was that the top riser of the staircase was shorter than the others; a person climbing stairs expects all steps to be uniform and often missteps and trips when they are not. A casual inspection of the stairs by an average user, particularly in poor lighting, would not necessarily reveal the shorter riser, and if it did, its significance would not necessarily be appreciated. Further, the experts opined that it was a combination of factors that made defendants' stairs dangerous: the "ledge" at the top of stairs, the short riser, the poor lighting, the slipperiness of the carpet, and the lack of handrails all combined to make the stairway hazardous. While any one of these factors might be noticed, the dangerous mix of factors likely would not be perceived upon casual inspection. Under these circumstances, it cannot be said that, as a matter of law, the stairway presented an open and obvious danger. Compare *Hughes v PMG Building, Inc*, ___ Mich App ___; ___ NW2d ___ (Docket No. 199525, issued 12/12/97).

Defendants correctly argue that the trial court erred in ruling that the open and obvious danger doctrine did not apply because Nuberg was a licensee rather than an invitee. See *White v Badalamenti*, 200 Mich App 434, 437; 505 NW2d 8 (1993). However, the trial court properly applied a *Bertrand* analysis and reached the right result in ruling on defendants' motion for JNOV. Under these circumstances, reversal is not warranted.

Defendants next contend that there was no competent evidence that Nuberg's fall was a result of their conduct, so that the trial court should have granted their motions for directed verdict and JNOV

on the issue of causation. Again, we disagree. There was expert testimony that the ledge and shorter top step of defendants' basement stairs were likely to cause a person to misstep, lose balance, and fall; the lack of a handrail prevented steadying oneself or breaking a fall. There was circumstantial evidence that Nuberg fell at the top of the stairs: the pictures hanging on the stairwell wall were askew after the fall but not before, laundry was scattered along the stairs, and there was expert opinion that Nuberg's right elbow was bruised from striking the overhang at the top of the stairs. There was also testimony from an expert in accident reconstruction and biomechanics that, in all probability, Nuberg's fall was caused by not being able to negotiate the last step and the ledge at the top of the stairs. Viewing this evidence in a light most favorable to plaintiff, reasonable jurors could conclude that Nuberg's fall was caused, at least in part, by the condition of defendants' stairs. The trial court did not err.

Defendants' claim concerning the propriety of two jury instructions – SJI2d 10.08 and an instruction concerning the lack of a handrail – was not raised in their statement of questions presented, and review is therefore inappropriate. *Weiss v Hodge (After Remand)*, 223 Mich App 620, 634; 567 NW2d 468 (1997).

Defendants claim that the jury's damage award was excessive because the court's instructions regarding damages were not based on the evidence. The first instruction about which defendants complained allowed the jury to award "reasonable compensation for the pain and suffering undergone by Betty Nuberg while she was conscious during the time between her injury and her death." The trial court's justification for the instruction – that there was a "scintilla" of time between Nuberg's slip and plaintiff's discovery of her lying unconscious during which she may have suffered pain – has some evidentiary support. There was evidence that Nuberg struck her elbow on the overhang above the stairs as she fell and that she was knocked unconscious upon hitting the basement floor; it may thus be inferred that she felt extremely brief, minor pain as she fell.

Defendants also challenge the trial court's instruction that, in assessing future damages, the jury could consider the statutory mortality table showing that "an ordinarily healthy person of Matt Nuberg's present age of 72 years . . . has a life expectancy of 9.15 years. . . . The mortality figures are to be considered by you in determining life expectancy only if you find that Matt Nuberg is in ordinarily good health." Defendants do not explain how this instruction was erroneous, except to point out that plaintiff had suffered a stroke, compromising his health. Given the caveat in the instruction, however, it is difficult to see how the instruction resulted in substantial injustice. *Szymanski v Brown*, 221 Mich App 423, 430; 562 NW2d 212 (1997). Accordingly, reversal is not required on this ground.

Defendants claim that they are entitled to a new trial because the trial court improperly allowed evidence regarding the cost of plaintiff's nursing care following his 1994 stroke and the costs associated with building an addition to the Dalstra home so that plaintiff could reside there. According to defendants, this evidence heightened the jury's sympathy for plaintiff and contributed to its award of damages. This claim is too speculative to warrant a new trial. Defendants concede that the jury was instructed not to consider these expenses. The jury was also told that plaintiff's stroke was a change in circumstances that occurred after Nuberg's death. The testimony concerning his care was not so prejudicial as to warrant a new trial, especially in light of the jury instructions.

Defendants next contend that there was no justiciable case before the court because Jeanelle Dalstra was a real party in interest the estate of Betty Nuberg. Again, because the issue was not raised in their statement of questions presented, review of this issue is inappropriate. *Weiss, supra.*

Finally, defendants argue that the trial court abused its discretion in denying their motion for remittitur. When presented with a motion for remittitur, the trial court must determine whether the jury's award is supported by the evidence. *Palenkas v Beaumont Hosp,* 432 Mich 527, 534; 443 NW2d 354 (1989). When reviewing the grant or denial of a motion for remittitur, this Court must afford due deference to the trial judge since the latter has personally observed the evidence and witnesses. *Id.,* p 534.

When deciding whether a jury award is supported by the evidence, the trial court's analysis must be limited to objective factors such as (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. *Palenkas, supra,* p 532. Here, while the sizable award might suggest that it was the product of sympathy for plaintiff, this Court can only speculate about the jury's actual reaction and is obliged to give the trial court the benefit of the doubt. *Id.,* p 437. With regard to the second factor, it must be kept in mind that no direct evidence of the value of loss of society may be furnished, and the jury must be given great discretion in determining the sum to be allowed. *Steinberg v Jensen,* 186 Wis2d 237, 275-276; 519 NW2d 753 (1994), aff'd in part and rev'd in part on other grounds 194 Wis2d 439; 534 NW2d 361 (1995). Plaintiff testified that he and his wife did everything together, including travel, spending the summers in Ludington, and making craft items. Plaintiff's son testified that his parents were completely devoted to each other, and that Mrs. Nuberg was a loving, ideal wife, mother, and grandmother. Applying the reasoning of *Steinberg,* the verdict was within the limits of what reasonable minds would deem just compensation. Finally, the award is within the limits of comparable Michigan cases. It therefore cannot be said that the trial court abused its discretion in denying defendants' motion for remittitur.

In his cross-appeal, plaintiff contends that there was no competent evidence to justify a finding of comparative negligence, so that the reduced damage award was grossly inadequate. This claim is without merit. In light of the medical documentation of Nuberg's .18 percent blood serum alcohol level, the testimony of defendants' toxicologist, and the testimony of medical personnel that they could detect the odor of alcohol on Nuberg's breath, the jury could find that her judgment and motor coordination were significantly impaired due to her severe intoxication, causing her to slip on the stairs. While plaintiff questions the credibility of the medical evidence, his arguments all go to the weight of the evidence, not to its sufficiency. The trial court correctly concluded that "an assessment of comparative negligence in the amount of 80% [was] exceedingly proper."

Plaintiff also argues that the court erred in granting a mistrial in the first trial after defendant Jeanelle Dalstra testified that "[w]hen we bought the house, we purchased adequate

homeowners insurance to protect us." We find no abuse of discretion. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 103; 330 NW2d 638 (1982). Reference to the insurance coverage of either party during a trial is presumptively improper. MCL 500.3030; MSA 24.13030; *Phillips v Mazda Mfg (USA) Corp*, 204 Mich App 401, 411; 516 NW2d 502 (1994). The testimony could only induce the jury to enter a large verdict in plaintiff's favor and was too prejudicial to be remedied by a cautionary instruction. Plaintiff's argument, that defendants should have been estopped from moving for a mistrial because one of the defendants made the reference to their insurance coverage, might, under more typical circumstances, have merit. Here, though, because defendants' interests were aligned with plaintiff's, defense counsel (who was retained by defendant's insurer) was properly allowed to move for a mistrial although his "client" was the party offering the insurance testimony. There was no abuse of discretion.

Plaintiff next claims that the trial court erred in denying his motion in limine to exclude evidence of Nuberg's blood serum alcohol level. Because plaintiff has merely announced a position and left it to this Court to discover and rationalize the basis for the claim, the issue is not properly preserved for review. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997).

Plaintiff also contends that the trial court erred in allowing defendants to withdraw their responses to a request for admissions plaintiff sent them during the post-mistrial period when defendants were without counsel. We find no abuse of discretion. *Medbury v Walsh*, 190 Mich App 554, 556; 476 NW2d 470 (1991). MCR 2.312(D)(1) provides that the trial court may, for good cause, allow a party to amend or withdraw an admission made in response to a request for admission. Here, it appears that the request for admissions was timed to take advantage of the fact that defendants were not represented by their insurer's lawyer. It also appears that defendants were eager to admit that their negligence was the sole proximate cause of Nuberg's death, and in so doing, benefit from plaintiff's recovery. If for no other reason than to prevent the appearance that the parties were working together to collect on defendants' insurance policy, the trial court properly allowed the withdrawal of defendants' admissions.

Plaintiff contends that the trial court erred in denying his motion for summary disposition pursuant to MCR 2.116(C)(10) because Jeanelle Dalstra's testimony in the first trial, combined with defendants' admissions in response to plaintiff's request for admissions, left plaintiff's negligence action "proved conclusively." We disagree. Unless there is no issue of material fact, the issue of causation is for the jury rather than the trial court. *Halbrook v Honda Motor Co, Ltd*, 224 Mich App 437; 569 NW2d 836 (1997). Here, a jury could reasonably infer from plaintiff's evidence that Nuberg slipped and fell backwards from the top of the stairs and that the condition of top riser and the landing, combined with the poor lighting, caused her to fall. On the other hand, defendants had evidence, including laboratory reports and the reports of medical personnel attending Nuberg, that her blood serum alcohol level was .18 percent, classified "severely" intoxicated. There was also evidence that Nuberg had been in a hurry when she fell. From this evidence, a jury could reasonably infer that Nuberg's fall was the result of her intoxication and carelessness in negotiating the stairs. Given the dispute as to causation, the trial court did not err in refusing to grant summary disposition.

Finally, plaintiff claims that the trial court erred in its award of attorney fees. He has failed to argue the merits of this allegation of error, however, or to explain why the award was insufficient. The issue is therefore abandoned. *Froling v Carpenter*, 203 Mich App 368, 373; 512 NW2d 6 (1993).

Affirmed.

/s/ Harold Hood
/s/ Barbara B. MacKenzie
/s/ William B. Murphy