

STATE OF MICHIGAN
COURT OF APPEALS

ELAINE G. TONER,

Plaintiff-Appellant,

v

MARY KABISA and JOHN KABISA,

Defendants-Appellees.

UNPUBLISHED

July 16, 1999

No. 207910

Oakland Circuit Court

LC No. 96-518804 NO

Before: Gage, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Plaintiff, the mother of defendant, Mary Kabisa, was injured when she allegedly slipped and fell on ice which had accumulated on defendants' driveway. Plaintiff appeals as of right from a jury verdict of no cause for action in favor of defendants. We affirm.

On appeal, plaintiff first argues that because evidence was presented from which a reasonable jury could conclude that plaintiff was either an invitee or a licensee at the time of the fall, the trial court erred when it failed to instruct as to the duty owed to an invitee and instead, instructed the jury that plaintiff was a licensee. We disagree.

The determination whether a jury instruction is applicable and accurately states the law is within the discretion of the trial court. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 515; 556 NW2d 528 (1996). In order for the court to give an instruction, sufficient evidence must be presented by the party to warrant it. *Byrne v Schneider's Iron & Metal, Inc*, 190 Mich App 176, 182; 475 NW2d 854 (1991). 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*. Because there was insufficient evidence to warrant presenting plaintiff's status as an invitee to the jury, the trial court did not abuse its discretion.

A landowner's duty to a visitor depends on the visitor's status. *Hottmann v Hottmann*, 226 Mich App 171, 175; 572 NW2d 259 (1997). A licensee is one who is on the premises of another because of some personal unshared benefit and is merely tolerated on the premises by the owner. *Doran v Combs*, 135 Mich App 492, 495; 354 NW2d 804 (1984). By contrast, an invitee is one

who is on the owner's premises for a purpose mutually beneficial to both parties. *Id.* at 496. The Restatement of Torts (2), § 332, p 176, which applies in Michigan,¹ defines "invitee" as follows:

- (1) An invitee is either a public invitee or a business visitor.
- (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.
- (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land. [*Preston v Slezniak*, 383 Mich 442, 450; 175 NW2d 759 (1970).]

When the visitor is a personal friend or family member, the legal status of the visitor is sometimes difficult to discern. However, "this Court [has] expanded the status of invitee to include a personal friend or family member, normally licensees, in instances where the predominant nature of the visit is not for social purposes, but rather for predominately beneficial purposes to the landowner." *Doran, supra* at 496. In *Leveque v Leveque*, 41 Mich App 127, 131; 199 NW2d 675 (1972), this Court recognized that "[t]he critical factor involved is to determine whether the benefit conferred is the dominant aspect of the visit, or, alternatively, is the 'routine incident of social or group activities.'" If the only inference that can be drawn from the evidence is that the dominant purpose of the visit was social and that the services rendered, if any, were only incidental to such purpose, then the court is permitted to conclude that the plaintiff possessed the status of licensee as a matter of law. *Id.* at 131-132. Under the facts in this case, the trial court's ruling in this regard was not "so palpably and grossly violative of fact and logic" for this Court to conclude that an abuse of discretion occurred when instructing the jury.²

At trial, defendant, Mary Kabisa, testified that plaintiff, her mother, was stopping by her house on December 15, 1995, to visit the grandchildren and pickup Christmas gift baskets that Mary had made for plaintiff to give as gifts to friends and coworkers. Plaintiff also had a little something to give to the grandchildren. Plaintiff occasionally stopped after work to see her grandchildren and was always welcome. Mary enjoyed making these baskets, had "a license and a name," but was not aggressively engaged in the basket making business. Sometimes plaintiff paid Mary for preparing these baskets, sometimes she did not. On occasion, they "worked out a different arrangement," however, there was no further elaboration in this regard. On this particular occasion Mary "could not say" that plaintiff paid her for the basket preparation. Further, Mary testified that she would have made the baskets for her mother regardless of the pay, because she enjoyed doing it, she was at home, and it helped plaintiff out.

Based upon this evidence, the trial court properly concluded that the dominant purpose of the visit was social and the services rendered were incidental to that purpose. The benefit, if any, from the visit inured to plaintiff, not defendant. Therefore, we find that the trial court did not abuse its discretion when it found that plaintiff was a licensee and thereafter, so instructed the jury on the duty of care owed to a visitor of this status.

Plaintiff next argues that the court erred in failing to grant her motions for directed verdict, judgment notwithstanding the verdict and new trial because the evidence was undisputed and defendants

admitted their negligence. We disagree. Review of the grant or denial of a directed verdict is de novo. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). We review all the evidence presented up to the time of the motion to determine whether a question of fact existed. In doing so, we view the evidence in the light most favorable to the nonmoving party and grant it every reasonable inference and resolve any conflict in the evidence in its favor. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 663; 575 NW2d 745 (1998); *Hatfield v St Mary's Medical Center*, 211 Mich App 321, 325; 535 NW2d 272 (1995). Similarly, in reviewing a decision on a motion for JNOV, we must view the testimony and all legitimate inferences from it in the light most favorable to the nonmoving party. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 76; 577 NW2d 150 (1998). Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *Settington v Pontiac General Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997).

Here, although the evidence appeared to be uncontroverted with respect to the existence of poor exterior lighting and the need for and failure to salt, this did not warrant a directed verdict or the post-trial relief requested by plaintiff. It is true that defendants testified that the condition of the driveway, combined with the fact that the driveway was not lighted, created an unreasonable risk of danger to plaintiff and was the cause of her fall. However, their testimony was impeached with prior statements from their deposition testimony. In addition, as the trial court recognized, the jury may have found, because of the circumstances of this case, that the witnesses were less than credible. Plaintiff's daughter and son-in-law were called as adverse witnesses by plaintiff's counsel. They more than readily conceded that they were negligent. The jury may have concluded that there was collusion between the parties, given their familial ties. The jury may have also considered their inconsistent testimony and determined that none of them were credible. Questions of credibility are left to the trier of fact. *D'Ambrosio v McCready*, 225 Mich App 90, 100; 570 NW2d 797 (1997). If evidence could lead reasonable jurors to disagree, the court may not substitute its judgment for that of the jury. *Lamson v Martin (After Remand)*, 216 Mich App 452, 455; 549 NW2d 878 (1996). Because the jury was required to make a determination as to the credibility of witnesses, directed verdict and judgment notwithstanding the verdict in plaintiff's favor would have been inappropriate.

Affirmed.

/s/ Hilda R. Gage

/s/ Michael R. Smolenski

/s/ Brian K. Zahra

¹ See *Stitt v Holland Abundant Life Fellowship*, 229 Mich App 504, 507-508; 582 NW2d 849 (1998)

² The Michigan Supreme Court has stated that an abuse of discretion will be found when the decision is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather

of passion or bias.” *Dacon v Transue*, 441 Mich 315, 328-329; 490 NW2d 369 (1992), citing to *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).