

STATE OF MICHIGAN
COURT OF APPEALS

JEAN HERTEG,

Plaintiff-Appellee,

v

SOMERSET COLLECTION GP, INC., and
FORBES/COHEN PROPERTIES,

Defendants-Appellants,

and

PERINI BUILDING COMPANY,

Defendant-Appellee.

UNPUBLISHED

September 20, 2002

No. 227936

Oakland Circuit Court

LC No. 98-011207-NO

Before: Jansen, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

In this premises liability negligence action, defendants appeal as of right from a judgment entered following a jury trial awarding plaintiff \$100,781.34. We affirm.

Defendants Somerset Collection GP, Inc., and Forbes/Cohen Properties, are the owners and operators of the Somerset Collection Mall. In the early morning of January 7, 1998, plaintiff, then 72 years old and a mall walker, slipped and fell in a puddle of water that had accumulated in an access area located before the entrance to a skywalk that connects old and new sections of the mall. The skywalk was built by defendant Perini Building Company and opened in October 1996. The puddle was created when rainwater leaked through the roof of the mall just above the skywalk access. It had been raining for three or four days prior to the accident. Intermittent leaks in the same area had caused the operators of the mall to effectuate repairs to the roof in June and July of 1997, and again in October and November of 1997. Plaintiff broke her left wrist and forearm in the fall.

Appellants first argue that the trial court erred in denying their motion for a directed verdict because the evidence did not establish that appellants had actual or constructive notice of the puddle, nor did it show that appellants had created the dangerous condition. We review de novo a trial court's ruling on a motion for a directed verdict. *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997).

In reviewing the trial court's ruling, this Court views the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, grants that party every reasonable inference, and resolves any conflict in the evidence in that party's favor to decide whether a question of fact existed. A directed verdict is appropriate only when no factual questions exist on which reasonable minds could differ. [*Wickens v Oakwood Healthcare System*, 242 Mich App 385, 388-389; 619 NW2d 7 (2000), vacated in part on other grounds 465 Mich 53 (2001).]

“In premises liability cases, the duty owed by the landowner is determined by the plaintiff's status at the time of injury.” *Burnett v Bruner*, 247 Mich App 365, 368; 636 NW2d 773 (2001). Accord *Stanley v Town Square Coop*, 203 Mich App 143; 512 NW2d 51 (1993). (“The duty a possessor of land owes to those who come upon the land turns on the status of the visitor.”). It is a long established principle of the common law that a storekeeper has a duty to provide a reasonably safe environment for its invitees. See *Clark v K Mart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001); *Carpenter v Herpolsheimer's Co*, 278 Mich 697, 698; 271 NW 575 (1937). This includes the responsibility of providing reasonably safe aisles for the customers to traverse while shopping. *Carpenter*, *supra* at 698. This duty also applies to the owners of shopping malls, who as possessors of the land have the affirmative duty to see that the hallways and passageways of the retail complex are safe for use by patrons of the retail stores located in the mall. See 2 Restatement Torts, 2d, § 344.

The question we are presented with is whether in these circumstances, plaintiff, who was at the mall on the day of the accident as a mall walker, was an invitee or a licensee of the mall. Answering this question is essential to the resolution of this appeal because of the differing duties owed by a landowner to invitees and licensees. To both invitees and licensees, the landowner owes a duty to warn of any hidden dangers the landowner either knows of or has reason to know of. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). However, a landowner also owes its invitees a duty to “make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards. Thus, an invitee is entitled to the highest level of protection under premises liability law” *Id.* at 597 (citation omitted).

In *Stitt*, our Supreme Court held that “[i]n order to establish invitee status, a plaintiff must show that the premises were held open for a commercial purpose.” *Id.* at 604 (emphasis omitted). In reaching this conclusion, the *Stitt* Court reasoned, in part, “that the imposition of additional expense and effort by the landowner, requiring the landowner to inspect the premises and make them safe for visitors, must be directly tied to the owner's commercial business interests.” *Id.* at 604.

The issue before the *Stitt* Court was “whether invitee status should be extended to an individual who enters upon church property for a noncommercial purpose.” *Id.* at 595.¹

¹ See also *Stitt*, *supra* at 597 (“In this case, we are called upon to determine whether invitee status should extend to individuals entering upon church property for *noncommercial* purposes.” [emphasis in original]), and at 607 (“[W]e hold that persons on church premises for other than commercial purposes are licensees and not invitees.”).

Examining three cases in which invitee status had been found with respect to persons injured on church property,² the Court concluded that the three cases showed that “invitee status has traditionally been conferred in our cases only on persons injured on church premises who were there for a commercial purpose.” *Id.* at 602. However, the Court noted that Michigan appellate courts had never directly addressed the issue of whether a churchgoer who fell into the category “public invitee” was also due a heightened standard of care. *Id.* at 600-601.

The Court concluded that the “invitee” designation should not be attached to “persons on church premises for other than commercial purposes.” *Id.* at 607. In reaching this conclusion, the Court examined the common-law meaning of the term “invitation.” *Id.* at 597-598. The Court observed that its “prior decisions have proven to be less than clear in defining the precise circumstances under which a sufficient invitation has been extended to confer ‘invitee’ status.” *Id.* at 598. Indeed, in conclusion that “Michigan has historically . . . recognized a commercial business purpose as a precondition for establishing invitee status,” the Court also acknowledged that the handling of the issue had not been uniform throughout Michigan appellate court decisions. *Id.* at 600.

“Given the divergence” of the prior Supreme Court cases, the *Stitt* Court further recognized the need to “provide some form of reconciliation in this case.” *Id.* at 603. In “harmonizing” the case law, the *Stitt* Court decided that the basis for the imposition of a heightened standard of care was the potential of commercial benefits accruing to the landowner. *Id.* at 604. In the words of the Court, “the prospect of pecuniary gain is a sort of quid pro quo for the higher duty of care owed to invitees.” *Id.* at 604.³

Section 332 of the Second Restatement Torts defines an invitee as being “either a public invitee or a business visitor.” 2 Restatement Torts, 2d, § 332. In *Stitt v Holland Abundant Life Fellowship*, 229 Mich App 504, 507-508; 582 NW2d 849 (1998), rev’d 462 Mich 591 (2000), this Court had concluded, based on its reading of *Preston v Sleziak*, 383 Mich 442; 175 NW2d 759 (1970), that § 332 of the Restatement applied in Michigan. The Supreme Court concluded, however, that the issue of whether to adopt the “public invitee” definition of § 332 was not before the *Preston* Court, and thus it was doubtful that *Preston* was binding on this point. *Stitt, supra*, 462 Mich at 603. Nevertheless, the *Stitt* Court overruled *Preston* to the extent that it could be considered as binding precedent on the issue. *Id.*

The *Stitt* Court then specifically declined to adopt § 332 of the Restatement. *Id.* The Court concluded that limiting invitee status to those situations where “the premises were held open for a commercial purpose,” *id.* at 604 (emphasis in original), “best serve[s] the interests of

² *Manning v Bishop of Marquette*, 345 Mich 130; 76 NW2d 75 (1956); *Kendzorek v Guardian Angel Catholic Parish*, 178 Mich App 562; 444 NW2d 213 (1989), overruled on other grounds in *Orel v Uni-Rak Sales Co*, 454 Mich 564; 563 NW2d 241 (1997); *Bruce v Central Methodist Episcopal Church*, 147 Mich 230; 110 NW 951 (1907).

³ According to William L. Prosser, Reporter of the Second Restatement of Torts, this commercial benefit test “seems to have originated in the mind of the writer of a forgotten treatise on the law of negligence, Robert Campbell, whose first edition appeared in 1871.” 26 Minn L Rev 573, 583 (1942) (footnote omitted).

Michigan citizens.” *Id.* at 607. In support of this formulation of the common-law rule, the Court looked to the reasoning of a Florida case, *McNulty v Hurley*, 97 So 2d 185 (Fla, 1957), overruled in part by *Post v Lunney*, 261 So 2d 146 (Fla, 1972). *McNulty* involved a churchgoer injured on church property. See *Stitt, supra* at 604. “With regard to church visitors,” the *Stitt* Court declared, “we agree with the court in *McNulty* . . . that such persons are licensees.” *Id.*

As framed by the *Stitt* Court, the question before it was narrow: “[W]hether invitee status should be extended to an individual who enters upon church property for a noncommercial purpose.” However, in answering this question, the Court examined a broad area of law involving invitee status in general. While arguably judicial dicta, we do not believe we can ignore the *Stitt* Court’s broad statements simply because they do not technically qualify as the holding of the Court. Unlike obiter dicta,⁴ judicial dicta is integral to the Court’s reasoning.⁵ *Luhman v Beechler*, 424 NW2d 753, 755 (Wis App, 1988). Given the relatively few number of cases granted certiorari, our Supreme Court frequently uses judicial dicta to guide the judiciary on particular areas of law, and to signal future development of the law. See Schauer, *Opinions as rules*, 53 U Chi L Rev 682, 683 (1986). Such judicial dicta is arguably as binding as the precise holding of the case. Am Jur 2d, § 603, p 299. Cf *Johnson v White*, 430 Mich 47, 55, n 2; 420 NW2d 87 (1988) (observing that “unlike obiter dicta, judicial dicta are not excluded from applicability of the doctrine of the law of the case”).

Accordingly, given the *Stitt* Court’s refusal to adopt § 332 of the Restatement, as well as its conclusions regarding the connection of invitee status to potential pecuniary gain, we conclude that under *Stitt*, a mall walker is not entitled to invitee status unless the invitation to enter upon the land is tied to the landowner’s business interests. *Stitt, supra*.

Thomas Bird, general manager of the Somerset Collection Mall, testified that a primary reason the mall had instituted an organized mall walkers program was to “increase sales for [the mall’s] stores.” While we agree with Bird’s contention that the mall walker phenomenon would likely exist even in the absence of such facility supervised programs, it is also clear from his testimony that this mall took particular steps to attract walkers to the Somerset Mall.⁶ In other words, the invitation extended to plaintiff was not for the mere benefit of plaintiff, but for the mutual advantage of both plaintiff and the mall. *Stitt, supra* at 600.

Bird testified that as part of the program, the walkers sign up to get a free tee shirt, and each is given a card that can be used to track “how many times they walk.” The mall even produced a newsletter for the mall walkers. In addition to these organizational steps, the mall

⁴ Cf *Sebring v City of Berkley*, 247 Mich App 666, 681-682; 637 NW2d 552 (2001) (declining to follow obiter dicta set forth in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 171, n 27; 615 NW2d 702 (2000)).

⁵ We note that often the distinction between judicial and obiter dicta is easier to define than it is to implement. Compare *Stitt, supra* at 602-603 (majority opinion) with *Stitt, supra* at 616 (Kelly, J., dissenting). In any event, we believe the general discussion by the *Stitt* majority on invitee status is integral to its holding.

⁶ The success of this program is evidenced by Bird’s testimony that at the time of the accident the mall had approximately 3,000 members “signed up” for the mall walker program.

also instituted a routine for passing out complimentary gifts to the mall walkers. For example, after every ten visits, each mall walker would receive a small gift that the mall “purchase[d] specifically” for the program. Once a month, the mall would have a free breakfast for the mall walkers. Bird indicated that the mall also tried to institute an educational program for the mall walkers. Further, the evidence established that the mall was open for use by mall walkers hours before the individual retailers opened for business. This evidence is not simply a willingness to have mall walkers enter the mall, but the desire that they do so. We believe it is reasonable to infer from this evidence that the mall’s primary consideration for inviting mall walkers to use the facility was commercial. The program held out the “prospect of pecuniary gain” to the landowner, and thus was “tied to the owner’s business interests.” *Id.* at 604.

Further, plaintiff testified that mall walking was not always the only reason she would visit the mall. She indicated that while walking, she would sometimes see an item in a store that she would purchase later. In other words, the mall’s goal of promoting sales by instituting what is essentially an organized ability to window shop within the facility itself was, at least in this instance, successful. A visitor of the mall need not have entered the facility with the immediate intention of making a purchase in order to be considered an invitee.

Given the above testimony, we believe it is reasonable to conclude that in the circumstances of this case, plaintiff’s presence on the day of the accident was directly tied to the mall’s commercial business interests. Therefore, plaintiff was an invitee and thus was owed a heightened standard of care.

A landowner, including the owner of a shopping mall,

is subject to liability for physical harm caused to his invitees by a condition on the land if the owner: (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that the condition involves an unreasonable risk of harm to such invitees; (b) should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect invitees against the danger. [*id.* at 597.]

We believe that when viewed in the appropriate light, reasonable jurors could have concluded from the evidence adduced at the time the motion for a directed verdict was brought, that defendants were liable. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 663; 575 NW2d 745 (1998).

The evidence showed that the roof in this area had leaked in October and November of 2001, just months prior to the accident. The later 2001 leaks were a reoccurrence of an earlier leaking problem that occurred during the summer of 2001. Despite this recent history, there was no evidence that the mall regularly inspected this area for leaks, or that they would inspect the area during periods of heavy rain, as occurred just prior to plaintiff’s accident. We believe that it is reasonable to infer from this evidence that given the advance warning of leaking problems, the mall’s failure to inspect and maintain this area constituted active negligence that caused the dangerous condition, i.e., the puddle of water. *Williams v Borman’s Foods, Inc*, 191 Mich App 320, 321; 474 NW2d 425 (1991).

Additionally, we believe that this evidence supports the conclusion that appellants had constructive knowledge of the condition. “If one by exercise of reasonable care would have known a fact, he is deemed to have had constructive knowledge of such fact.” Black’s Law Dictionary (6th ed), p 314. We believe that given the history of leaking in the area, a jury could reasonably find that the mall, by exercising reasonable care, could have discovered the puddle in time to prevent this accident. There is no direct evidence establishing how long the puddle was there. However, the puddle obviously had to have been accumulating sometime before the accident, which occurred at approximately 7:30 a.m. There was testimony estimating the size of the puddle to be somewhere between twelve and fifteen inches. There is no evidence that the flow of water leaking from the skywalk was heavy. A reasonable jury could infer from this evidence that the puddle had taken a sufficient length of time to accumulate, that the mall could have discovered the puddle in enough time to either remedy it or to warn its invitees of the hidden danger had it used ordinary care to inspect an area where previous leaks had been discovered during periods of heavy rain. Accordingly, appellants are deemed to have constructive knowledge of the danger.

Further, a reasonable jury could conclude that the mall’s failure to inspect this area constituted a failure to exercise reasonable care under the circumstances. We want to make clear that precise time limits cannot be established for when liability attaches in such a situation. See *Louie v Hagstrom’s Food Stores, Inc*, 81 Cal App 2d 601, 608 (1947) (“The exact time the condition must exist before it should, in the exercise of reasonable care, have been discovered and remedied, cannot be fixed, because, obviously, it varies according to the circumstances.”). Each accident must be viewed in light of its own unique circumstances, and the question of whether a dangerous condition existed for a long enough time to be discovered by a reasonably prudent landowner is a question of fact that should be left to the jury. *Id.* See also *Ortega v K-Mart Corp*, 26 Cal 4th 1200, 1209; 114 Cal Rptr 2d 470 (2001). Under these circumstances, a reasonable jury could have found appellants negligent.

We also believe a reasonable jury could conclude that the mall should have expected that its mall walkers would not discover the puddle or would fail to protect themselves against it. Testimony at trial established that the puddle was so transparent as to be virtually undetectable by casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002). Plaintiff testified that she did not see the puddle before she fell. Another mall walker who witnessed the fall testified that the floor in the area was made of a shiny marble that would have made it difficult to see the puddle unless you were looking for it. Additionally, the estimated diameter of the puddle was not so large as to make it an openly visible hazard. Cf *Munoz v Applebaum’s Food Market, Inc*, 293 Minn 433, 196 NW2d 921 (1972) (concluding that a puddle measuring twenty square feet and one-quarter of an inch deep was open and obvious). We do not believe that this evidence establishes that the puddle was readily detectable by a reasonable person in plaintiff’s position. *Riddle v McLouth Steel Products Co*, 440 Mich 85, 96; 485 NW2d 676 (1992).

Next, appellants argue that the trial court erred in refusing to reduce the judgment by the \$22,000 mediation settlement plaintiff received from Perini. We disagree. In support of their assertion, appellants rely on the common-law rule that a defendant is entitled to a *pro tanto* reduction of a judgment for amounts received by plaintiff in a prior settlement. See *Thick v Lapeer Metal Products*, 419 Mich 342, 348-349; 353 NW2d 464 (1984); *Larabell v Schuknecht*,

308 Mich 419; 14 NW2d 50 (1940). This common-law principle was codified at MCL 600.2925d(b), which, until 1995, provided that a release or covenant not to sue “reduces the claim against the other tort-feasors to the extent of any amount stipulated by the release or the covenant or to the extent of the amount of the consideration paid for it, whichever amount is the greater.”

However, when the Legislature amended § 2925d in 1995, they deleted the above language from the statute. 1995 PA 161. Defendants argue that repeal of subsection 2925d(b) effectively revived the common-law rule as it existed before it was codified. *People v Reeves*, 448 Mich 1, 8; 528 NW2d 160 (1995); 2B Singer, *Sutherland Statutory Construction* (6th ed., 2000), § 50:01, pp 140-141. We disagree.

“The overriding goal guiding judicial interpretation of statutes is to discover and give effect to legislative intent.” *Bio-Magnetic Resonance, Inc v Dep’t of Public Health*, 234 Mich App 225, 229; 593 NW2d 641 (1999). While courts often turn to the rules of statutory construction to assist in this endeavor, it must be remembered that these rules are merely aids to statutory interpretation, “not inflexible mandates for construction contrary to evident intent.” *New Jersey v Daquino*, 56 N J Super 230, 241; 152 A 2d 377 (1959). See also *Arlandson v Humphrey*, 224 Minn 49, 55; 27 NW2d 819 (1947) (“Statutes must be construed as to give effect to the obvious legislative intent, though construction is contrary to such rules.” [quoting 6 *Dunnell, Dig & Supp* § 8937]).

Our analysis of this issue is also guided by the understanding that where tort law was once solely a creature of common law, extensive legislative action in the area of tort reform has transformed the nature of the law. See Weiss, *Reforming tort reform*, 38 *Cath U L Rev* 737, 753 (1989). In Michigan, tort law is now a synthesis of statutory and common law.

The elimination of the language at issue from the statute was a part of a legislative tort reform package that “replaced the common-law doctrine of joint and several liability among multiple tortfeasors with the doctrine of several liability.” *Smiley v Corrigan* 248 Mich App 51, 53; 638 NW2d 151 (2002). Under the new system, “defendants now are only accountable for damages in proportion to their percentage of fault.”⁷ Trial courts are now required to instruct juries to answer special interrogatories and apportion the percentage of fault of all persons that contributed to the injury, including any individual released from liability. MCL 600.6304(1).⁸

⁷ MCL 600.2957(1) provides:

In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to [MCL 600.6304] in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

⁸ MCL 600.6304(1) provides:

In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than
(continued...)

We believe that this statutory scheme reflects a clear Legislative intent to abolish the rule requiring offset and replace it with a several liability system to apportion damages. Therefore, the common-law rule is abrogated. *Bak v Citizens Ins Co of America*, 199 Mich App 730, 738; 503 NW2d 94 (1993). We will not apply the reversion rule of statutory construction to revive what has, by clear implication, been abolished.

Finally, defendants argue that they should be granted a new trial because of an apparent inconsistency regarding plaintiff's potential contributory negligence. Specifically, defendants point to the verdict form, in which the jury in one section affirmatively indicated that plaintiff was not negligent, and then in another section indicated that the percentage of negligence attributable to plaintiff was five percent. Defendants argue this inconsistency requires a new trial. We disagree for several reasons.

Initially, we note that defendants did not bring a motion for new trial based on the alleged inconsistency before the trial court. The matter was first raised at a hearing on defendants' motion for set off. Defendants' failure to tie their argument to the grounds set forth in MCR 2.611(A)(1), which "provide[] the only bases upon which a jury verdict may be set aside" on a motion for new trial, *Kelly v Builders Square, Inc*, 465 Mich 29, 38; 632 NW2d 912 (2001), would preclude the trial court from granting such relief. *Id.* at 39.⁹

Further, when the matter was brought before the court, defendants indicated that they did not believe that the circumstance constituted reversible error. Instead, defendants suggested that it was simply "a flip of the coin" on which party would get the benefit of any ambiguity, i.e., if

(...continued)

1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:

(a) The total amount of each plaintiff's damages.

(b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under [MCL 600.2925d] regardless of whether the person was or could have been named as a party to the action.

⁹ In *Kelly*, our Supreme Court stated, "MCR 2.611(A)(1) does not identify inconsistency or incongruity as a ground for granting a new trial." *Kelly, supra* at 39. We do not read *Kelly* as stating that inconsistency and incongruity could never be argued in support of a motion for new trial. Rather, we believe *Kelly* stands for the proposition that such an argument must be made in context of the grounds set forth in the court rule. *Id.* at 41 (declining to construe the ground set forth in MCR 2.611(A)(1)(e) not because the sub rule does not use the words "inconsistent" or "incongruous," but because the trial court did not rely on the sub rule when granting a new trial). Indeed, we believe the *Kelly* majority specifically left open the door to an argument that inconsistency may serve as the basis for a new trial when it wrote, "*But even if a jury verdict may be set aside on the basis of inconsistency under our current court rule, the trial court did not apply the standard . . . for reviewing inconsistent verdicts.*" *Id.* (emphasis added).

the full damage award would stand or be reduced by five percent. We believe that this position impliedly recognizes, and indeed invokes, the court's authority to somehow reconcile the two positions taken by the jury. Defendants may not now be heard to complain simply because the trial court did not decide the ambiguity in their favor. Their waiver of their right to argue that any irregularity required a new trial effectively extinguished any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Moreover, "a party may not take a position in the trial court and subsequently seek redress in an appellate court on the basis of a position contrary to that taken in the trial court." *Phinney v Perlmutter*, 222 Mich App 513, 543; 564 NW2d 532 (1997).

In any event, we do not believe that the verdict rendered is logically inconsistent or irreconcilable. "[T]he obligation to remedy an inconsistent verdict . . . lies with the court, with or without objection of counsel." *Farm Bureau Mut Ins Co v Sears, Roebuck & Co*, 99 Mich App 763, 766; 298 NW2d 634 (1980). An allegedly inconsistent verdict should be upheld if "there is an interpretation of the evidence that provides a logical explanation for the findings of the jury." *Granger v Fruehauf Corp*, 429 Mich 1, 7; 412 NW2d 199 (1987). Accord *Kelly*, *supra* at 41. "A court must look beyond the legal principles underlying the plaintiff's causes of action and carefully examine how those principles were argued and applied in the context of the case." *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 399; 628 NW2d 86 (2001).

After reviewing the record, we believe the court's jury instructions provide a logical explanation for this apparent inconsistency. *Id.* In instructing the jury, the court began with a series of proper instructions on the elements of negligence. It then instructed the jury that if plaintiff proved each element of the tort, then the jury "must determine the percentage of fault for each party or non-party whose negligence was a proximate cause of plaintiff's injuries." The court continued, "In determining the percentage of fault, you should consider the nature of the conduct and the extent to which each person's conduct caused or contributed to the plaintiff's injuries." The court then turned to the duties owed by a landowner to an invitee. After that, the court returned to the issue of apportioning fault:

If you find that more than one of the parties [sic] are at fault, then you must allocate the total fault among those parties.

In determining the percentage of fault of each party, you must consider the nature of the conduct of each party and the extent to which each party's conduct caused or contributed to the plaintiff's injury. The total must add up to one hundred percent.

We believe it is plausible that the apparent inconsistency was the result of a misconception by the jury on its charge. Again, we emphasize that we find no fault with the instructions given. However, we are mindful of our Supreme Court's admonition in *McCormick v Hawkins*, 169 Mich 641, 649; 135 NW 1066 (1912): "Jurors are not learned in the law, and very frequently misapprehend the scope of their powers and duties."

When first giving the instruction on "considering the nature of the conduct of each party," the court specifically linked it to the legal concepts of negligence and proximate cause. The jury was told it needed to determine the percentage of fault for all those "whose negligence was a proximate cause of plaintiff's injuries." The court then left the subject. When it returned,

the concepts of negligence and proximate causation were missing from the preface. The jury was then told that if they found “that more than one of the parties are at fault, then you must allocate the total fault among those parties.” Further, only at this point were the jurors instructed that the total “fault” must add up to one hundred percent. We believe it is possible that the jury simply disconnected the legal concept of negligence from the calculation of fault percentages, relying more on an everyday understanding of personal responsibility. In other words, the jury could have marked the verdict form as it did based on the conclusion that even though defendant had not established that plaintiff was negligent, she nonetheless bore some level of fault for the accident. We believe that in these circumstances, the trial court’s determination that the specific finding of no negligence on plaintiff’s part should govern was a reasonable remedy.

Affirmed.

/s/ Kathleen Jansen

/s/ Donald E. Holbrook, Jr.

/s/ Richard Allen Griffin