

STATE OF MICHIGAN
COURT OF APPEALS

NIKKOLE MURDOCK,

Plaintiff-Counterdefendant-
Appellee,

v

DAVID J. KIRCHER,

Defendant-Counterplaintiff-
Appellant,

and

EASTERN HIGHLANDS APARTMENTS,

Defendant.

UNPUBLISHED
February 15, 2005

No. 251153
Washtenaw Circuit Court
LC No. 02-000163-NO

Before: Markey, P.J., and Murphy and O’Connell, JJ.

PER CURIAM.

Defendant Kircher appeals as of right the jury verdict awarding plaintiff Nikkole Murdock \$96,378 for injuries caused by defendant’s negligence.¹ We affirm.

Plaintiff suffered an ankle injury requiring surgery after jumping from her apartment balcony to escape a fire in the apartment building. Defendant owns and manages the apartment complex in which plaintiff lived at the time of the fire. Plaintiff argued that defendant’s negligence caused her injuries.

A plaintiff must prove four elements to establish a prima facie case of negligence: (1) a duty owed by the defendant to the plaintiff, (2) breach of that duty, (3) causation, which includes cause in fact and legal or proximate cause, and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). In both issues raised by defendant on appeal, he argues that plaintiff failed to prove that his actions, or his failure to act, caused her injuries.

¹ Defendant Eastern Highlands Apartments was dismissed pursuant to a stipulated order. Our reference to “defendant” in this opinion pertains only to defendant Kircher.

Defendant first argues that the trial court erred in denying his motions for directed verdict and judgment notwithstanding the verdict [JNOV]. We disagree. We review decisions to deny or grant motions for directed verdict and JNOV de novo. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). When reviewing these motions, this Court may not substitute its judgment for that of the jury when reasonable jurors could have honestly reached different conclusions. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003); *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998). Directed verdicts are viewed with disfavor, particularly in negligence cases. *Berryman v K Mart Corp*, 193 Mich App 88, 91; 483 NW2d 642 (1992). A directed verdict is appropriate only where no factual question exists upon which reasonable minds could differ. *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 679-680; 645 NW2d 287 (2001). When deciding whether to grant a motion for directed verdict or JNOV, the trial court must view the evidence and all legitimate inferences arising from the evidence in a light most favorable to the nonmoving party to determine whether a prima facie case was established. *Orzel v Scott Drug Co*, 449 Mich 550, 557-558; 537 NW2d 208 (1995); *Wiley, supra* at 491; *Tobin v Providence Hosp*, 244 Mich App 626, 652; 624 NW2d 548 (2001). This Court recognizes the unique opportunity of the jury and trial judge to observe witnesses and the fact-finder's responsibility to determine the credibility and weight of the evidence. *Wiley, supra* at 491.

Plaintiff presented evidence from which the jury could have reasonably found that defendant acted negligently and that his negligence caused her injuries. At the time of the fire, plaintiff was the only tenant living in the building. The evidence overwhelmingly indicated that the building contained no working hallway lights and no working or functioning smoke detectors. Plaintiff testified that she and her fiancé, Tiago Terry, went to sleep around 11:15 p.m. Terry woke plaintiff up in the middle of the night and told her that there was a fire in the building. Plaintiff could smell smoke immediately. She went to the front door with Terry. When she opened the door, plaintiff saw "thick, black, dark smoke." Though there were no hallway lights, plaintiff could see the smoke by the lights of the kitchen stove and bathroom. She did not believe that they could escape through the hallway because of the thick smoke. Thus, plaintiff ran to the balcony. From the balcony, plaintiff could see fire "underneath and around." She could feel heat from below. Terry encouraged plaintiff to jump from the balcony. She stepped over the balcony railing and stood on a small piece of wood beyond the railing. Plaintiff could not lower herself from the balcony to the ground because of the fire directly below her, nor did plaintiff consider exiting through her bedroom window to escape. She jumped to the ground and severely fractured her ankle, which has resulted in surgery, pain, therapy, and a limp, with significant bills and costs being incurred. Terry also jumped. Plaintiff had requested the maintenance man to replace the hallway lights, but they were never replaced. Plaintiff did not recall a smoke detector in her apartment. She never heard a smoke detector sounding off in her building.

The testimony of Terry regarding the night of the fire was consistent with that of plaintiff. Terry, however, testified that he did not smell any smoke when he woke up to use the restroom. But he did notice fire. Terry saw flickering lights and pulled back the curtains to further investigate. When he did so, he saw the fire. Terry did not hear any smoke detector alarms in the building. He testified that he smelled and saw smoke coming from the bedroom in the back of the apartment shortly before jumping from the balcony.

Defendant testified that the fire marshal told him to remove any smoke detectors that tend to be vandalized, but smoke detectors were, however, required near the sleeping areas of each apartment. He further testified that there were no smoke detectors in the hallways because the fire marshal told him to remove them, but there were smoke detectors in the apartments. Defendant acknowledged that the township in which the apartment complex is located had cited him for numerous code violations.

An attorney who represented the township with respect to court actions involving enforcement and violations of local building codes and ordinances testified that he filed suit against defendant over code violations, including the failure to have working smoke detectors. An inspection report, completed over a year before the fire, indicated that defendant was to make the building exits safer and to take steps to maintain the smoke detectors and fire extinguishers. The report also indicated that smoke detectors on the second and third floor were inoperative. The case against defendant by the township was eventually dropped because of repairs made by defendant.

The fire marshal testified that, following an inspection of the fire-damaged apartment complex, he concluded that a working smoke detector may have alerted plaintiff and Terry sooner such that a jump from the balcony would not have been necessary. Only the base of a smoke detector was found in plaintiff's apartment; the smoke detector itself was missing. The smoke detectors in the second and third floor hallways did not work. It was also noted that plaintiff's apartment did not have a fire extinguisher. The fire marshal further testified that it would have been possible for plaintiff and Terry to smell smoke from the fire when they awoke and that it was probable that there was smoke in the hallway. He also stated that a smoke detector is more sensitive than a human nose, and it would detect smoke before someone would smell it.

Defendant's myriad arguments can be boiled down to a claim that plaintiff failed to establish that the absence of working smoke detectors, or any other alleged instances of negligence, were the cause of plaintiff's injuries. A plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994). A mere possibility of such causation is not sufficient; and when the matter remains one of pure speculation and conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict in favor of the defendant. *Id.* at 165 (citation omitted).

There was evidence of smoke in the building and the apartment at the time plaintiff awoke, and the smoke was so thick in the hallway that plaintiff and Terry chose not to attempt an escape by that route. Terry also saw flames in the building on awakening. It is more than reasonable to infer that the fire and the heavy smoke billowing through the complex had started some time before plaintiff and Terry awoke. It is just as reasonable to infer that working smoke detectors would have awoken plaintiff and Terry in time to escape the inferno in a safe manner. Simply because the fire marshal could not state with absolute or one-hundred-percent certainty that there was smoke in plaintiff's apartment and that a working smoke detector would have made it unnecessary for plaintiff to jump from the balcony, it does not translate to a failure on plaintiff's part to establish her case. Plaintiff, who was in the apartment at the time of the fire as opposed to the fire marshal, smelled smoke on waking up and discovered thick smoke in the

hallway, yet no alarms were being sounded. There was intense heat and fire such that plaintiff could not safely lower herself to the ground from the balcony. Taking this into consideration, along with the thickness of the smoke in the hallway, Terry's observation of fire, the fire marshal's testimony, and also the evidence suggesting that the fire started in the lower level of the building, lead to the reasonable conclusion that the fire had been burning for a period of time during which plaintiff and Terry were asleep and that working smoke detectors would have alerted them in time to prevent injury. Minimally, reasonable minds could differ on the matter after consideration of the facts presented at trial. Plaintiff submitted evidence which afforded a reasonable basis for the conclusion that it was more likely than not that the defendant's conduct was a cause in fact of the injury. There was sufficient evidence on all of the elements of negligence to allow the jury to resolve the action in plaintiff's favor.

Defendant next argues that the trial court abused its discretion in denying his motion for new trial where the verdict was against the great weight of the evidence. We disagree. We review a decision to deny or grant a motion for new trial for an abuse of discretion. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000).

A trial court may grant a new trial when the verdict was against the great weight of the evidence. MCR 2.611(A)(1)(e). With respect to such a claim, this Court may overturn a verdict only when it is manifestly against the clear weight of the evidence. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). We give substantial deference to the trial court's determination that the verdict was not against the great weight of the evidence. *Id.* The jury's verdict should not be set aside if there was competent evidence to support it, and the trial court cannot substitute its judgment for that of the jury. *Id.* We recognize the superior position of the trial court and the jury with respect to judging the credibility and weight of the testimony and will not substitute our judgment unless the record reveals a miscarriage of justice. *Id.* On the basis of the facts recited above relative to our ruling on the motions for directed verdict and JNOV, we find that the evidence did not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. The trial court did not abuse its discretion in denying defendant's motion for a new trial.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Peter D. O'Connell