# S T A T E  O F  M I C H I G A N

# C O U R T  O F  A P P E A L S

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MICHAEL URBAN RUMP,

Plaintiff-Appellee,

V

BAYPOINTE APARTMENTS,

Defendant-Appellant.

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UNPUBLISHED
February 24, 2004

No. 244082
Saginaw Circuit Court
LC No. 98-024503-NI

Before: Hoekstra, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right a jury verdict awarding damages to plaintiff for injuries he suffered when he fell in an apartment complex owned by defendant. We affirm.

Defendant first argues that plaintiff, who was injured in his fall on a cracked step in a common area in defendant's apartments, is precluded from recovering because he voluntarily encountered a known and avoidable hazard. We disagree.

First, the record indicates that the danger posed by the step was not open and obvious, which it must be to relieve a landlord of liability for negligently exposing invitees to dangerous conditions. *Lugo v Ameritech Corp, Inc,* 464 Mich 512, 516; 629 NW2d 384 (2001); *Joyce v Rubin,* 249 Mich App 231, 235-237; 642 NW2d 360 (2002). The record indicates that the step was carpeted and, therefore, the crack was not visible.

Plaintiff knew from walking on the step that it was, in his words, "spongy" and would "give" when stepped on in a certain spot. He was concerned enough about the step's condition that he repeatedly reported it to defendant. The crack, however, was only discovered when defendant's maintenance manager repaired it after plaintiff fell. Moreover, plaintiff had no dominion over a step located in a common area and no ability to discern the real character of its defect. All that he knew was that the step had a soft spot and that it was important to avoid this soft spot while walking on the step, which he did. It certainly was not open and obvious that there was a crack in the step capable of widening with continued use so that it eventually became unsafe to walk on any part of the step. The fact that the step apparently had one defect did not make the existence of a distinct defect creating a different sort of danger open and obvious. Plaintiff was injured, not because of the apparent defect of a soft spot in the step, which he took reasonable precautions to avoid, but by the hidden defect of a crack of which he could not have known.

Defendant argues that the jury finding that plaintiff was not comparatively negligent by failing to use the other staircase was contrary to the great weight of the evidence. We disagree.

> In deciding a motion for a new trial, the trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party. *Phinney v Perlmutter*, 222 Mich App 513, 525; 564 NW2d 532 (1997). This Court must determine whether the trial court abused its discretion in ruling with regard to a motion for a new trial. *Id.* Substantial deference is given to the trial court's conclusion that the verdict was not against the great weight of the evidence. *Id.* [*Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000).]

The record does not show any negligence on the part of plaintiff. That is, there was no showing that plaintiff was aware that the step was cracked as opposed to having a mere soft spot. Plaintiff navigated around the soft spot on numerous occasions without incident, and cannot be faulted for his continued use of the step.

Defendant argues that remittitur is necessary because the evidence fails to support a finding that plaintiff's condition from the time of surgery in March 1998 resulted from the fall rather than from degenerative disc disease, while conceding that the evidence supports a finding that plaintiff's condition before this point was the result of the fall. We disagree.

We review a trial court's ruling on a remittitur motion for an abuse of discretion. *Palenkas v Beaumont Hosp*, 432 Mich 527, 533; 443 NW2d 354 (1989). We find such an abuse only if an unbiased review of the facts indicates that the ruling had no justification. *Szymanski v Brown,* 221 Mich App 423, 431; 562 NW2d 212 (1997). In making this review, we consider the evidence in the light most favorable to the nonmoving party, *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 499; 668 NW2d 402 (2003), and defer to the trial court's opportunity to see the testimony, evidence, and jury reactions, and assess credibility. *Phillips v Deihm*, 213 Mich App 389, 404; 541 NW2d 566 (1995). Under this standard, we find no abuse of discretion.

Defendant asserts that there is no evidence that plaintiff's continued injuries following the second surgery were caused by his fall rather than by degenerative arthritis. Viewing the evidence in a light most favorable to plaintiff, there is ample evidence that all the injuries for which he was compensated were caused by his fall. *Wiley, supra*.

In acknowledging that the evidence supports a finding that the injuries before the second surgery were caused by the fall, defendant evidently acknowledges the sufficiency of the evidence that although plaintiff had back problems before the fall, partly as the result of an earlier automobile accident, they had been successfully treated before the fall. Defendant also apparently acknowledges that the fall did cause plaintiff's spinal injury, and that the treatment before the second surgery did not cure the injury. The questions implicated by defendant's argument, therefore, are (1) whether the second surgery completely cured the injury, and (2) whether there was a superseding cause of any further injury.

The answer to the first question is clearly that the evidence does not show a complete cure. This is indicated most tellingly by the testimony of the surgeon who performed the second operation, Dr. Gerald R. Schell. Dr. Schell indicated that plaintiff, who before the fall had

successfully lifted loads of a hundred pounds or more as required by his construction job, and who had been an amateur weightlifter, was limited after the second surgery to lifting no more than fifteen or twenty pounds. This specific restriction, Dr. Schell indicated, would be in place for at least eighteen months, and there would be permanent lifting restrictions, though it was not yet possible to quantify them. Dr. Schell also indicated that plaintiff's sexual dysfunction, while improved after the surgery, remained abnormal. Dr. Schell further indicated that plaintiff could aggravate the injury by participating in vigorous activities, and that he was susceptible to injuring other parts of his back as a result of pressure being displaced from injured regions to healthier areas, increasing the possibility that they in turn will be injured by the added stress. Taken as a whole, Dr. Schell's testimony supports a finding that the second surgery did not completely cure plaintiff's spinal injury.

We also note that Dr. E. Malcolm Field, who performed the earlier surgery, also testified that plaintiff, even after the successful second surgery, remained more susceptible to future spinal injury than most people would be. Dr. Field also testified that it was by no means certain that the spinal fusion performed in the second surgery would prove permanent, and that a further operation to redo this procedure could become necessary.

Defendant nevertheless argues that plaintiff's injuries subsequent to the second surgery must be attributed to degenerative arthritis rather than to the fall. Again, a careful examination of the record indicates that this argument must fail for a number of reasons. Most importantly, Dr. Schell testified that the "traumatic insult" of a heavy force, such as plaintiff suffered in the fall, could contribute to degenerative disc disease. Dr. Field also testified that trauma to the back can accelerate degenerative disc disease.

Defendant further argues that remittitur should have been ordered because the jury awarded damages for future injury resulting from the fall. We disagree. We have already noted Dr. Schell's and Dr. Field's testimony that plaintiff's injury made further future injury likely to occur. There was, therefore, testimony to support this award. That there may have been other evidence that could support a contrary conclusion does not render this evidence insufficient.

Lastly, defendant argues that the past non-economic damages of $322,000 for a period of 4-1/2 years were excessive. We disagree. There was detailed evidence as to the extent of plaintiff's non-economic damages. A non-exhaustive list of the non-economic losses suffered by plaintiff include: (1) intense pain, causing sleep difficulties and requiring a reliance upon drugs, including prescribed narcotics; (2) psychological depression; (3) episodes of anger, related to the pain and depression; (4) sexual dysfunction; (5) loss of bladder and bowel control; (6) the end of a romantic relationship plaintiff had expected to lead to marriage, as a result of his partner's ultimate inability to maintain the relationship in the face of the first five results listed; (7) the inability to engage in recreational activities that had been a major and important part of his life; and (8) the loss of a sense of self-worth resulting from the inability to practice his trade and to do the charitable work he had used his professional skills to perform. In light of the evidence of these damages, we do not find the award to be excessive.

Defendant correctly cites *Palenkas, supra,* for the proposition that jury awards, to be affirmed, ought to be in the range for awards in analogous cases. Defendant then argues that, because it has presented a "compendium" of spinal injury cases in which awards for past non-economic damages were on the average considerably lower, the award here must be found to be

outside the range, and therefore excessive. We do not find the compendium convincing because it lacks any indicia of reliability.

The compendium consists of fifteen cases decided between 1991 and 2002. Not one of these cases is from Michigan.[1] Apparently, defendant chose these cases from a much larger sample, as some bear a computerized heading indicating they are printed from a "rank" of sixteen, while others are from a "rank" of fifty-six. No explanation is given of the criteria for choosing the cases selected. Defendant notes that fifteen was the number considered in *Palenkas,* but offers nothing to demonstrate that the cases are typical of the presumably much larger number of spinal injury cases decided throughout the nation over an eleven-year period. Most are mere computer printouts indicating the jurisdiction, the place of injury, the theory of the recovery, and the size of the award, so we have no basis for determining whether, even assuming the sample to be a typical one, the injuries sustained were similar to what plaintiff suffered.

In sum, there is no basis for determining that these cases are representative of the typical spinal injury case, that the facts are similar to this case, or that the same legal standard for finding damages we are required to follow was used. It may be that defendant scrupulously endeavored to compile the most closely analogous cases it could find, and carefully avoided any self-serving effort to skew the sample in its favor. Although this may be the case, we have no way to determine whether it is or not. Had defendant shown that the jury award here was grossly disparate from that in factually similar cases, or that it is outside the mainstream of awards allowed in Michigan, there might be a basis for finding this award to be excessive. Defendant has done neither, so its compendium does not provide an adequate basis for finding that the trial court abused its discretion by denying defendant's motion for remittitur.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

[1] Five of the cases are from Louisiana. Of the other ten reported cases, two are from California, and one each is from Arizona, Florida, Maryland, Missouri, Ohio, Oregon, Texas, and Virginia.