STATE OF MICHIGAN

COURT OF APPEALS

DAWN MCKOLAY and MICHAEL MCKOLAY,

Plaintiffs-Appellants,

v

TEBOE FLORIST, INC.,

Defendant-Appellee.

UNPUBLISHED
July 1, 2003

No. 235362
Grand Traverse Circuit Court
LC No. 00-020066-NO

Before: Smolenski, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

Plaintiffs appeal as of right a judgment entered pursuant to a jury verdict in favor of defendant. Plaintiffs brought suit seeking personal injury damages for a slip and fall accident in defendant's parking lot in which plaintiff Dawn McKolay was injured. We affirm.

First, plaintiffs argue on appeal that they are entitled to a new trial because defense counsel allegedly made improper remarks during his closing argument denying plaintiffs a fair trial.[1] We disagree.

Where conflicting or contradictory testimony has been presented, parties may try to persuade the jury to believe their witnesses and disbelieve the adverse party's witnesses and that reasonable inferences from testimony may be drawn by counsel during closing arguments. See *Wheeler v Grand Trunk W R Co*, 161 Mich App 759, 765; 411 NW2d 853 (1987). As our Supreme Court stated in *Koepel v St Joseph Hosp & Medical Center*, 381 Mich 440, 442; 163 NW2d 222 (1968):

> An attorney is entitled to some license in his argument, and the testimony to him may bear quite different inferences and conclusions than might be deduced by a disinterested and unbiased judge. But if we were to reverse cases because the attorneys of the parties claimed more from the testimony for their clients than we could discern in the evidence, or argued that facts were established when we

[1] With the exception of defense counsel's comments regarding plaintiff's footwear, plaintiffs did not object, request a curative instruction, or request a mistrial. Accordingly, our review is limited to determining whether the alleged error was incurable and denied plaintiffs a fair trial. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 100-104; 330 NW2d 638 (1982).

> thought they were not, we should not only invade the province of the jury, but vacate most, if not all, of the judgments that come for review before us. [Quoting with approval *Dikeman v Arnold,* 83 Mich 218, 221-222; 47 NW 113 (1980).]

In this case, conflicting testimony was introduced regarding the condition of defendant's parking lot on the date of Mrs. McKolay's accident. Seven witnesses testified that the ground was slippery. However, Rachelle Babcock, Traver Teboe, and Kathy Teboe testified they did not slip or slide in approaching Mrs. McKolay or in standing talking to her, and they did not have any trouble keeping traction in the area where Mrs. McKolay fell. In light of the conflicting and contradictory testimony, we conclude that defense counsel was acting within permissible bounds when he asked the jury to find that the ground on which Mrs. McKolay fell was not icy. Therefore, defense counsel's statements during closing arguments regarding the state of defendant's parking lot on the date of Mrs. McKolay's fall were proper.

Regarding defense counsel's comments suggesting that Mrs. McKolay's medications may have played a role in her fall, again we conclude that these challenged statements were permissible. First, contrary to plaintiffs' position, this argument was based on the evidence produced at trial. During cross-examination, Mrs. McKolay admitted that at the time of her fall she was taking the drug Paxil, and one of the side effects of the drug is dizziness or vertigo. Further, approximately seven months before her fall, she had seen a doctor for intermittent mild vertigo and imbalance. Although Mrs. McKolay testified that the dosage of Paxil she took was too small to cause vertigo or dizziness, and she was not dizzy or suffering from vertigo at the time of the accident, these assertions affect the weight accorded to the evidence. It is clear from plaintiff's testimony that there was evidence produced at trial to support defense counsel's statements. Accordingly, defense counsel was entitled to draw reasonable inferences during closing arguments and to highlight those inferences for the jury. *Wheeler, supra* at 765.

Next, in regard to defense counsel's alleged disparagement of plaintiff's expert witness, Ronald Tyson, as plaintiffs note in *Mott v Detroit, GH & M R Co,* 120 Mich 127, 135; 79 NW 3 (1899), our Supreme Court held that trial counsel committed error requiring reversal when he described the opposing party's expert witnesses as "hired servants of masters." In its extremely terse ruling, the *Mott* Court simply stated that it believed "counsel went too far in denouncing these witnesses." *Id*.

In more recent cases, our courts have clarified the law with regard to this issue. See *Kern v St Luke's Hosp,* 404 Mich 339, 353-354; 273 NW2d 75 (1978), and *Wayne Co Bd of Rd Comm'rs of v GLS LeasCo,* 394 Mich 126, 134; 229 NW2d 797 (1975). In both cases, the challenged statements were unsupported by the evidence on the record. These cases stand for the proposition that an attorney may not attack the credibility of an opposing party's witness without support for doing so in the record.

In contrast, in *Hunt v Freeman,* 217 Mich App 92, 95; 550 NW2d 817 (1996), this Court held that so long as there is record support, it was permissible for defense counsel to argue that an opposing party's expert witness spends a significant portion of their time evaluating cases for attorneys and in giving testimony in lawsuits for which he was well compensated.

In the present case, the objected-to comments were fully supported by the record. On cross-examination, plaintiffs' expert witness Tyson admitted that he charged a fee of $170 per

hour for testifying and eighty percent of his income was derived from his work as an expert witness. In light of this testimony, defense counsel's statements regarding Tyson were proper based on the evidence.

With regard to defense counsel's comments on Mrs. McKolay's credibility, again we conclude that these statements were permissible. While a party should not be subjected to personal attacks and unsubstantiated insinuations, *Wayne, supra* at 134, challenges to the credibility of an opposing party's witnesses are permitted when such statements are supported by the record. *Kern,* supra at 353-354; *Wayne, supra* at 134; *Hunt, supra* at 92. Indeed, the Michigan Supreme Court has explicitly stated that counsel may discuss the character of witnesses and the probability of the truth of testimony given and may characterize testimony when there is any reasonable basis for so doing. *Kern, supra* at 353-354. Moreover, it is permissible to argue that an opposing party has failed to produce evidence that it might have, and to argue the jury may draw an inference against the opposing party based on this failure. *Reetz v Kinsman Marine Transit Co,* 416 Mich 97, 102; 330 NW2d 638 (1982). Based on the above authorities, we conclude that defense counsel's comments regarding plaintiff's credibility were proper.

Turning to defense counsel's comments regarding Mrs. McKolay's footwear, we conclude that these comments also do not constitute a valid basis for granting plaintiffs a new trial. It is permissible to point out that an opposing party failed to produce evidence that it might have and to argue that the jury may draw an inference against the opposing party.[2] *Reetz, supra* at 109. Further, assuming that error occurred, after plaintiffs objected to these comments, the trial court gave an effective curative instruction. Jurors are presumed to follow their instructions. *Craig v Oakwood Hosp,* 249 Mich App 534, 561; 643 NW2d 580 (2002).

Next, plaintiffs argue that the jury's verdict that defendant was not negligent was against the great weight of the evidence. We disagree. Specifically, plaintiffs assert it was an uncontroverted fact that Mrs. McKolay fell on ice in defendant's parking lot and that defendant failed to take proper precautions to protect business invitees such as Mrs. McKolay. However, after reviewing the testimony presented at trial as a whole, we conclude that these facts were contested and there was sufficient evidence to support the jury's verdict.

A number of witnesses testified that the ground beneath Mrs. McKolay's feet at the time she fell was slippery. However, Traver Teboe and Babcock testified they did not slip or slide in approaching Mrs. McKolay or in standing talking to her after she fell, and they did not have any trouble keeping traction in the area where Mrs. McKolay fell. Traver's wife, Kathy, also

[2] It is unclear whether defense counsel's comments were directed to the issue of causation in fact or comparative negligence. Plaintiffs bore the burdens of production and persuasion regarding the former, but not the later. Furthermore, as noted by the trial court in denying plaintiffs' motion for a new trial:

> . . . because the jury found that the Defendant was not negligent and returned a verdict of no cause for action, the jury never reached the issues of proximate cause and comparative negligence to which the Plaintiff's footwear would have been relevant.

testified she had no trouble by slipping or falling when she approached Mrs. McKolay. Such testimony, while not explicitly asserting that the ground where Mrs. McKolay fell was not icy, nonetheless clearly suggests there was as at least a question of fact regarding whether it was icy in the spot where Mrs. McKolay fell.

Furthermore, Mrs. McKolay and Traver Teboe testified they did not observe any ice where Mrs. McKolay fell, thus suggesting that Mrs. McKolay's fall may not have been due to ice at all. This possibility was then further buttressed by Mrs. McKolay's admissions that she was taking Paxil at the time of her fall and that one of the side effects of this drug is dizziness or vertigo. This testimony further confirms our conclusion that the evidence on the question whether defendant's parking lot was icy in the area where Mrs. McKolay fell, taken as a whole, was a factual issue properly submitted to the trier of fact. The jury's finding on this question largely hinged on which witnesses the jury found to be more credible and on the burden of persuasion. In such circumstances, bearing in mind that the question of credibility should be left to the factfinder, *Rossien v Berry,* 305 Mich 693, 701; 9 NW2d 895 (1943), we hold that the evidence on this factual issue did not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski,* 232 Mich App 24, 28; 592 NW2d 75 (1998).

The testimony in this case was equally as contradictory and conflicting on the factual question whether defendant took proper precautions to prevent patrons from falling in his parking lot. Four witnesses, including owner Traver Teboe, testified that the parking lot was slippery in the area where plaintiff fell. In addition, plaintiffs' expert witness Ronald Tyson stated that, in his opinion, reasonable ice clearing procedures for a parking lot such as defendant's, where there was a history of water runoff from the roofline, would include putting salt along the parking lot below the roofline on the day in question, something that defendant in this case failed to do. This testimony would tend to suggest that defendant did not take adequate precautions to protect the safety of his patrons.

However, Traver Teboe gave a lengthy description of the efforts he made on the date of plaintiff's fall to try to make his parking lot safe. These included doing a visual inspection of the entire parking lot from his truck, followed up by a walking inspection of the lot with a bucket of salt in hand and spreading salt as needed throughout the lot. Moreover, five witnesses, including Mr. and Mrs. McKolay, stated either that defendant's parking lot was dry and clear of snow and ice or that they had not had any difficulty walking in defendant's lot that morning. Further, Traver Teboe testified that on the morning of plaintiff's fall, he walked directly over the spot where plaintiff fell and did not see any ice and checked the parking lot along the roofline and found that no salt was needed. This testimony clearly suggests that defendant exercised reasonable care to prevent patrons from falling in his lot.

Based on the contradictory and conflicting evidence introduced by the parties, we conclude that the evidence on this issue did not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Gadomski, supra* at 28. Accordingly, we hold that the jury's verdict of no cause of action was not against the great weight of the evidence.

Plaintiffs further argue that the trial court committed error regarding reversal by refusing to instruct the jury on a failure-to-warn theory of negligence. Again, we disagree. MCR

2.516(D)(2) provides that, when requested by a party, a court must give a standard jury instruction if it is applicable and accurately states the law. However, the determination whether an instruction is applicable is in the sound discretion of the trial court, *Ewing v Detroit*, 252 Mich App 149, 173; 651 NW2d 780 (2002). A court may refuse to give a generally applicable instruction if it would neither add to an otherwise balanced and fair jury charge nor enhance the jury's ability to decide the case intelligently, fairly, and impartially, *Johnson v Corbet*, 423 Mich 304, 327; 377 NW2d 713 (1985).

In the present case, while plaintiffs mentioned the negligence theory of failure to warn in their complaint and in their closing argument at trial, plaintiffs failed to introduce any evidence in support of a claim for failure to warn. Accordingly, because plaintiffs merely argued the failure-to-warn theory, without providing any evidence in support of such a theory, plaintiffs failed to provide the basis on which the jury could find that defendant had breached his duty to warn. Therefore, we conclude that the trial court did not abuse its discretion in failing to instruct the jury on a failure-to-warn theory. *Johnson, supra* at 327.

Affirmed.

/s/ Michael R. Smolenski
/s/ Richard Allen Griffin
/s/ Peter D. O'Connell