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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2308-06T2

FRANCES LEONARDO,

Plaintiff-Appellant,

v.

COMFORT INN VICTORIAN,

Defendant-Respondent.

Argued March 12, 2008 - Decided April 8, 2008

Before Judges Wefing, Parker and Lyons.

On appeal from Superior Court of New Jersey,
Law Division, Atlantic County, Docket No. L-
2095-04.

Nancy C. Ferro argued the cause for
appellant (Ferro and Ferro, attorneys; Ms.
Ferro, on the brief).

Joseph M. Powell argued the cause for
respondent (Powell & Associates, LLC,
attorneys; Anthony J. Corino, on the brief).

PER CURIAM

Leaving her Egg Harbor hotel room, plaintiff Frances
Leonardo was walking to her car on a path bordered by decorative
rock beds. Plaintiff did not see an egg-shaped rock on the path
before her, slipped, and fell. Plaintiff sued defendant hotel,

Comfort Inn Victorian (Comfort Inn). Following a trial, the jury found that Comfort Inn was not negligent in the maintenance of its property. Plaintiff now appeals that verdict and a subsequent order denying her motion for a new trial.

The facts surrounding this case are straightforward. Plaintiff and her friend, Rose Caratozzola, were staying at Comfort Inn in Egg Harbor. On the morning of September 2, 2002, plaintiff and her friend left their room and were walking toward the parking lot on a cement walkway. One of the stones from the decorative beds of stone that bordered the walkway was on the path. Plaintiff tripped and fell over that egg-shaped stone.

Plaintiff went to the manager's office to report the incident. Robin Shaffer Indyg (Indyg), general manager, was on duty. Plaintiff reported to Indyg that "she had tripped over a rock, fell, and scraped up her knees and her hands and that her neck and back were hurting." Plaintiff refused medical attention. Indyg took plaintiff to the ladies' room, where Indyg "cleaned up" plaintiff. Indyg then asked plaintiff where she fell and Indyg took pictures of the surrounding areas "to show how the rocks are placed in the beds and that there was . . . no debris or anything else around there." Then, plaintiff once more refused medical attention because she was "off to the casino." Indyg then filled out an incident report.

Plaintiff claims that the pain came on later, forcing her to leave the Taj Mahal casino early, after only six hours. In the next "day or two," plaintiff saw her family physician, Dr. Dominic Rabino. Plaintiff was treated by several other doctors and incurred nearly \$100,000 in medical bills.¹

Plaintiff filed a complaint on July 8, 2004, alleging that Comfort Inn was negligent, causing plaintiff's injuries. At trial, which extended from October 16 to 20, 2006, the jury heard testimony from the owner of Comfort Inn, plaintiff, Rose Caratozzola, plaintiff's son, Indyg, and doctors and safety engineers from both sides. The jury returned its verdict in favor of Comfort Inn on October 20, 2006, finding that Comfort Inn was not negligent. The trial court entered judgment on October 26, 2006.

Plaintiff filed a pro se motion for a new trial on November 8, 2006. The motion for new trial was heard on December 1, 2006. The trial court issued a written decision and order on the same day, denying plaintiff's motion.

¹ There was considerable testimony regarding plaintiff's medical problems and whether they were caused by the fall. Because causation and damages are not relevant to any issues raised on appeal, the majority of the facts relating to damages have been omitted.

On December 27, 2006, plaintiff filed a notice of appeal. In her appeal, plaintiff raises the following issues for our consideration:

POINT I

THE COURT ERRED IN DENYING PLAINTIFF PRO SE'S MOTION FOR NEW TRIAL.

POINT II

THE MODE OF OPERATION RULE SHOULD BE EXTENDED TO THIS TYPE OF SITUATION AND SHOULD HAVE BEEN INCLUDED IN THE JURY CHARGE (NOT RAISED BELOW).

POINT III

THE VERDICT BELOW WAS CLEARLY AGAINST THE WEIGHT OF THE EVIDENCE.

We will address plaintiff's arguments seriatim. Plaintiff asserts that the trial court erred in denying her pro se motion for a new trial. Plaintiff argued in her motion that the "court did not tailor the charge to this case by advising the jury that the single rock on which plaintiff tripped could constitute 'hazardous conditions' or 'defects,'" and this failure was clearly capable of producing an unjust result. Plaintiff claimed that had the jury instruction made reference to a

hazardous condition or a defect in the singular, as opposed to plural, "the verdict may have been different."²

We note at the outset that because plaintiff did not object to the jury instructions at trial, we view their propriety in light of the plain error standard. R. 2:10-2. The court has the obligation to tailor the charge to the facts of the case when necessary for the jury's understanding. Reynolds v. Gonzalez, 172 N.J. 266, 288-89 (2002). However, "[a]ppellate courts should review jury instructions as a whole, and may not reverse if the charge adequately conveys the law and is unlikely to confuse or mislead the jury." Boryszewski v. Burke, 380 N.J. Super. 361, 374 (App. Div. 2005), certif. denied, 186 N.J. 242 (2006).

The charge in issue reads:

The owner must take such steps as are reasonably prudent to correct or warn of hazardous conditions or defects actually known to him or his employees and of hazardous conditions or defects he or his employees by exercise of reasonable care could discover.

² The record makes an oblique reference to a post-verdict communication between the jurors by the trial court in which jurors may have discussed their perception of the efficacy of the jury instructions. We reaffirm our admonition "that trial judges should refrain from such interaction [with the jury] in the future so as to avoid the type of allegations . . . that have been made in this appeal or other claimed grounds for appeal." Ertle v. Starkey, 292 N.J. Super. 1, 7 (App. Div. 1996).

The Model Jury Charge for Duty Owed - Condition of Premises

reads:

He/She must take such steps as are reasonable and prudent to correct or give warning of hazardous conditions or defects actually known to him/her (or his/her employees), and of hazardous conditions or defects which he/she (or his/her employees) by the exercise of reasonable care, could discover.

[Model Jury Charge (Civil), § 5.20F.]

"It is difficult to find that a charge that follows the Model Charge so closely constitutes plain error. Although the charge could have been more artfully drafted, it conveyed the clear message" Mogull v. CB Commer. Real Estate Group, 162 N.J. 449, 466 (2000). Based on a reading of the entire charge, we find that there is no reversible error because the charge "conveys the law and is unlikely to confuse or mislead the jury, even though part of the charge, standing alone, might be incorrect." Id. at 464.

Furthermore, the trial court conducted a lengthy jury charge conference during which the court, using what was referred to by the court as the "collaborative method," reviewed the proposed instructions with counsel. Counsel requested the charge to read, "an owner must take such steps as are reasonable and prudent to correct or give warning of hazardous conditions or defects actually known to him or his employees and of

hazardous conditions, defects which employees could discover." At the end of the conference, plaintiff's counsel stated, "I think we're good."

In fact, plaintiff's counsel discussed and suggested the very jury charge provisions plaintiff now contests. Plaintiff's counsel now complains that the trial court "repeatedly used terms such as 'hazardous conditions' and 'defects.'" "The doctrine of invited error operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when that party urged the lower court to adopt the proposition now alleged to be error." Brett v. Great Am. Rec., 144 N.J. 479, 503 (1996). To the degree that the instructions were specifically requested by plaintiff, plaintiff's arguments are barred by the doctrine of invited error.

Plaintiff also claimed in her new trial motion that the trial court erred in not giving a spoliation instruction regarding two Polaroid photographs allegedly lost by Comfort Inn. Plaintiff claims that these photographs were "crucial to plaintiff's case since they showed stones on the ground on the day of plaintiff's fall." During discovery, plaintiff was given copies of these pictures. At trial, plaintiff requested Comfort

Inn's counsel to produce the original color Polaroids, which were lost by Comfort Inn and could not be produced.

A "spoliation inference" instruction "permits the jury to infer that the evidence destroyed or concealed would not have been favorable to the spoliator." Jerista v. Murray, 185 N.J. 175, 202 (2005). Typically, the party requesting the instruction must "make a threshold showing that [the spoliator's] recklessness caused the loss or destruction of relevant evidence in the underlying personal injury lawsuit" Id. at 203. Then, the instruction may be given. Ibid. Here, there was no showing of recklessness. Moreover, the pictures were irrelevant to plaintiff's argument. The photographs were of a black-topped parking area, not of the cement sidewalk where plaintiff fell. We find no plain error because the lack of original pictures of the parking area did not cause an unjust result.

Plaintiff also argues that the mode-of-operation instruction should have been given to the jury. Plaintiff claims that "the present case falls within the general principles [of mode of operation] because of the inherent danger in having the stone beds located on a slope leading to the sidewalk without no [sic] barrier preventing them from coming onto the sidewalk" and because Comfort Inn was aware of the

hazard, as evidenced by the owner instructing the housemen to push stones back. Plaintiff asserts that this situation "is similar to an establishment like a cafeteria, a discount store or a mall where the owner is aware that a hazardous condition regularly occurs."

The facts of this case do not lend themselves to a mode of operation instruction. "The Model Charge correctly states the rule that when a substantial risk of injury is inherent in a business operator's method of doing business, plaintiff is relieved of showing actual or constructive notice of the dangerous condition." Nisivoccia v. Glass Gardens, 175 N.J. 559, 564 (2003). This charge is given in cases where there is a possibility that the hazardous condition was caused by a customer or an employee in situations where the business operation sells food or other goods to customers on a self-service basis. Wollerman v. Grand Union Stores, Inc., 47 N.J. 426 (1966) (slip and fall on string bean in self-service supermarket); Bozza v. Vornado, Inc., 42 N.J. 355 (1964) (slip and fall in self-service cafeteria); Torda v. Grand Union Co., 59 N.J. Super. 41 (App. Div. 1959) (slip and fall on the wet floor of self-service supermarket). More recently, we have applied the mode of operation instruction to non-supermarket cases. Craggan v. IKEA USA, 332 N.J. Super. 53, 61-62 (App.

Div. 2000) (an IKEA self-service store); O'Shea v. K. Mart Corp., 304 N.J. Super. 489, 492-93 (App. Div. 1997) (a K-Mart). The common thread throughout, however, is the self-service element.

Plaintiff argues that, like a cafeteria, discount store, or mall, Comfort Inn's owner was aware that a hazardous condition regularly occurs -- rocks are found on the sidewalk. We disagree. The mode-of-operation jury instruction is limited to those situations where the nature of the business itself, such as a self-service grocery store or retailer, creates the hazard. Id. at 564. Because we find that a decorative rock on the sidewalk of a hotel is not a condition which arises from the natural mode of operation of a hotel, the mode-of-operation jury instruction is not warranted.

Plaintiff further argues that the verdict below was clearly against the weight of the evidence. Plaintiff argues that her safety engineer concluded that heavy rains and winds caused the rock to move onto the sidewalk and a barrier between the rocks and the sidewalk could have avoided the "whole problem." According to plaintiff, Comfort Inn's expert was not as credible as plaintiff's. In light of these arguments and the other two points, plaintiff claims that she "has met the burden on appeal

of demonstrating that the verdict was against the weight of the evidence."

The "scope of review from the denial of a motion for a new trial is such that a jury verdict will not be overturned unless there is a clear showing of a miscarriage of justice." Okulicz v. DeGraaff, 361 N.J. Super. 320, 329 (App. Div. 2003) (citing R. 2:10-1). We must conduct an "independent assessment of the trial record while giving deference to the trial judge regarding the intangible aspects of the case including witness credibility and "the feel of the case." Ibid. Both plaintiff and Comfort Inn offered expert testimony. As with many trials, the two experts gave contradicting opinions and testified that the other expert was wrong.

Comfort Inn's expert testified that the premises were properly designed and safely maintained. To that end, he testified that the "housemen" walk the property every hour to hour and a half to ensure that no debris or garbage is present on the walkways. In addition, defendant's expert's testimony vigorously disputed plaintiff's expert's calculations and conclusions regarding the ability of the storm to move a rock onto the sidewalk.

After independently viewing the record, we find that there was no miscarriage of justice. Based upon the verdict, the jury

found Comfort Inn's expert to be more credible than plaintiff's. Amaru v. Stratton, 209 N.J. Super. 1, 20 (App. Div. 1985) ("The jury may adopt so much of [an expert's testimony] as appears sound, reject all of it, or adopt all of it.") (quoting State Highway Com. v. Dover, 109 N.J.L. 303, 307 (E. & A. 1932)). Accepting "as true all evidence supporting the jury's verdict and [drawing] all reasonable inferences in its favor whenever reasonable minds could differ," the jury's verdict is clearly supported by the proofs in the record. Bell Atl. Network Servs., Inc. v. P.M. Video Corp., 322 N.J. Super. 74, 83 (App. Div.), certif. denied, 162 N.J. 130 (1999). We have held that "[j]ury verdicts should be set aside in favor of new trials only with great reluctance, and only in cases of clear injustice." Boryszewski, supra, 380 N.J. Super. at 391. While there was conflicting testimony, we find that the jury's credibility assessment was supported by the record and did not result in an injustice. Amaru, supra, 209 N.J. Super. at 20

Accordingly, the trial court's decision should be affirmed.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION