2018 IL App (1st) 173062-U

FIFTH DIVISION
Order filed: December 14, 2018

No. 1-17-3062

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

MICHAEL D. BERK, Plaintiff-Appellee, v. PEPPER CONSTRUCTION CO., an Illinois Corporation, Defendant-Appellant.	))))))))))))	Appeal from the Circuit Court of Cook County No. 13 L 10526 Honorable Daniel J. Lynch, Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the orders of the circuit court denying the defendant's motions for judgment *n.o.v.*, a new trial, or remittitur where: (1) the plaintiff presented evidence sufficient to establish that the defendant had constructive notice of the unnatural accumulation of ice upon which the plaintiff fell caused by meltwater from snow piled in the defendant's parking lot flowing onto the adjacent sidewalk and refreezing; and (2) we are unable to find that the jury's verdict exceeded the bounds of fair compensation for the plaintiff's injuries.

¶ 2 The defendant, Pepper Construction Co. (Pepper), appeals from the orders of the Circuit Court of Cook County denying its motions for a directed verdict and for judgment notwithstanding the verdict (judgment *n.o.v.*) in favor of the plaintiff, Michael D. Berk. Pepper also appeals from the denial of the alternative relief it sought in the form of a new trial or a remittitur. For the reasons that follow, we affirm.

¶ 3 The following facts relevant to our disposition of this appeal were adduced from the pleadings and the evidence introduced at trial.

¶ 4 On January 27, 2012, the plaintiff fractured his right ankle when he slipped and fell on a public sidewalk adjacent to the parking lot of a building owned and occupied by Pepper. The plaintiff instituted this action against Pepper, charging, in his single-count first amended complaint, that Pepper breached its duty of ordinary care in the maintenance of its property by, *inter alia*, allowing a condition to exist or remain on its property which caused water to flow onto the sidewalk that, after freezing, became the unnatural accumulation of ice upon which he slipped and fell. The plaintiff further alleged that Pepper knew or should have known that a dangerous condition existed on the premises.

¶ 5 Pepper answered the complaint, denying the material allegations and raising affirmative defenses, including its lack of actual or constructive notice of the alleged dangerous condition. Pepper filed a motion for summary judgment which the circuit court denied, and the matter proceeded to trial.

¶ 6 The plaintiff testified that, at approximately 7:30 or 7:45 a.m. on January 27, 2012, he was walking from the train station to work when he slipped and fell on a sidewalk near the entrance of Pepper's parking lot. The plaintiff stated that his left foot slipped and that, when he planted his right foot to prevent his fall, he fell to the ground and heard "bones crunching." At

the moment he slipped, he did not know what caused his fall. However, the plaintiff testified that, as he lay on the ground, he could feel ice beneath him and realized that he slipped and fell on the ice. The plaintiff stated that, as he was walking prior to his fall, the ice "was not visible," "nobody would have seen the ice," and "there was no visible issue, warning, anything." He was unable to describe the amount of ice on the sidewalk, but stated that, while on the ground, he saw the ice "leading back up towards [Pepper's] parking lot and the drain." According to the plaintiff, after he fell, Robert Bruno "pulled up" and asked if he was alright and whether he wanted him to call an ambulance. The plaintiff recalled that Bruno remained at the scene of the accident for about a minute, but he had no recollection of any further conversation with Bruno. The plaintiff testified that he was lying on the ground for 20 to 30 minutes before the paramedics arrived.

¶ 7 The plaintiff admitted that he took the same route from work to the train station on the evening before his fall and saw no snow or ice on the sidewalk near Pepper's parking lot. He testified that it had not rained or snowed on the morning of his fall.

¶ 8 According to the plaintiff, he fractured his right ankle as a result of his fall. He stated that he underwent three surgeries to repair his ankle, had physical therapy, was required to wear a cast for two months, and was left with a scar on his right ankle. He stated that the pain from his injuries fluctuated in intensity throughout the healing process, but acknowledged that he recovered well from the surgeries and was "essentially pain free," except for some soreness associated with physical therapy. The plaintiff testified that, from college until the day of his accident, he played basketball, football, golf, and tennis. After his third surgery, his doctor recommended that he stop playing sports like basketball and tennis, and take up swimming and biking instead. He admitted that, aside from the limitations on his ability to play sports and some

limitation on his ability to play with his children, his ability to engage in other activities was unaffected.

¶ 9 David Schroeder was called as an expert witness by the plaintiff. He is an architect who works on "light construction" projects, such as designing residential patios, driveways, sidewalks, and drainage systems. Schroeder stated that he has testified as a plaintiff's expert in approximately 120 other cases since obtaining his license in 2004, including testifying as an expert in a case involving a parking lot.

¶ 10 Schroeder testified that he used a clinometer to determine the slope of Pepper's parking lot. According to Schroeder, ascertaining the slope of the lot was important in determining whether meltwater from snow piled in the parking lot would flow onto the public sidewalk, rather than into the parking lot drains. He spilled jugs of water onto the parking lot to determine the path that the water would flow. Schroeder concluded that the slope of the parking lot was "great." He admitted, however, that he did not account for the velocity or rate of flow of the water, nor did he conduct an exhaustive review of the entire parking lot, stating that such a review was unnecessary. Schroeder testified that, due to the design of Pepper's partially-walled parking lot, meltwater from snow piled against the eastern interior wall of the lot could flow onto the sidewalk rather than into several drains located near the entrance of the lot. He opined that the meltwater from the snow piled against the eastern interior wall of Pepper's parking lot prior to January 27, 2012, flowed onto the sidewalk and froze, forming the ice upon which the plaintiff slipped and fell.

¶ 11 Schroeder admitted that the drain in Pepper's parking lot met industry standards and was functioning properly when he examined it. He also admitted that he had never designed a comparable parking lot or a parking lot drainage system, and has no expertise in engineering,

hydrology, hydrodynamics, or fluid dynamics. He stated, however, that he has the ability to design parking lots or concrete outdoor spaces like sidewalks, patios, and stairs. He also testified that he found no building code violations in Pepper's parking lot, and that the lot was well-designed, provided snow was not piled against the eastern wall. According to weatherunderground.com, a website relied on by Schroeder in his review of the parking lot, in the three days preceding the plaintiff's fall, the temperature fluctuated from above and below freezing. He opined that the fluctuation in temperature, among other causes, would have resulted in the snow piled in the parking lot melting, and the meltwater flowing onto the sidewalk and refreezing.

¶ 12 The plaintiff also called Dr. George Holmes, his orthopedic surgeon, as a witness. Dr. Holmes' testimony was presented by means of a videotape deposition. He testified that he treated the plaintiff and performed three surgeries to repair his right ankle. Dr. Holmes explained that the plaintiff suffered from a fibular fracture of the right ankle which he surgically repaired on February 14, 2012. The injury healed well, and Dr. Holmes released the plaintiff from his care on May 30, 2012, recommending that he return for a reevaluation in two months. According to Dr. Holmes, at that point, the plaintiff was able to resume regular activities such as light walking or brief jogging.

¶ 13 On February 22, 2013, Dr. Holmes surgically removed the hardware he previously placed in the plaintiff's ankle. He testified that the plaintiff was walking normally without complaint when he saw him on March 8, 2013. Dr. Holmes again released the plaintiff from his care and prescribed a course of physical therapy.

¶ 14 Dr. Holmes stated that he saw the plaintiff again on July 30, 2014, at which time the plaintiff complained of ankle pain while playing basketball and golfing. Dr. Holmes concluded

that the plaintiff's symptoms were consistent with arthritis, which he attributed to the January 2012 fall. According to Dr. Holmes, individuals who do not have ankle fractures are not prone to developing arthritis in the ankle. He testified that he recommended that the plaintiff cease playing high-impact sports and switch to low-impact sports and exercise, such as swimming and cycling.

¶ 15 The plaintiff returned to Dr. Holmes on June 23, 2016, complaining of continued ankle pain. Dr. Holmes stated that the plaintiff reported that he was still playing basketball once a month and was having trouble "keeping up with his children." Dr. Holmes testified that x-ray scans of the plaintiff's ankle confirmed his arthritis diagnosis and revealed bone spurs. On January 6, 2017, Dr. Holmes operated on the plaintiff, repairing his syndesmosis, correcting his bone spurs with a calcaneal osteotomy, and repairing a ligament.

¶ 16 According to Dr. Holmes, he last saw the plaintiff on March 29, 2017. He stated that, as of that visit, the plaintiff was "essentially pain free." He explained that the plaintiff's third surgery resolved all of his ankle-related problems; however, his arthritis is permanent. He again advised the plaintiff to refrain from high-impact sports.

¶ 17 In its case-in-chief, Pepper called Bruno, a senior vice president of one of its business units, as a witness. He testified that, as he was turning his vehicle into Pepper's garage entrance on January 27, 2012, he observed the plaintiff lying on the ground and asked the plaintiff if he was "okay." When the plaintiff answered, "no," he exited his vehicle and walked over to the plaintiff who then told him that his ankle was injured. Bruno stated that he had a Pepper's office employee call for an ambulance, and then returned to stay with the plaintiff, attempting to comfort him while waiting for the ambulance to arrive.

¶ 18 Bruno testified that he did not recall seeing any ice on the sidewalk near or around the

parking lot or the sidewalk where the plaintiff fell. During Bruno's cross-examination, counsel for the plaintiff presented a photograph of the scene of the plaintiff's fall. Bruno identified the photograph which depicts the sidewalk, the presence of snow piles along the eastern interior wall of the parking lot, and paramedics attending to the plaintiff who was lying on a gurney. While viewing this photograph on re-direct examination, Bruno testified that he never saw the paramedics slip while attending to the plaintiff, nor did he see any other person slip while walking in the area where the plaintiff fell. The photograph was admitted into evidence.

¶ 19 Also called as a witness for Pepper was Barry Scheftel, a retired Pepper employee who was working as the engineer for its building and parking lot on the date of the plaintiff's fall. He testified that he was responsible for maintaining Pepper's office building and keeping the grounds safe. Every morning and evening, all year long, he would walk the perimeter of the property to ensure that there were no unsafe conditions. When it snowed, he would shovel the property himself if fewer than two inches of snow accumulated. Otherwise, a contractor would be used to clear the snow. He stated that a contractor had plowed the snow in the parking lot on January 21, 2012, and spread an "ice-melting compound on the walks." Scheftel testified that, on the morning of the plaintiff's fall, he was at another one of Pepper's offices, but that he walked the perimeter of the property the night before and found no ice or other hazards.

¶ 20 According to the National Oceanic and Atmospheric Administration (NOAA) reports which Pepper published to the jury without objection by the plaintiff, the temperature from January 21, 2012, through January 27, 2012, fluctuated from a high of 46 degrees Fahrenheit to a low of 16 degrees. During each of the five days prior to the plaintiff's fall, the temperature both rose above 35 degrees and fell below freezing.

¶ 21 At the close of its case-in-chief, Pepper moved for a directed verdict, arguing, *inter alia*,

that there was no evidence that it was on notice of the alleged unnatural accumulation of ice on the sidewalk where the plaintiff fell. It also argued that, based on the NOAA report which established that there was no precipitation in the City of Chicago on January 26 or 27, 2012, and the fact that the temperature never dropped below freezing for approximately 48 hours prior to the plaintiff's fall, the evidence established that there was no ice on the sidewalk when the plaintiff slipped and fell. The circuit court denied Pepper's motion. Thereafter, the parties made their closing arguments, and the circuit court instructed the jury.

¶ 22 Following deliberations, the jury returned a $2 million verdict in favor of the plaintiff, itemized as follows: $181,000 for medical expenses, $500,000 for past and future pain and suffering, $1,000,000 for past and future loss of normal life, and $319,000 for disfigurement.

¶ 23 Pepper filed a post-trial motion, seeking entry of a judgment *n.o.v.* or, in the alternative, a new trial or a remittitur of damages. In support of its prayer for the entry of a judgment *n.o.v.*, Pepper alleged, *inter alia*, that the evidence established that: (1) there was no ice on the sidewalk when the plaintiff slipped and fell; (2) the plaintiff failed to introduce any evidence that it exercised control over the sidewalk where he fell; and (3) the plaintiff failed to prove that it had notice of the ice on the sidewalk where he fell. In support of its alternative request for a new trial, Pepper incorporated its arguments in support of a judgment *n.o.v.* and also argued that the jury was improperly instructed because the instructions failed to advise the jury that the plaintiff was required to prove that it had control over the sidewalk where he fell. In support of its alternative request for the entry of a remittitur, Pepper argued that the verdict is excessive in light of the plaintiff's successful surgeries and "excellent recovery." The circuit court denied Pepper's post-trial motion, and this appeal followed.

¶ 24 Contending that the plaintiff failed to establish that it had either actual or constructive

notice of the dangerous condition which he alleged caused his fall and resulting injury, Pepper argues that the circuit court erred in denying both its motion for a directed verdict and its motion for a judgment *n.o.v.* However, the denial of Pepper's motion for a directed verdict has merged into the final judgment (*Taylor v. Board of Education of City of Chicago*, 2014 IL App (1st) 123744, ¶ 32). Our review is, therefore, limited to the denial of Pepper's motion for judgment *n.o.v*.

¶ 25 "A motion for judgment *n.o.v.* should be granted only when 'all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors [a] movant that no contrary verdict based on that evidence could ever stand.' " *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 37 (quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967)). "[A] motion for judgment *n.o.v.* presents a 'question of law as to whether, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to the plaintiffs, there is a total failure or lack of evidence to prove any necessary element of the [plaintiff's] case.'" *Id.* (quoting *Merlo v. Public Service Co. of Northern Illinois*, 381 Ill. 300, 311 (1942)). Judgment *n.o.v.* is not appropriate if "reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented." *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 351 (1995). The denial of a motion for judgment *n.o.v.* turns on a question of law, and our standard of review is *de novo*. *Taylor*, 2014 IL App (1st) 123744, ¶ 33.

¶ 26 In order to recover in a case involving a slip and fall on ice, snow, or water, a plaintiff must establish "that the accumulation of ice, snow or water is due to unnatural causes and that the property owner had actual or constructive knowledge of the condition." *Hornacek v. 5th Avenue Property Management*, 2011 IL App (1st) 103502, ¶ 29. In actions against an

independent contractor for injuries sustained from slipping and falling on an unnatural accumulation of ice or snow caused by the contractor's plowing, proof of notice is not required. *Id.* ¶ 31, 34. However, for liability to attach to the property owner when the unnatural accumulation was created by an independent contractor's plowing, actual or constructive notice must be established. *Id.* ¶ 29. Actual notice may be established when previous complaints have been made to the owner, or prior accidents or near misses have occurred. See *Bloom v. Bistro Restaurant Ltd. Partnership,* 304 Ill. App. 3d 707, 712 (1999); *Sullivan-Coughlin v. Palos Country Club, Inc*., 349 Ill. App. 3d 553, 559 (2004); see also *Hornacek*, 2011 IL App (1st) 103502, ¶¶ 35-36. Generally, in order to establish that a defendant had constructive notice of a dangerous condition, the plaintiff must prove that "the dangerous condition existed for a sufficient time or was so conspicuous that the defendant should have discovered the condition through the exercise of reasonable care." *Smolek v. K.W. Landscaping*, 266 Ill. App. 3d 226, 228-29 (1994). "One will be considered to have constructive knowledge if he receives facts that would make the dangerous condition known to any ordinary prudent person." *Stackhouse v. Royce Realty & Management Corp.*, 2012 IL App (2d) 110602, ¶ 30. Whether a defendant has actual or constructive notice is a question of fact (*Nunez v. Diaz,* 2017 IL App (1st) 170607, ¶ 37); however, the determination of whether a plaintiff has presented sufficient evidence to establish every necessary element of his case is a question of law for a reviewing court to decide on appeal from a circuit court's ruling on a motion for judgment *n.o.v. Lawlor*, 2012 IL 112530, ¶ 37.

¶ 27 In support of its argument that the circuit court erred in denying its motion for judgment *n.o.v.*, Pepper first contends that the plaintiff failed to establish that it had actual notice of an unnatural accumulation of ice on the public sidewalk where the plaintiff fell which was caused

by snow that was piled against the eastern wall of its parking lot, melting, flowing onto the sidewalk, and refreezing. We agree. The plaintiff did not produce any evidence that employees of Pepper saw the ice upon which he fell, that Pepper received previous complaints regarding the ice, or that there had been prior accidents or incidents of individuals nearly slipping and falling on the ice. See *Hornacek*, 2011 IL App (1st) 103502, ¶¶ 35-36; *Sullivan-Coughlin*, 349 Ill. App. 3d at 559; see also *Bloom*, 304 Ill. App. 3d at 712.

¶ 28 Next, Pepper maintains that the plaintiff failed to establish that it had constructive notice of an unnatural accumulation of ice on the public sidewalk which was caused by snow piled in its parking lot melting and the meltwater flowing onto the sidewalk and refreezing. We disagree.

¶ 29 In order for the plaintiff to establish that Pepper had constructive notice that ice formed on the sidewalk adjacent to its parking lot caused by meltwater from snow piled against the eastern wall of the lot, he was required to prove that the "dangerous condition existed for a sufficient time or was so conspicuous that the defendant should have discovered the condition through the exercise of reasonable care." *Smolek*, 266 Ill. App. 3d at 228-29. During trial, evidence was introduced establishing that a contractor, engaged by Pepper, plowed the parking lot on January 21, 2012, six days before the plaintiff's fall. The photograph of the scene of the fall on January 27, 2012, clearly depicts snow piled along the lot's eastern interior wall. There is also evidence of record that the temperatures from January 21, 2012, until the morning of the plaintiff's fall on January 27, 2012, fluctuated between below freezing and above freezing. The plaintiff testified that he slipped and fell on ice which had formed on the sidewalk, and that as he lay on the ground, he saw ice leading back towards Pepper's parking lot and the drain. The plaintiff's expert witness opined that the fluctuation of the temperatures, in addition to the slope of the parking lot, could result in meltwater from the snow piled against the eastern wall of the

lot to flow past the parking lot drains, onto the adjacent sidewalk where the plaintiff fell, and refreeze. Although there was no evidence introduced that any of Pepper's employees observed meltwater from the parking lot flow onto the adjacent sidewalk and form ice, the evidence established that (1) snow had been piled along the eastern wall of Pepper's lot for six days before the plaintiff's fall, and (2) the temperature from January 21, 2012, through January 27, 2012, fluctuated from a high of 46 degrees Fahrenheit to a low of 16 degrees.

¶ 30 We believe that the jury was free to rely on the common knowledge that snow melts at temperatures above 32 degrees Fahrenheit and that water freezes at a temperature of 32 degrees or below, and infer, therefrom, that the snow piled against the eastern wall of Pepper's parking lot was melting when the temperature rose above 32 degrees and that the meltwater refroze when the temperature fell below 32 degrees. The climatological data which Pepper published to the jury supports a finding that this melting and refreezing process occurred on each of the five days prior to the claimant's fall. The evidence of record, including the plaintiff's expert witness testimony, and the reasonable inference which might be drawn therefrom, is sufficient to establish that the process of meltwater from the snow piled against the eastern wall of Pepper's parking lot flowing onto the adjacent sidewalk and refreezing occurred over a sufficient period of time (five days prior to the plaintiff's fall), and was so conspicuous that the condition should have been discovered through the exercise of reasonable care. We conclude, therefore, that the evidence adduced at the trial of this cause was sufficient for the jury to have found that Pepper had constructive notice of the unnatural accumulation of ice upon which the plaintiff slipped and fell.

¶ 31 Based on the foregoing analysis, we find that the circuit court did not err in denying Pepper's motion for judgment *n.o.v.*

¶ 32 In support of its argument that the circuit court erred in denying its alternative prayer for relief seeking a new trial, Pepper contends that the verdict in favor of the plaintiff is against the manifest weight of the evidence as there is no evidence in the record that it had either actual or constructive notice of the dangerous condition which caused the plaintiff's fall and resulting injury. We disagree.

¶ 33 "[O]n a motion for a new trial, the trial court will weigh the evidence and order a new trial if the verdict is contrary to the manifest weight of the evidence." *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992). "A verdict is against the manifest weight of the evidence only where the opposite result is clearly evident or where the jury's findings are unreasonable, arbitrary and not based upon any of the evidence." *Lawlor*, 2012 IL 112530, ¶ 38.

¶ 34 Based upon the evidence recited in our analysis addressing the denial of Pepper's motion for judgment *n.o.v.*, we conclude that the jury's verdict in favor of the plaintiff is supported by the evidence, is neither unreasonable nor arbitrary, and an opposite result is not clearly apparent. Therefore, the verdict is not against the manifest weight of the evidence, and the circuit court did not err in denying Pepper's motion for a new trial.

¶ 35 Finally, Pepper maintains that the plaintiff's $2,000,000 verdict, specifically, the $319,000 award for disfigurement and the $1,000,000 award for past and future loss of normal life, was beyond any reasonable range of conclusions supported by the facts in this case. It concludes, therefore, that the circuit court erred in denying its motion for a remittitur. Again, we disagree.

¶ 36 The resolution of a motion for a remittitur is a matter committed to the sound discretion of the trial court, and its determination of the matter will not be disturbed on appeal unless that discretion has been abused. *Martinez v. Elias*, 397 Ill. App. 3d 460, 474 (2009). "An abuse of

discretion may be found only where no reasonable man would take the view adopted by the circuit court." *Clayton v. County of Cook*, 346 Ill. App. 3d 367, 377 (2003).

¶ 37 The determination of damages is a question reserved for the trier of fact. *Richardson v. Chapman*, 175 Ill. 2d 98, 113 (1997). Where a jury's award falls within the flexible range of reasonable compensation supported by the evidence, the court should not grant a remittitur. *Martinez*, 397 Ill. App. 3d at 474. A remittitur is appropriate only in those cases where the jury has made a mathematical error, the jury's award of damages is so excessive that it indicates that the jury was moved by passion or prejudice, the damages awarded exceed the necessarily flexible limits of fair and reasonable compensation, or when the award is so large that it shocks the judicial conscience. *Id.*

¶ 38 To illustrate that the award in the present case is significantly larger than the awards for similar injuries, Pepper provides settlement and verdict award values from other premises liability cases involving injuries similar to those sustained by the plaintiff. However, we decline to compare the plaintiff's award with awards in other cases, as damage awards cannot be tested for excessiveness by comparison with verdicts in other cases. *Richardson*, 175 Ill. 2d 98 at 114; see also *Simmons v. University of Chicago Hospitals & Clinics*, 247 Ill. App. 3d 177, 191, (1993).

¶ 39 The record in this case reflects that, as a result of his fall, the plaintiff suffered a fractured right ankle and underwent three surgeries and physical therapy to repair his ankle. He has physical limitations which prevent him from engaging in high-impact sports and which restrict his interaction with his children. In addition, he has permanent arthritis in his right ankle as well as a scar. Although the jury's damage award is high, we cannot say that the award was the result of passion or prejudice, that it exceeds the limits of fair and reasonable compensation, or that it is

so large that it shocks the judicial conscience. Therefore, we are unable to conclude, that the circuit court abused its discretion in denying Pepper's motion for a remittitur.

¶ 40 Affirmed.