STATE OF MICHIGAN

COURT OF APPEALS

LINDA HANNA,

Plaintiff-Appellee,

v

WAL-MART STORES, INC.,

Defendant-Appellant.

UNPUBLISHED
April 13, 2001

No. 219477
Livingston Circuit Court
LC No. 98-016551 NO

Before: Talbot, P.J., and Hood and Gage, JJ.

PER CURIAM.

In this premises liability action, defendant appeals as of right after a jury verdict finding defendant negligent and awarding plaintiff $30,000 in damages. We affirm.

Defendant first contends that the trial court erroneously denied its motion for summary disposition premised on MCR 2.116(C)(10). This Court reviews de novo a trial court's summary disposition ruling. A (C)(10) motion tests a claim's factual support, and is reviewed to determine whether the affidavits, pleadings, depositions, or any other documentary evidence establish a genuine issue of material fact to warrant trial. All reasonable inferences from the record are resolved in the nonmoving party's favor. *Hampton v Waste Management of Michigan, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999).

Plaintiff tripped over a floor mat while exiting defendant's Howell store. Defendant contends that it was entitled to summary disposition of plaintiff's negligence claim as a matter of law because (1) no evidence indicated that defendant had knowledge of any dangerous condition before plaintiff's fall occurred, and (2) any asserted defect in the mat was open and obvious to plaintiff as she left the store, and did not represent an unreasonably dangerous condition.

Possessors of land owe a legal duty to exercise reasonable care to protect their invitees from dangerous conditions on the land. *Abke v Vandenberg*, 239 Mich App 359, 361; 608 NW2d 73 (2000). An invitor is liable for injuries resulting from unsafe conditions either caused by the invitor's active negligence or, if otherwise caused, where the invitor knew of the unsafe condition or the condition is of such a character or has existed a sufficient length of time that the invitor should have had knowledge of it. *Berryman v K Mart Corp*, 193 Mich App 88, 92; 483 NW2d 642 (1992). When a condition is open and obvious, however, the invitor's duty does not apply unless the condition poses an unreasonable risk of harm. A danger qualifies as open and

obvious when an average user with ordinary intelligence would discover the danger and the risk presented on casual inspection. *Id*. at 361-362.

Plaintiff testified that she tripped over a two-inch high fold in a floor mat, and that she did not observe the fold immediately before her fall. Plaintiff indicated, however, that on leaving the store after filing an accident report with defendant's management, she observed that the mat possessed the same two-inch fold over which she believed she had tripped. Plaintiff's husband also described a two-inch lump toward the center of the mat. Several employees of defendant who witnessed the mat at varying times after plaintiff fell averred that the mat's only irregularity constituted a small crease, no more than a half-inch or full-inch high. This conflicting testimony created an issue of fact regarding the cause of plaintiff's fall.

Even assuming that any of the asserted folds possessed by the mat represented open and obvious defects, readily ascertainable on the casual inspection of an individual of ordinary intelligence, we find that the record existing at the time of defendant's motion raised a question of fact regarding whether the folded mat nonetheless qualified as unreasonably dangerous. "[I]f a risk of harm remains unreasonable, despite its obviousness . . . then the circumstances may be such that the invitor is required to undertake reasonable precautions." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995). In some cases, "the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger." *Id*. at 611, quoting 2 Restatement Torts, 2d, § 343A, comment f, p 220. "[R]eason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious." *Id*. at 611-612, quoting 2 Restatement Torts, 2d, *supra*.

In this case, plaintiff averred that she failed to see the mat folds because the store was busy and, as she exited the building, she was surrounded by other shoppers and "all these little kids running around me trying to get out of the store." Deposition testimony of defendant's employees indicated that on the date of plaintiff's fall, the Friday of the weekend before Thanksgiving, the store would have been very busy. The employees' testimony also included the observations that sometimes customer traffic caused bunches or folds in the floor mats near the exit, and that a customer walking amongst a crowd of people might not detect the mat's irregularities. Thus, while defendant contends that absolutely no evidence established that it caused the allegedly unsafe condition, this testimony at least creates an issue of fact whether defendant had knowledge of the mat's potential to bunch or fold. *Berryman*, *supra*. Furthermore, we find that this testimony, viewed in the light most favorable to plaintiff, created an issue of fact for the jury concerning whether the floor mat folds inside defendant's busy store constituted a foreseeably dangerous condition. *Bertrand*, *supra* at 611. Accordingly, the trial court properly denied defendant's motion for summary disposition pursuant to MCR 2.116(C)(10).

Defendant similarly argues that the trial court erred in denying its motion for directed verdict because plaintiff failed to produce any evidence that defendant either caused or was aware of a dangerous condition, or that any open and obvious defect in the mat was unreasonably dangerous. Defendant's employees' trial testimony again indicated some workers' knowledge

that defendant's mats sometimes became bunched or wrinkled by customer traffic or the store's doors. Defendant's employees also testified that the store was very busy on the afternoon of plaintiff's fall and that the store's exit doors represented a high traffic area, and opined that a customer exiting the store surrounded by other shoppers and children might not view any bunches or folds in the mats. Plaintiff affirmed at trial that she failed to ascertain the fold in the mat because of the heavy customer traffic and the running children exiting the store around her. Viewing this testimony in the light most favorable to plaintiff, we again find that the statements and the reasonable inferences arising therefrom created an issue of fact for the jury whether defendant should have anticipated that its occasionally folding floor mats near its crowded exits posed an unreasonable risk of harm to exiting shoppers, despite the mats' open and obvious nature. *Berryman*, *supra* at 91 ("noting that '[d]irected verdicts, particularly in negligence cases, are viewed with disfavor"). Accordingly, we conclude that the trial court properly denied defendant's motion for directed verdict.

Defendant next claims that plaintiff's counsel's repeated emphases and vilifications of defendant's status as a powerful, wealthy corporation deprived it of a fair trial. We agree that on two occasions during his closing argument and once during his rebuttal closing plaintiff's counsel made improper remarks, including comments regarding defendant's status as a nationwide chain founded by billionaire Sam Walton, a company "that doesn't play by the rules and [whose] main goal is to protect their corporate bottom line," and concerning defendant's failure, "with all their power" to find "a quack" to opine with respect to plaintiff's minimal damages.[1] *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 111; 330 NW2d 638 (1982). Defendant only objected to the quack remark, and the trial court sustained defendant's objection. See *Thorin v Bloomfield Hills Bd of Education*, 203 Mich App 692, 704; 513 NW2d 230 (1994) (finding that the defendants waived any error relating to closing argument by not objecting). Defendant never sought a curative instruction. The trial court nonetheless instructed the jury that "[t]he arguments, statements and remarks of the attorneys are not evidence and you should disregard anything said by an attorney . . . not supported by the evidence or by your own general knowledge or experience," and that "[t]he corporation defendant in this case is entitled to the same fair and unprejudiced treatment as an individual would be under like circumstances and it is your duty to decide the case with the same impartiality you would use in deciding a case between individuals." After reviewing the arguments in the context of the trial court record, we are not convinced that plaintiff's counsel's remarks were so pervasive that the trial court's instructions to the jury did not cure any prejudice arising from the remarks, cf., *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 292; 602 NW2d 854 (1999), or that "the theme [was] constantly repeated so that the error bec[a]me[] indelibly impressed on the jur[y]'s consciousness." *Reetz*, *supra* at 111.

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[1] With respect to defendant's allegations that plaintiff's counsel improperly argued in his closing that (1) defendant "didn't want any evidence" of a defective mat, (2) defendant's safety sweep policy was "a myth", and (3) plaintiff was an "ordinary American[]" who had to "quit whining and . . . get back to work," we find these statements proper in light of the arguments and evidence, or lack thereof, presented at trial.

Lastly, defendant asserts that the trial court improperly admitted into evidence affidavits of several trial witnesses, permitting plaintiff's counsel to impeach the witnesses with respect to irrelevant, collateral matters, specifically "the size of the wrinkle in the rug and whether or not plaintiff landed on the sidewalk." We initially observe that contrary to defendant's contention, these facts related to the existence, location and size of the mat's defects, which were relevant to establishing the scope of defendant's duty toward plaintiff and to what extent, if any, plaintiff negligently encountered an obvious hazard. MRE 401. To the extent that defendant suggests that affidavits of two of defendant's employees were inadmissible as prior consistent statements, MRE 801(d)(1)(B), defendant ignores that MRE 801(d)(2)(D), pursuant to which the trial curt admitted the employees' affidavits, is not limited in its application to either consistent or inconsistent statements.[2] Lastly, even assuming the existence of evidentiary error with respect to the affidavits' admission, after reviewing the record we find no resulting inconsistency with substantial justice. *Sackett v Atyeo*, 217 Mich App 676, 683; 552 NW2d 536 (1996).

Affirmed.

/s/ Harold Hood
/s/ Hilda R. Gage

[2] Because defendant does not argue on appeal that the trial court improperly admitted the unsigned affidavit of Ruby Reed, which Reed averred that she did not read before signing, we do not consider this specific issue. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999) ("It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court.").