STATE OF MICHIGAN

COURT OF APPEALS

ANDREW JACKSON DUNKLE and FRAN DUNKLE,

Plaintiffs-Appellees,

v

KMART CORPORATION,

Defendant-Appellant.

UNPUBLISHED
November 20, 2001

No. 218789
Genesee Circuit Court
LC No. 96-051557-NO

Before: Whitbeck, P.J., and Murphy and Cooper, JJ.

PER CURIAM.

In this trip and fall case, defendant Kmart Corporation appeals as of right from the order of the trial court, following a bench trial, awarding damages, interest, and costs to plaintiff Andrew Dunkle. Kmart's sole issue on appeal is whether the trial court erred in declining to rule as a matter of law that it was shielded from liability because the hazard over which Dunkle tripped, a pallet on which boxes were stacked, was an open and obvious condition. Kmart raised this issue below in motions for summary disposition and directed verdict. We conclude that the trial court properly denied the motions and we affirm.

I. Basic Facts And Procedural History

A. The Accident

According to Dunkle's testimony at trial, on September 5, 1996, he went to Kmart's retail store in Grand Blanc to get some peanuts for his wife. Dunkle testified that he entered the store from the north, approached the aisle with the peanuts through the "east/west main aisle," then turned and "observed at the entranceway toward where the peanuts were . . . a lot of boxes sat there . . . ." Dunkle explained further:

> And there was no attendant and there was no caution or anything to cause me not to think that that—those boxes there were lined up—the shelving of the peanuts, that the main—that the aisle that I was going to be using to pick up the peanuts, I had no reason to think it wasn't clear.

Dunkle stated that he did not notice "in particular" that the boxes were stacked on a pallet. Dunkle added that he walked "from west to east and . . . expected to make a turn where the top of the boxes ended, stating:

> [W]hen I walked to the left to avoid the boxes I might have been a foot or two feet more from them and I made a turn because the boxes that were on the pallet . . . seemed to be in direct alignment with the metal shelving that held the peanuts.
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> * * *
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> So I made a turn, . . . and I was looking for the peanuts, I am not looking down, and by the time I make the turn—or tried to make the turn my right foot got hooked underneath . . . , and then I think my left foot also struck it because I was trapped. I couldn't get out.

Dunkle explained that he then fell, and felt great pain in his elbow, shoulder, and neck. Asked what was the last thing he saw before making that right turn, Dunkle replied as follows:

> Probably the top of the boxes, which seemed to be in alignment with the shelving at the aisle of the peanuts. So, that being the case, I started to make the turn where the boxes—where the end of the loaded pallet—the most eastwardly box is the one where I started to make the turn. Then I realized when I got my foot hooked that that pallet had been unloaded—or maybe it never was loaded—but that portion of it, I would say eighteen to twenty inches, I am guessing with that proximity, projected into the aisle that I was gonna walk down, and I wasn't lookin' down at the floor because I knew where I was going.

B. The Motion For Summary Disposition

Before trial, Kmart moved for summary disposition under MCR 2.116(C)(10) (no genuine issue as to material fact). Kmart relied on *Bertrand v Alan Ford, Inc*[1] and argued that the hazard posed by the pallet was open and obvious. Kmart then invoked the test set forth in *Novotney v Burger King (On Remand),*[2] to the effect that the question is "would an average user with ordinary intelligence have been able to discover the danger and the risk presented upon casual inspection?" Kmart argued that there was nothing concealed or otherwise deceptive about the pallet and that Dunkle admitted in his deposition that if he had looked at the pallet he would have had no difficulty in discovering its presence. Dunkle responded with the argument that, essentially, the danger posed by the pallet was not open and obvious. The trial court agreed with Dunkle and denied the motion.

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[1] *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995).

[2] *Novotney v Burger King (On Remand),* 198 Mich App 470, 474-475; 499 NW2d 379 (1993).

C. The Motion For Directed Verdict

At the close of Dunkle's proofs, Kmart moved for a directed verdict, again citing the open and obvious doctrine. In particular, Kmart argued that, under *Novotney*, it is necessary for a plaintiff to come forward with evidence to create a genuine issue of material fact as to whether an ordinary user upon casual inspection could have discovered the existence of the condition complained of. The trial court denied the motion, stating:

> I am not prepared to say that a finder of fact could find that the risk presented by this configuration was discoverable upon casual inspection. Given the manner in which the boxes were placed upon the pallet and their apparent alignment with the racks of merchandise, I think a casual observer moving through a commercial store would look at that and conclude that the extension from the racks consisted of the boxes which were visible to a height somewhere in the middle of Mr. Dunkle's chest and that it would be reasonable to conclude from that observation that it was an extension of those racks and that he could proceed around the corner, up the aisle to where he was headed. Therefore, I don't believe that the Defendant establishes the first element, and that is that under Novatney [sic] and the test set forth therein that this risk is open and obvious.

Kmart's counsel then raised the question of the extent of the trial court's ruling:

> MR. McCORMICK: The court is denying the motion; I understand that. The Court is not – or is it – making a finding of fact that the condition complained of was not in fact open and obvious, or is the Court simply indicating that that remains to be determined as a matter of fact?
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> THE COURT: That's a determination to be made; I am not making any determination at this time; I haven't heard all the evidence.

D. The Trial Court Decision

After hearing Kmart's proofs and the arguments of the parties, the trial court rendered its written opinion in mid-December of 1998 in Dunkle's favor, stating:

> [T]his Court finds that the configuration of the danger, as represented in the photographs, was not open and obvious, but, in fact, created a trap for the plaintiff. The alignment of the edge of the pallet with the cardboard boxes, created the appearance that the aisle extended to the north. However, the empty end of the pallet was low to the ground and extended two feet into the peanut aisle. An individual, such a plaintiff, turning that corner . . . would encounter the low end of the pallet extending into the aisle. The configuration exhibited in the photographs is not open and obvious. In my opinion, it is the exact opposite of open and obvious.

II. The Open And Obvious Defense

A. Standard Of Review

This Court reviews decisions on motions for summary disposition, and for directed verdict, de novo as questions of law.[3] Our task concerning both a motion for summary disposition pursuant to MCR 2.116(C)(10), and a motion for directed verdict, is to view the evidence in the light most favorable to the nonmoving party to determine whether a factual question exists over which reasonable minds could differ.[4]

B. The General Terrain Features Of The Defense

It is not in dispute here that Dunkle entered the store as Kmart's business invitee. Thus, Kmart had a duty of care, not only to warn of any known dangers, but also to ensure that the premises were safe in general.[5] This policy imposes on possessors of land a legal duty to protect their invitees on the basis of the special relationship that exists between them. As Justice Cavanagh stated in *Bertrand*,[6] citing to *Williams v Cunningham Drugs Stores, Inc*,[7] "The rational for imposing liability is that the invitor is in a better position to control the safety aspects of his property when his invitees entrust their own protection to him while entering his property." The passage from *Williams* states:

> Social policy, however, has led the courts to recognize an exception to this general rule where a special relationship exists between a plaintiff and a defendant. Thus, a common carrier may be obligated to protect its passengers, an innkeeper his guests, and an employer his employees. The rational behind imposing a duty to protect in these special relationships is based on control. In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is best able to provide a place of safety.[8]

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[3] See *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999) (summary disposition), and *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997) (directed verdict).

[4] See *Ardt, supra* at 688 (summary disposition), and *Oakland Hills Development Corp v Lueders Drainage Dist*, 212 Mich App 284, 289; 537 NW2d 258 (1995) (directed verdict). See also *Clark v Kmart Corp*, ___Mich___; ___ NW2d ___ (2001), slip op at 3-4.

[5] See *Wymer v Holmes*, 429 Mich 66, 71, n 1; 412 NW2d 213 (1987).

[6] *Bertrand, supra* at 609.

[7] *Williams v Cunningham Drugs Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988), footnotes omitted.

[8] *Id.* at 499.

This duty does not normally extend to warning or otherwise protecting against open and obvious hazards.[9] Thus, if the danger is open and obvious, then a defendant has a defense to an assertion that it violated the duty of care running from a premises owner to a business invitee. Justice Cavanagh set out the general parameters of the open and obvious defense in *Bertrand* by stating the following proposition of law:

> Consequently, invitors may be held liable for an invitee's injuries that result from a failure to warn of a hazardous condition or from the "negligent maintenance of the premises or defects in the physical structure of the building."[10]

Bertrand sets out a two-step analysis. The first step addresses the question of whether the plaintiff either knew or should have known of the condition. Stated differently, the question is whether the condition is "open and obvious." As the Court stated recently in *Lugo v Ameritech Corp, Inc*, this is not some type of exception to the duty generally owed to invitees, "but rather [it is] an integral part of the definition of that duty."[11] If a condition is open and obvious, then the possessor of land is not liable to his invitees for physical harm caused to them by the activity or condition.[12]

The second step in the analysis is a limitation to the application of the open and obvious defense. That limitation exists if, despite the obviousness of the activity or condition (or the knowledge of it by the invitee), "the risk of harm remains unreasonable."[13] As the Court said in *Lugo:*

> In sum the general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make

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[9] See *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992), and *Hass v City of Ionia*, 214 Mich App 361, 362, 364, n 3; 543 NW2d 21 (1995).

[10] *Bertrand, supra* at 610, citing to *Williams, supra* at 499-500.

[11] *Lugo v Ameritech Corp, Inc,* 464 Mich 512, 517; 609 NW2d 193 (2001).

[12] *Bertrand, supra* at 610, citing 2 Restatement Torts, 2d, § 343A(1), p 218. See also *Riddle, supra* at 92 ("[I]f the dangers are known or obvious to the invitee, no absolute duty to warn exists, and the invitee cannot recover on that theory"); *Milliken v Mobile Home Park, Inc*, 234 Mich App 490, 495; 595 NW2d 152 (1999) (citing *Caniff v Blanchard Navigation Co*, 66 Mich 638, 647; 33 NW 744 (1887), *Quinlivan v Great Atlantic & Pacific Tea Co, Inc,* 395 Mich 244, 258-260; 235 NW2d 732 (1975), and *Williams, supra* at 500, to the effect that an owner of the premises has no duty "to keep the premises free from" dangers if those dangers are *known* to a visitor, that a possessor of land can be subject to liability for a "condition on the land" only if the invitee would not *discover or realize* the danger, and that a possessor of land is absolved of any duty to "protect invitees" from *obvious and apparent* dangers); *Hughes v PMG Building, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997) (citing *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 263-264; 532 NW2d 882 (1995) to the effect that "while an invitor must warn of hidden defects, there is generally no duty to warn of 'open and obvious' dangers").

[13] *Bertrand, supra* at 611, n 3, citing to 62 Am Jur 2d, Premises Liability, §§ 156-158, pp 523-527.

> even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.[14]

Rather clearly, however, if the condition is *not* open and obvious, then the analysis under *Bertrand*, as amplified in *Lugo*, need not move to the consideration of the unreasonable risk of harm/special aspects limitation on the open and obvious defense. It is apparent from the record that the dispute here relates to the applicability of the open and obvious defense. Therefore, the unreasonable risk of harm/special aspects limitation on the open and obvious defense is not at issue.

In *Bertrand*, Justice Cavanagh set out three "theories" upon which a plaintiff may recover: (1) failure to warn, (2) negligent maintenance, or (3) defective structure. The latter two theories are sometimes collectively referred to as a "duty to make safe," while the former is sometimes referred to as "duty to warn." It is not entirely clear from the record here as to whether Dunkle was proceeding under a duty to make safe theory or a duty to warn theory. However, in light of *Milliken*, the distinction is irrelevant, at least as it relates to the application of the open and obvious defense. There, this Court said, "We conclude from the precedents summarized in *Riddle* that the open and obvious doctrine applies both to claims that a defendant failed to warn about a dangerous condition and to claims that the defendant breached a duty in allowing a dangerous condition to exist in the first place."[15]

With this underbrush cleared, we turn to the rather knotty central issue in this case: under the circumstances obtaining here, is the application of the open and obvious defense a question of *law* or is it a question of *fact*. If it is, or is primarily, a question of law, then the case law favors Kmart. If it is, or is primarily, a question of fact, then the case law favors Dunkle. We conclude that the question was primarily an issue of fact, both at the summary disposition stage and the directed verdict stage.

C. Summary Disposition

(1) A Prima Facie Case Of Negligence

"To establish a prima facie case of negligence, a plaintiff must introduce evidence sufficient to prove that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach of its duty was a proximate cause of the plaintiff's injuries, and (4) the plaintiff suffered damages."[16] "A prima facie case of negligence may be established by use of legitimate inferences as long as sufficient evidence is introduced to take the inferences "out of the realm of conjecture.'"[17] In the summary disposition context, therefore, the question here is whether Dunkle demonstrated that there was a genuine issue of material *fact* in dispute

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[14] *Lugo, supra* at 517.

[15] *Milliken, supra* at 495.

[16] *Berryman v K-Mart Corp*, 193 Mich App 88, 91-92; 483 NW2d 642 (1992).

[17] *Id.* at 92, citing to *Ritter v Meijer, Inc*, 128 Mich App 783, 786; 341 NW2d 220 (1983).

regarding Kmart's duty or whether, as a matter of *law*, the open and obvious defense had been triggered under the circumstances of the case.

(2) Standards For Summary Disposition

A motion for summary disposition relying upon MCR 2.116(C)(10) tests whether there is factual support for a claim.[18] A court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it.[19] The party opposing the motion has the burden of showing that a genuine issue of material fact exists.[20] All inferences will be drawn in favor of the nonmovant.[21] A court must determine whether a record could be developed that would leave open an issue upon which reasonable minds could differ.[22]

(3) The *Novotney* Objective Test

This Court has framed the inquiry as follows: "Would an average user with ordinary intelligence have been able to discover the danger and the risk presented upon casual inspection? That is, is it reasonable to expect that the invitee would discover the danger?"[23] The question is not whether the hazard *could* have been discovered at all, by a person with ordinary intelligence upon causal inspection. Such a rule would be a shield to liability for any hazard that is not essentially invisible. Instead, the question is whether the party responsible for the premises should reasonably expect a person of ordinary intelligence to discover the hazard upon casual inspection. The operative word, for present purposes, is *casual* inspection. The rule envisions not a customer's duty to examine every inch of surface upon which he or she may step, but a duty to notice and avoid hazards evident upon ordinary, everyday, *casual* inspection. Further, the rule is an objective one. The question is not whether the actual *plaintiff* could have discovered the hazard upon casual inspection but, rather, whether the defendant should expect a *person of ordinary intelligence* to discover it upon casual inspection.

(4) The Common Law Of Steps

In a sense, this case involves the possible extension of what might be colloquially termed the Michigan common law of steps. Both of the cases under consideration in *Bertrand* involved steps. In the first, *Maurer v Oakland Co Parks and Recreation Dep't*, the plaintiff alleged that she stumbled and fell on an unmarked cement step at Addison Oaks County Park.[24] The plaintiff testified at her deposition that she saw the first step, turned around to make sure that her children also saw the step and then tripped on the second step:

[18] *Spiek v Dep't of Transportation*, 456 Mich 331, 338; 572 NW2d 201 (1998).

[19] *Id.*

[20] *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994).

[21] *Dragen v Hastings Mutual Ins Co*, 166 Mich App 225, 229; 420 NW2d 111 (1987).

[22] *Bertrand, supra* at 617-618.

[23] *Novotney, supra* at 475. See also *Eason, supra* at 264.

[24] *Bertrand, supra* at 618.

Q. So you had an accident that you claim is attributable to some problem with the step, is that correct?

A. Yes.

Q. What is the problem, as you perceive it?

A. I just didn't see the step there.

Q. You just didn't see the step. And is there any reason you didn't see the step?

A. I don't know. I just—it just didn't—you know how you spot things; I just did not see it.

Q. What time of day was this, do you remember?

A. 12:00 noon.

* * *

Q. Referring to the step that's shown on the top picture in Exhibit No. 1, what is it about that step that you feel is dangerous or defective?

A. I just didn't see it.

Q. And that's the only thing you feel about this step that is dangerous or defective, is the fact that you didn't see it?

A. Right.[25]

In *Bertrand* itself, the plaintiff fell backwards off a step at the defendant's place of business in Bloomfield Hills.[26] The plaintiff testified at her deposition that she exited the door of the lounge area facing backward as she held the door open for others to enter:

Q. Okay. Do you know what caught—as I understand it, you fell; is that right?

A. Yes. I was holding the door open for those people to come in, and when they got in, I had to step back to let the door close to go back down the walk.

Q. You were going to go back down the walk rather than going into the drive, is that it?

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[25] *Id.* at 619.

[26] *Id*. at 621.

A. Right, yes. And if the candy machine hadn't been there, I could have stepped over, but I had to step back and I fell down the step.

Q. Looking at [photograph] number two, I see there is a candy machine there, and if I understand your testimony, you were letting the door close and you were not able to step back, but you had to step out toward the service drive; is that it?

A. Yes.

Q. And when you stepped or when you went into the service drive, is it my understanding that you lost your balance or something or something [sic] happened to you?

A. Yes, I was stepping back.

Q. I see. You were stepping back, and as a result you stepped on the curb edge and lost your balance; is that right?

A. Yes.[27]

In *Maurer*, the Court found no liability:

> Here, viewing the facts in the light most favorable to the plaintiff, we conclude that there was no genuine issue of material fact for the jury and that summary disposition was appropriate. *The plaintiff's only asserted basis for finding that the step was dangerous was that she did not see it*. We hold that the plaintiff has failed to establish anything unusual about the step that would take it out of the rule of *Garrett*[28] and *Boyle*.[29] Because the plaintiff has not presented any facts that the step posed an *unreasonable* risk of harm, the trial court properly granted summary disposition.[30] [31]

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[27] *Id.* at 622-623.

[28] In *Garrett v W S Butterfield Theaters*, 261 Mich 262, 263; 246 NW 57 (1933), the plaintiff fell off a step where a ladies' lounge adjoined a toilet room and was injured. The Court held that, "A reasonably prudent person, watching where he is going, would have seen the step." *Id.* at 264.

[29] In *Boyle v Preketes*, 262 Mich 629, 631-632; 247 NW 763 (1933), the plaintiff failed to see steps in a restaurant, fell and was injured. The plaintiff testified that she fell because she simply did not see the steps. *Id.* at 633. The Court found no negligence, quoting *Garrett* to the effect that, "'A reasonably prudent person, watching where he is going, would have seen the step.'" *Id.* at 635-636.

[30] Justice Levin dissented in the *Maurer* portion of *Bertrand*. Recognizing that *Maurer* was a duty to warn case, Justice Levin stated:

> A reasonable juror might find that the nature of these premises required a warning sign. Plaintiffs have demonstrated that the sun shines into the doorway at certain times of day. The change in light might make it difficult for some invitees

(continued...)

In *Bertrand*, by contrast, the Court found liability:

> As in *Maurer*, we agree with the trial court that the plaintiff did not allege a jury submissable claim for liability based on a failure to warn theory because no reasonable juror would disagree that the danger of falling was open and obvious. *However, the premises still may be unreasonably dangerous, but not for want of a warning*. In contrast to *Maurer*, when we view the plaintiff's allegations in the light most favorable to her, we find a genuine issue regarding whether the construction of the step, when considered with the placement of the vending machines and the cashier's window, along with the hinging of the door, created an unreasonable risk of harm, despite the obviousness or the invitee's knowledge of the danger of falling off the step.[32]
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> * * *
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> We cannot find as a matter of law that the risk of harm was reasonable. Because a genuine issue existed regarding whether the defendant breached its duty to protect the plaintiff against an *unreasonable* risk of harm, in spite of the obviousness or of the plaintiff's knowledge of the danger, summary disposition was inappropriate. Whether this risk of harm was unreasonable and whether the defendant breached a duty to exercise reasonable care by failing to remedy the danger are issues for the jury to consider.[33]

Thus, under the common law of steps, the fact that a plaintiff simply did not see the steps is not enough to make the risk of harm unreasonable. In fact, this Court has stated that "the risk of

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(...continued)

> to see the second step. The location of this building in a public park at which picnics are held might also be significant. A reasonable juror might conclude that the park district should have anticipated the presence of picnickers who might fail to notice the second step.
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> Determining whether a risk is unreasonable requires weighing the harm caused by the risk against the cost of preventing the harm. In this case, a warning sign might have prevented this harm at little cost to defendant. A reasonable juror might find that not to take such an inexpensive precaution was unreasonable. [*Bertrand, supra* at 627-628 (Levin, J., dissenting in part)].

One commentator has observed that:

> Reviewing these theories one can almost hear the Supreme Court majority screaming "Enough." While warnings may have their place, they may have concluded that it overstepped the bounds of reason to have every step marked "DANGER: steps!" See Herstein, *Real Property*, 43 Wayne L R, 1121; emphasis in original.

[31] *Bertrand, supra* at 621 (first emphasis supplied; second emphasis in original).

[32] *Bertrand, supra* at 623-624 (emphasis supplied).

[33] *Id.* at 624-625 (emphasis in the original).

harm from steps and their surrounding conditions is *presumptively* reasonable."[34] "However, where there is something unusual about the steps, because of their 'character, location, or surrounding conditions,' then the duty of care remains."[35] To many in the general populace – indeed to some trial and appellate judges, including some members of this panel – these distinctions may appear almost talmudic, but of such distinctions lawsuits are made. However, we strongly emphasize that *this* lawsuit does not rest on driving a camel through the eye of this particular needle. As we noted above, the question before the trial court was not whether the unreasonable risk of harm/special aspects limitation on the open and obvious defense applies. Rather, the question was whether, as a matter of law, the open and obvious defense applied at all.

(5) The Common Law of Aisles And Pallets

Nevertheless, Kmart here urges us to extend the common law of steps into an area that might be colloquially termed the Michigan common law of aisles and pallets. Kmart contends that this case simply involves a plaintiff who did not watch where he was walking and consequently became injured. Here, Dunkle, intending to buy peanuts for his wife, approached the aisle in which he knew the peanuts were kept and saw that several boxes were stacked at the end of the merchandise aisle, flush with the normally stocked merchandise racks on both sides, giving the appearance that the aisle had been extended. Dunkle walked around that extension and turned directly into the aisle that followed, failing to notice that the boxes had been stacked atop a wooden pallet, and that the pallet extended approximately two feet – apparently to the east – into the aisle he was entering. Dunkle lodged his foot in an opening in the pallet and fell.

Thus, the hazard here was not the pallet but rather the opening in the pallet in which Dunkle hooked his foot. The fact that Dunkle stated in his deposition that he would have noticed the "protrusion to the east" if he had "stopped and looked down," did not, as a matter of law, make the hazard created by the opening in the pallet an open and obvious one. Rather, we conclude, as did the trial court, that there was a question of fact as to whether the actual mechanism that caused Dunkle to fall was open and obvious to him. Using the objective test set out in *Novotney*, we further conclude that there was a question of fact as to whether that actual mechanism would be apparent to an ordinary person upon casual inspection. We need not, therefore, address the question of whether the risk of harm presented by that mechanism was presumptively reasonable. If there is a common law of aisles and pallets under the second prong of the *Bertrand* analysis, we need not develop it here.

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[34] *Spagnuolo v Rudds #2*, 221 Mich App 358, 361, n 2; 561 NW2d 500 (1997), citing to *Bertrand, supra* (emphasis in the original).

[35] *Bertrand, supra* at 617, citing to *Garrett, supra* at 262, 263-264.

D. Directed Verdict

(1) Standards For A Directed Verdict

In *Berryman*,[36] this Court set out the standards for a directed verdict:

> When ruling on a motion for directed verdict, a trial court must consider the evidence presented at trial and all legitimate inferences that may be drawn from the evidence in a light most favorable to the nonmoving party to determine if a prima facie case was established. *Bercel Garages, Inc v Macomb Co Rd Comm*, 190 Mich App 73, 89; 475 NW2d 840 (1991); *Reisman v Regents of Wayne State University*, 188 Mich App 526, 538; 470 NW2d 678 (1991). Where the evidence is such that reasonable jurors could honestly have reached different conclusions, the trial court may not substitute its judgment for that of the jury and the motion must be denied. *Bercel Garages, supra* at 89; *Mourad v Automobile Club Ins Ass'n*, 186 Mich App 715, 721; 4654 NW2d 395 (1991). In reviewing the decision of the trial court, this Court uses an identical standard to determine if the trial court erred. *Reisman*, *supra* at 538.

(2) The Evidence

We have summarized the evidence at trial above. Dunkle did testify at trial that he "wasn't lookin' down at the floor" and that his right foot got "hooked" in the pallet "like in a bear trap." He stated that he didn't see the uncovered portion of the pallet before he tripped on it but that he could have seen if he were "lookin' down." He further stated that if he had been specifically looking for a situation in which the front of the pallet was empty and protruding into the shopper's aisle, "if I was looking for that, I would have seen it." Dunkle also stated that he would have had no difficulty walking around the protruding portion of the pallet "if I had seen it" and that he could have avoided the corner of the pallet if he had seen it. In some exasperation, Kmart's safety expert alluded to the same point: "I don't know how many different ways I can say it. If you don't look down, you will never see it [the obstruction]."

The issue here is essentially the same as it was at the summary disposition stage. We have concluded that the hazard here was not the pallet but rather the opening in the pallet in which Dunkle hooked his foot. Therefore, the question is not whether the pallet was open and obvious; it certainly was, and that fact was apparent on casual inspection. The question is not even whether the "protrusion" of the pallet into the aisle was open and obvious; it may have been, and that fact may have been apparent on causal inspection. Rather, the question is whether the opening in the pallet in which Dunkle hooked his foot was open and obvious. Clearly, had Dunkle focused his entire attention on that opening when he was first able to see it – which was apparently just as he rounded the corner – he might have recognized the hazard that the opening created. This, however, is not casual inspection. We agree with the trial court that, as a matter of

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[36] *Berryman*, *supra* at 91.

fact, the risk presented in this case by the "configuration" that Dunkle encountered was not open and obvious under the casual inspection test of *Novotney*.

We note that Kmart does not contend that the evidence supporting the trial court's ultimate decision was insufficient. We therefore need not address the trial court's factual finding that the circumstances "created a trap" for Dunkle or that the configuration was "the exact opposite of open and obvious." In any event, we would be disinclined under all but the most extreme circumstances to disturb findings of fact made by a trial court that heard the evidence and evaluated the credibility of the witnesses' testimony.

Affirmed.

/s/ William C. Whitbeck
/s/ William B. Murphy
/s/ Jessica R. Cooper