STATE OF MICHIGAN

COURT OF APPEALS

ADRIENNE T. CLAHASSEY,

Plaintiff-Appellee,

v

C AMI INC., d/b/a CHEZ AMI INC. and TRAFFIC JAM LOUNGE,

Defendant-Appellant,

and

B & B BEER DISTRIBUTING COMPANY INC.,

Defendant.

UNPUBLISHED
September 24, 2002

No. 229003
Kent Circuit Court
LC No. 96-003945-NI

Before: Whitbeck, C.J., and Bandstra and Talbot, JJ.

PER CURIAM.

In this negligence action, defendant C Ami Inc. appeals as of right from a judgment entered in favor of plaintiff following a jury trial in the amount of $77,950.50, including $59,321.50 in attorney fees that defendant was ordered to pay as case evaluation sanctions. We affirm.

This case arises from injuries suffered by plaintiff while participating in a mock sumo wrestling match held at defendant's lounge. The match entailed dressing up in a padded outfit intended to duplicate the exaggerated shape of a sumo wrestler. The outfits apparently impaired the contestants' mobility and prevented them from being able to put their arms out in front of them if they fell forward. The contestants would attempt to push their competitors down and pin them. During the match, plaintiff fell into a bar stool located near the perimeter of the ring, sustaining injuries to her face and mouth.

On appeal, defendant asserts that the trial court's denial of its motion for summary disposition was error. We review a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Defendant moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that no duty is owed to someone who voluntarily participates in a competition with knowledge of

the risks inherent in the activity, and that the risks of the competition at issue here were open and obvious to plaintiff.[1] The trial court denied defendant's motion, concluding that a question of fact regarding whether the risks of the competition were open and obvious existed. We find no error in this decision.

Generally, a premises owner has a duty to exercise reasonable care to protect his invitees from unreasonable risks of harm posed by dangerous conditions of the land that the possessor knows or should know will not be discovered by invitees. *Betrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). However, this duty is not absolute and does not extend to conditions which are so open and obvious that an invitee could be expected to discover them herself. *Id*. at 610. Nonetheless, if the risk of harm from a dangerous condition remains unreasonable despite the fact that it is open and obvious, or that the invitee has knowledge of it, the premises owner must still take reasonable care to protect the invitee from that risk. *Id*. at 610-611.

Here, defendant asserts that no genuine issue of material fact exists that the dangers associated with the sumo event were open and obvious and, therefore, defendant owed no duty to plaintiff. In making this argument below, defendant argued that plaintiff's deposition testimony confirmed that she knew of many of the hazards before she participated in the match. Specifically, defendant pointed out that plaintiff knew that the helmet could cover her eyes, and that she could trip as a result. Defendant also noted that plaintiff knew of the risk of falling out of the ring toward the bar because she had witnessed a previous participant do the same thing.

Plaintiff argued, however, that the suit, which appeared to be soft and padded, allowing a participant to move around easily, was actually stiff and restricted her movements. Thus, plaintiff questioned whether the casual observer would be able to discern the quality of the suit. Plaintiff further pointed out that defendant recognized the need to warn and protect her against the special dangers associated with participation in the match because it required other participants to sign a waiver acknowledging the "inherent and extraordinary risks" involved.

We agree with the trial court that both parties presented plausible arguments, along with supporting evidence, regarding the issue whether the characteristics of the costume and match were open and obvious. We further agree that because reasonable minds could differ on the outcome of this question, summary disposition would have been improper. *Moore v First Security Casualty Co*, 224 Mich App 370, 375; 568 NW2d 841 (1997). Although the issue whether a duty exists is generally a question of law for the court, where the determination depends on factual findings, those findings must be made by the jury. *Holland v Liedel*, 197 Mich App 60, 65; 494 NW2d 772 (1992). Accordingly, the trial court properly denied defendant's motion for summary disposition.

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[1] Although defendant moved for summary disposition under both MCR 2.116(C)(8) and (10), it presented the issue to the trial court as a motion brought only under MCR 2.116(C)(10) during the hearing, and in doing so presented evidence outside of the pleadings. Therefore, it is appropriate for this Court to review the issue under MCR 2.116(C)(10). *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 633, n 4; 601 NW2d 160 (1999).

Defendant next argues that the trial court erred in admitting an "incident report" wherein defendant's disk jockey suggested certain changes in the manner in which the lounge conducted the wrestling matches. Defendant characterizes the report as a subsequent remedial measure inadmissible under MRE 407, while plaintiff argues otherwise. Without deciding that question, we conclude that admission of this evidence would not be error justifying reversal. An error in admitting evidence is harmless unless its admission was "inconsistent with substantial justice." MCR 2.613(A). The gist of defendant's argument here is that admission of this evidence established that defendant had been negligent in failing to provide sufficient spotters for the sumo wrestling event. However, through other evidence properly admitted, the jury had been informed that spotters were required for the event to be conducted safely. Further, the disk jockey himself admitted that as many as six spotters had been used for the event on prior occasions. Plaintiff testified, however, that only two spotters were used on that night she participated in the event, and that neither of these individuals were guarding the area near the bar at the time she was injured. In light of the fact that the jury was thus apprised of the insufficiency of spotters being a possible cause of the incident, introduction of the contested evidence, which was merely cumulative on that point, could not be considered "inconsistent with substantial justice."

Defendant next argues that the trial court improperly instructed the jury.[2] First, defendant asserts that the trial court misstated defendant's duty to plaintiff by instructing the jury that defendant would be legally responsible if it knew or should have known the activity was dangerous. Defendant argues that by using the term "dangerous" the trial court lowered the threshold for liability, which it argues can only be imposed where an "unreasonable risk of injury" is involved. In making this argument, however, defendant confuses the general duty owed by a premises owner to an invitee, with that owed in the event the condition is found to be open and obvious.

Defendant is correct that the law recognizes varying degrees of risk, and imposes varying degrees of responsibility on landowners based on those risks and the nature of the conditions involved. However, the jury instructions accurately reflect these gradations. As our Supreme Court recently stated in *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000), a "landowner has a duty of care, not only to warn the invitee of any known *dangers*, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards." (Emphasis added). However, as explained above, where the danger involved is so open and obvious that a person should be expected to discover the condition themselves, the landowner can be held liable only if the risk of harm from that

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[2] Defendant represents, and plaintiff does not dispute, that, although both sides stipulated to reading the standard instructions, the trial judge delivered his own jury instructions. At the close of the instructions, the trial judge asked each side if they had any objections to the instructions as he delivered them. Although plaintiff's counsel stated that she had no objections, defense counsel stated that he would need a transcript to detail how the instructions as given departed from the law. Although defense counsel never stated the particular provisions he objected to, as required to preserve this issue, see MCR 2.516(C), given the unusual circumstances of the instructions, and considering that defendant apparently had no time to review the judge's instructions, we will address the merits of defendant's argument.

dangerous condition remains unreasonable despite the fact that it is open and obvious. *Bertrand, supra* at 610-611.

Defendant's argument that only the "unreasonable risk of injury" standard could apply assumes that the jury would have to find that the conditions at issue here were open and obvious. However, as previously discussed, there was a genuine issue of material fact as to whether the conditions were open and obvious. The jury could have found the conditions were not open and obvious, in which case defendant would have a duty to warn of known dangers, *Stitt, supra*, or the jury could have found the condition was open and obvious, in which case defendant would have a duty to protect against unreasonable risks of injury, *Bertrand, supra*. Given that the trial court's instruction accurately reflected defendant's varying duties, we find no error in the trial court's instruction.

Next, defendant argues that the trial court's instructions "completely ignored" application of the open and obvious doctrine. However, while defendant is correct that the trial court never used the phrase "open and obvious," the instructions given nonetheless conveyed the import of that doctrine. In instructing the jury, the trial court stated that to find defendant negligent the jury must find, among other things, that defendant knew or should have appreciated that a patron would not likely discover the risks involved. In so stating , the trial court imparted that if it were likely that plaintiff knew or was likely to discover the risk, then defendant could not be held liable. This was simply another way of stating that the jury could not find defendant liable if the conditions were open and obvious. After all, the test for an open and obvious danger is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. See *Abke v Vandenberg*, 239 Mich App 359, 361-362; 608 NW2d 73 (2000).

Defendant next argues that the trial court's failure to advise the jury that there was no duty to warn of an open and obvious risk, when coupled with its instruction that a lack of reasonable care could be based upon a failure to warn, created "a legal duty which simply does not exist in Michigan." In doing so, defendant asserts that this situation is analogous to *Riddle v McLouth Steel Products Corp*, 440 Mich 85; 485 NW2d 676 (1992). We disagree.

In *Riddle*, the trial court delivered what formerly was SJI2d 19.03, which instructed that "[t]he possessor must warn the invitee of dangers of which it knows or has created." On appeal, the defendant successfully argued that the instruction was deficient because it incorrectly informed the jurors that a premises owner has an absolute duty to warn an invitee of dangerous conditions, including those that are open and obvious. *Id*. at 101. As a result, SJI2d 19.03 was amended to read that "a possessor must warn an invitee of an open and obvious danger if the possessor should expect that an invitee will not discover the danger or will not protect herself against it." This instruction is essentially the same as that delivered by the trial court in the instant matter. The trial court here instructed the jury that, for a premises owner to be liable, the owner "must have known or should have appreciated that the patron was not likely to discover the risk, or if they discovered the risk, wasn't likely to appreciate the danger involved or for whatever reason wasn't going to be able to protect themselves against it." Defendant fails to show how this instruction significantly departs from the standard instruction, which it sought to have read to the jurors. Accordingly, we reject defendant's assertion that the trial court's instruction, as read, was legally deficient.

Defendant next relies on the following statement to argue that the jury instructions were deficient:

> Now, if nobody was negligent, not the Traffic Jam Lounge or anybody else, in particular, the lounge, because that's the case we're dealing with here, then the patron, although injured, if you find that to be the case, has to bear the consequences. The proprietor of the establishment *is responsible*, even though those consequences are the result of something that happened on their premises. [Emphasis added.]

We agree that the language emphasized above erroneously states the consequences flowing from a finding that no one here was negligent. However, jury instructions should be reviewed in their entirety, rather than extracted piecemeal to establish error in isolated portions. *Clark v Kmart Corp*, 249 Mich App 141, 144; 640 NW2d 892 (2002). Moreover, "[e]ven if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Here, when the trial court's instructions are viewed in their entirety, it is clear that the trial court simply misspoke in making the challenged statement. It should have informed the jury that if no one here was negligent, then "[t]he proprietor of the establishment is *not* responsible, even though those consequences are the result of something that happened on their premises." Nonetheless, the error was insignificant when put into context with the preceding sentence, which suggests that plaintiff would have to bear the consequences if no one here was negligent. That the error was harmless is further supported by earlier statements by the trial court, including that the first question the jury must determine was whether defendant was negligent, and that, "if the answer is no, then you don't have to answer anymore of these questions. Because if they were not negligent then the law says there's no way they can be held responsible . . . ." Accordingly, because the instructions as a whole adequately and fairly presented the jury with the applicable law, we find no error warranting reversal. *Clark*, *supra*; *Case*, *supra*.

Finally, defendant takes issue with the trial court's denial of its request for an evidentiary hearing regarding the issue of attorney fees under MCR 2.403(O). Defendant also asserts that the amount of plaintiff's attorney fees sought, $59,321.50, was unreasonable in light of what it terms as the "garden-variety" nature of this case.

Defense counsel requested an evidentiary hearing to inspect the handwritten notes of plaintiff's attorneys that were used to compile the typewritten bills for attorney fees. However, defendant's only argument before the trial court was that the total number of hours worked was unreasonable given the nature of the case, and not that plaintiff's counsel was attempting to defraud the court. Generally, a trial court should hold an evidentiary hearing when the opposing party challenges the reasonableness of a fee request. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999). However, the failure to hold such a hearing is not error if the parties created a sufficient record to review the issue and if the trial court fully explained the reasons for its decision. *Id.* Here, the trial court had enough information to make the required decision and stated on the record the reasons for its ruling, preventing the need for an evidentiary hearing. The trial judge presided over the entire trial and was aware of the complexities in presenting the case. Moreover, the trial court stated that it was aware of the billing practices and fees of most of the attorneys in the area, and that it did not believe that

plaintiff's request was unreasonable in light of the nature of the case. On these facts, we find no error in the trial court's refusal to conduct an evidentiary hearing.

Defendant's argument that the fees are unreasonable is based primarily on its claim that the trial court abused its discretion by assessing attorney fees for more than one-hundred hours that were prompted by plaintiff's request for an adjournment. This argument, however, is without merit. Relying on *Maple Hill Apartment Co v Stine*, 131 Mich App 371, 376-378; 346 NW2d 555 (1984), defendant asserts that it should only be held responsible for attorney fees that were reasonably foreseeable and actually necessitated by its rejection of the case evaluation, and that, therefore, it should not be held responsible for those fees associated with an adjournment requested by plaintiff. *Maple Hill*, however, was vacated by our Supreme Court and has no precedential value. See *Maple Hill Apartment Co v Stine*, 422 Mich 863; 365 NW2d 762 (1985). Moreover, this Court has since held that the phrase "necessitated by the rejection," as used in MCR 2.403(O)(6)(b), denotes only a temporal demarcation, precluding recovery of fees for hours spent before rejection of the case evaluation. *Michigan Basic Property Ins Ass'n v Hackert Furniture Distributing Co, Inc*, 194 Mich App 230, 235-236; 486 NW2d 68 (1992). Therefore, defendant could be held liable for any attorney fees incurred after rejection, so long as the fees are reasonable. *Id*. Accordingly, defendant's argument that it should not be held liable for attorney fees incurred as a result of the adjournment is actually better characterized as a challenge to the reasonableness of the attorney fees. However, having examined the record and the reasoning employed by the trial court, we do not conclude that the award is so "grossly violative of fact and logic" as to constitute an abuse of discretion. *Id.* at 234.

We affirm.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Michael J. Talbot