Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **17th day of March, 2023** are as follows:

BY Hughes, J.:

2022-C-00841 LASHONDRA JONES VS. MARKET BASKET STORES, INC. (Parish of Calcasieu)

APPELLATE COURT DECISION VACATED; DISTRICT COURT JUDGMENT REINSTATED; GENERAL DAMAGE AWARD AFFIRMED. SEE OPINION.

Weimer, C.J., additionally concurs and assigns reasons.

SUPREME COURT OF LOUISIANA

No. 2022-CC-00841

LASHONDRA JONES

VERSUS

MARKET BASKET STORES, INC.

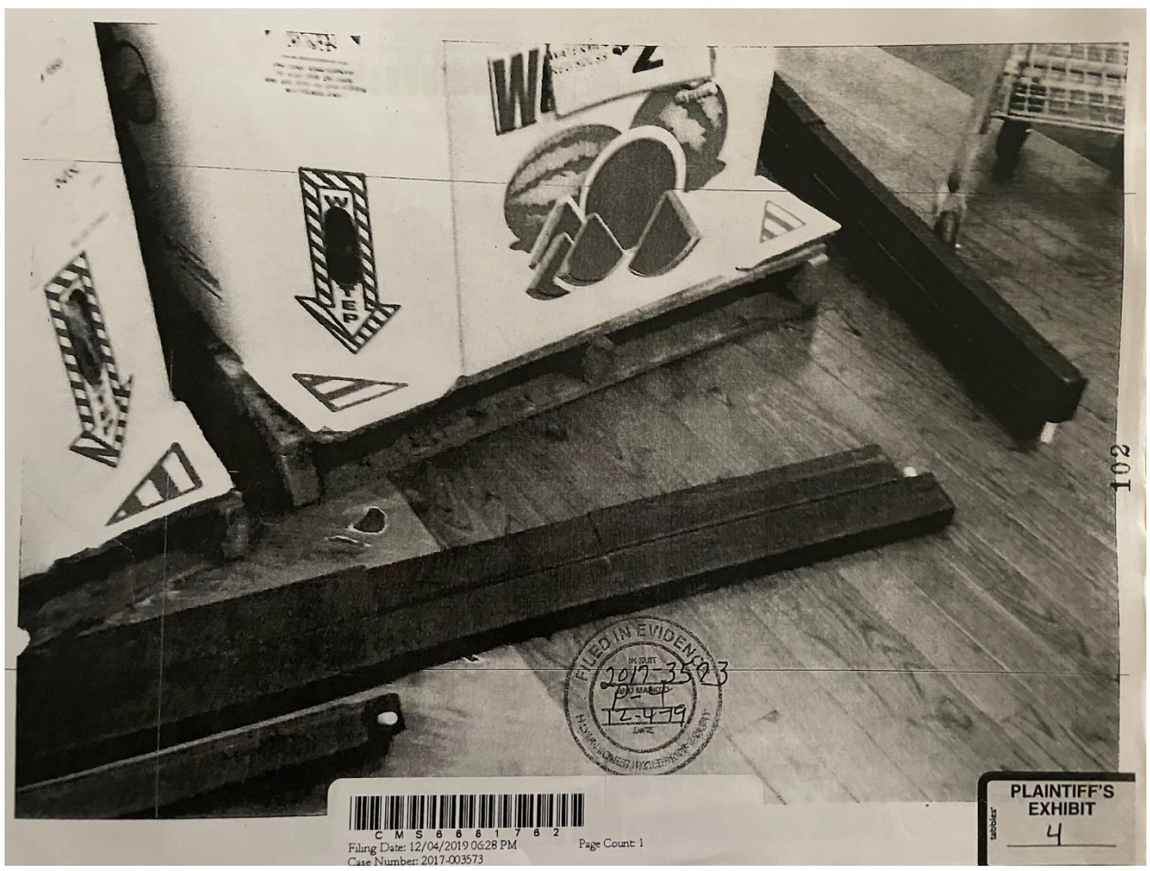
On Writ of Certiorari to the Court of Appeal,
Third Circuit, Parish of Calcasieu

HUGHES, J.

The district court awarded damages to the plaintiff who was allegedly injured when she stepped on a wooden pallet with an attached pallet guard, holding a bulk watermelon bin, to reach a watermelon in the bottom of the bin, and the pallet guard collapsed. The defendant appealed, and the appellate court reversed the award, finding manifest error in the factual findings of the district court requiring de novo review and concluding that the watermelon display did not present an unreasonable risk of harm to the plaintiff. After a thorough review, we conclude there was no manifest error in the district court's finding of negligence on the part of the defendant; therefore, the appellate court erred in its ruling, and we reverse.

FACTS AND PROCEDURAL HISTORY

As context for the trial testimony discussed hereinafter, we initially note that the July 12, 2017 accident site at issue in this case is depicted in the following two photographs, introduced into evidence during the December 4, 2019 trial of the matter:



As these photographs show, there are words and/or letters in the graphical arrows at each corner of these two cardboard watermelon bins. On the bin on the left (shown more fully in the top photograph, Plaintiff's Exhibit 5), the word "STEP" can be seen contained within the lower portion of the arrows at the corners of the

box. On the bin on the right (shown more fully in the lower photograph), the letter "W" appears within the top of the arrows, and only the letters "TEP" can be seen in the bottom of the arrows. The wooden pallets are visible under each watermelon bin, and the darker planks seen in the foreground were identified at trial as parts of a "pallet guard," which had been affixed to the pallets prior to the accident.

During the trial, plaintiff Lashondra Jones testified that, at the time of the accident, she had been a school teacher for more than five years in Calcasieu Parish, and she also worked part time at Lake Charles Memorial Hospital as a PBX operator. Previously, she had worked as an assistant manager at Walmart.[1]

Ms. Jones testified that, on the day of the July 12, 2017 accident, she and her son, Devin Morgan, went to the Market Basket store to purchase a watermelon and that, when they approached one of the two watermelon bins depicted in the evidence photographs, it contained only watermelons remaining in the bottom of the bin so she stepped on the "black barrier around the pallet" (later identified as a "pallet guard") so she could reach a watermelon, and "it gave way." Ms. Jones testified that she had no reason to think that she was not supposed to step on the pallet guard, as there were no signs warning not to step on it and she did not know what it was at the time. When the pallet guard gave way, Ms. Jones stated that she fell against the watermelon bin and injured her right side, back, and leg.

Ms. Jones indicated that the pallet guard appeared to be "fully formed like a LEGO." She also stated that she had stepped onto the pallet and pallet guard, which she indicated was "around the pallet" that was "underneath the box" of watermelons, on the side that was depicted in the evidence photograph as being "all broken up,"

[1] Although Ms. Jones admitted she had experience in employee and customer safety when working at Walmart, she maintained that she had never before seen a bin and pallet with a pallet guard like that she encountered at the Market Basket grocery store, since Walmart did not display watermelons in that way when she worked there, and bins displaying merchandise at Walmart were kept filled to ensure customer safety.

after the accident. Ms. Jones identified the pallet guard that was "broken up" in the evidence photographs as the one she stepped on to get a watermelon out of the bin immediately before the accident; she reiterated that after she stepped on the pallet guard it "gave away" and "broke apart," and she fell with her right side hitting the side of the watermelon bin. When asked by defense counsel whether she stepped "on it in the middle of the box or on the corner of the box," Ms. Jones responded, "I don't remember." Ms. Jones testified that she only remembered stepping on the pallet guard while she was "facing the watermelon bin … like you go to pick up a watermelon." Ms. Jones testified that she assumed, since the pallet guard was around the pallet and she had never seen a pallet guard before, that it was a step.

At trial, on being shown the Market Basket written accident report, completed on July 25, 2017 by Market Basket assistant manager Tammy Gleave, Ms. Jones denied writing any part of it. Ms. Jones further testified that the statement in the accident report that "[s]he stepped on pallet to reach inside watermelon bin, ***slipped*** on black cover and fell" was not accurate; Ms. Jones testified that what actually happened was the pallet guard "***collapsed*** underneath [her]." (Emphasis added.)

When Ms. Jones was questioned by defense counsel at trial about whether, from her prior experience working at Walmart, she knew it was unsafe to climb on ***shelves***, she agreed; however, when defense counsel asked whether it was unsafe "to climb on ***pallets***" (emphasis added), Ms. Jones did *not* express agreement. Rather, she indicated that she had never seen a pallet with a pallet guard like that included in the watermelon display she encountered at the Market Basket on the day of her accident. Defense counsel then expressly asked Ms. Jones whether, during her prior employment with Walmart, "you would have never stepped on a pallet, would you?" Ms. Jones responded, "Yes, I would."[2] Defense counsel further questioned Ms.

[2] We note that Ms. Jones did indicate that, at Walmart, it was not necessary to step on a pallet to reach merchandise, because she stated that Walmart employees "were taught to keep our bins filled to where it doesn't create a safety hazard for the customer." Although the defense contended

Jones about whether she understood that the red markings on the side of the Market Basket watermelon bins were safety warnings, but she denied seeing any safety warnings on the watermelon bins.

Ms. Jones additionally testified that, at the time of the accident, there were no Market Basket employees in the area where her accident occurred, but that her son went and found a Market Basket manager, to whom Ms. Jones described the accident and showed the injured area on her right side. A photograph, taken after the accident and introduced into evidence, shows marks and skin discoloration on Ms. Jones' torso. Ms. Jones confirmed in her testimony that the photograph accurately reflected the injury to her right side immediately after the accident in the Market Basket store.

Ms. Jones further stated that she sought treatment at St. Patrick's Hospital emergency room after the accident, either that day or the next day. She said the emergency room doctor diagnosed contusions and directed her to follow-up with her primary care doctor, Dr. Chadha, who thereafter recommended physical therapy with West Calcasieu Cameron Hospital. Ms. Jones testified that, as a result of the accident, she sustained injuries to her lower back, right hip, and right leg, for which she received treatment for six months, including physical therapy, which consisted of stretching, bending, and other exercises to alleviate her muscle spasms and pain. She indicated that she was also directed by the treating physical therapist to utilize these physical therapy modalities at home as well. Ms. Jones further related that she used over-the-counter pain relievers, such as ibuprofen and Aleve.

In addition, Ms. Jones testified that her husband had to take over doing some of the household chores she had previously taken care of; particularly, walking the dog, since she was not able to jog as it caused an increase in her pain. Ms. Jones also attributed her subsequent weight gain to her inability to walk the dog and/or jog.

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during oral argument and in brief to this court that the plaintiff "knew better than to step on a pallet but did it anyway," we find no evidence in the record to support this assertion.

Ms. Jones further stated that she became depressed due to the restriction of her activities on account of pain from her injuries.

The plaintiff's son, Devin Morgan, who was fifteen years old at the time of the December 4, 2019 trial, testified that he was with his mother at the Market Basket on the date of her accident, but he was "on [his] phone and then [he] heard something fall." Devin said his mother "fell by the watermelon bin," and "she was in pain so I helped her up." Devin confirmed that his mother hurt herself when she fell, and he thought it was "mostly her back."

The plaintiff's husband, Darre Morgan, testified that when his wife came home from the store on the day of the accident, she was in "a lot of pain." Mr. Morgan further stated that the plaintiff showed him the injury to her side, and he saw that her skin was broken and bruised; he verified that the evidence photograph of the plaintiff's side accurately reflected her injuries that day. Mr. Morgan also testified that the plaintiff was complaining that her back and her leg were hurting. Mr. Morgan indicated that Ms. Jones received treatment for her injuries for about six months and that the treatment included physical therapy. Mr. Morgan further testified: that Ms. Jones would often cry out in pain when moving an injured part of her body; that he was would massage Ms. Jones' injuries to ease the pain; that he washed dishes and cleaned the house when she could not do so because of her injuries; that she was unable to jog or walk the dog as she did before; and that the lack of exercise caused her to gain a lot of weight. Mr. Morgan further testified that his wife's constant pain made her irritable, causing them to argue and not get along with one another, which led to a lot of "confusion" in the household.

The plaintiff's medical records, submitted into evidence, confirmed that she sought treatment on July 13, 2017 at St. Patrick's Hospital, complaining of pain and tenderness to her right hip, ribs, and knee as a result of a fall the previous day at a grocery store while reaching for a watermelon; she was diagnosed with contusions

and prescribed pain medication. The medical records of Chadha Medical Clinic verified that Ms. Jones was treated by Dr. Chadha for lower back and right leg pain between July of 2017 and December of 2017. Additionally, West Calcasieu Cameron Hospital records showed that Ms. Jones received approximately thirteen physical therapy treatments between October 11, 2017 and December 20, 2017.

Market Basket assistant manager Tammy Gleave completed the Market Basket accident report introduced into evidence at trial, on July 25, 2017 (some thirteen days after the July 12, 2017 accident), though she did not witness the accident and she was unaware of any witnesses to the accident. Ms. Gleave acknowledged in her trial testimony that, in the accident report, she recorded statements made to her by Ms. Jones about the accident to the best of her recollection. However, there were several details about the watermelon display involved in the accident that, when asked about at trial, Ms. Gleave was unable to remember (i.e., whether pallet guards had been used on the watermelon display in question; whether each individual pallet has its own pallet guard or if one pallet guard can be expanded to cover two pallets; and whether she had ever "expanded" pallet guards before). In addition, when asked why she did not prepare the accident report immediately after the accident, instead of thirteen days later, Ms. Gleave replied, "I don't remember. I was probably busy. I don't know." Although some terminology used by Ms. Gleave varied from that used by Ms. Jones, there were no material differences that were not explained or clarified by the testimony of the plaintiff, who the district court judge expressly found credible.

Roger Hebert, a Market Basket division manager who was familiar with the company's safety policies and procedures also testified. Mr. Hebert admitted that he did not work in the store in which Ms. Jones' accident occurred, nor was he at that store on the day of the accident. Mr. Hebert testified that watermelons are delivered to Market Basket stores in cardboard bins on pallets, so it is Market

Basket's "procedure" to display watermelons in the bin, on top of a pallet, surrounded by pallet guards. Though Mr. Hebert admitted it would not be impossible to display the watermelons in a different way, he stated that it was not Market Basket's customary procedure to do so.

Because the wooden pallets are open at the ends, Mr. Hebert further testified that Market Basket's policy was to attach pallet guards to "make sure that no one puts their foot into the openings of the pallet"; otherwise, "someone could get their foot stuck inside the opening." Mr. Hebert agreed that it is Market Basket's contention that the pallet guards cannot support the weight of a person so they should not be stepped on. However, Mr. Hebert also admitted no sign is placed on or near these bins to warn customers not to step on the pallet or pallet guards to reach merchandise, though he admitted "[i]f we wanted to, we could" and it would not be expensive to do so.

Ms. Jones also offered the testimony of safety expert Jason English, who stated that he was an engineering consultant specializing in post-accident evaluations. Mr. English testified that he has a Bachelor of Science degree in Industrial Engineering, with a specialty in System Safety Engineering, and a Masters of Science in Safety Engineering; he stated that he is licensed as a professional Engineer in Texas. The district court accepted Mr. English as an expert in the field of safety engineering, over an objection by the defense.[3]

In Mr. English's analysis of the evidence, he described the accident as occurring when Ms. Jones "was trying to access the watermelons in the bin … at least one foot stepped on what they're referring to as their pallet guard, which gave way, and caus[ed] her to fall." Mr. English thoroughly analyzed the watermelon

[3] The district court's acceptance of Mr. English, as a safety expert, was not cited as error in the appellate court - only a portion of his testimony was made the subject of one of the defendant's assignments of error to the appellate court.

display at issue and opined that "[t]his product, in my opinion, actually creates more hazards than it ... solves." (See Appendix "A" following this opinion for a more extensive quotation of Mr. English's testimony on this point, which will not be published with this opinion but will remain a public record of this court.)

Mr. English further opined that Market Basket failed to adequately replenish its watermelon display, so that customers had to reach into the bottom of the box to pick up a watermelon. Mr. English also stated that Market Basket could have displayed the watermelons in a manner other than in deep bins that reach down to the floor, but rather, in the same manner as other fruit (i.e., on tables, shelving, etc.). In the expert opinion of Mr. English, Market Basket's set-up and placement of its watermelon display created a hazardous condition that presented an unreasonable risk of harm to Ms. Jones, particularly in its use of the pallet guard, failure to use adequate warnings, and failure to properly stock and display its watermelons, which conditions he indicated made Ms. Jones' injury reasonably foreseeable. Mr. English specified that it is foreseeable that a shopper, in the process of trying to access watermelons in a bin on a pallet, might step on the pallet guard as a means of getting closer to the product.

When asked by the district court about the word "STEP," which appeared on the side of the watermelon bins involved in Ms. Jones' accident, Mr. English pointed out that on these particular bins there were holes punched into the bins just above the word "STEP," which obliterated a word preceding "STEP" that begins with a "W." Mr. English expressed his opinion that the missing word was "WATCH," as the two words appeared in a linear manner in an orientation from the top to the bottom of the box and ended with an arrow pointing to the corners of the bins, which did not cover the corners of the pallet beneath the bin. Mr. English stated that, as a result of the obliteration of letters from the likely intended warning "WATCH STEP," the warning was made unclear and caused confusion. Mr.

English further pointed out that "[w]arnings should be clear and concise, identify exactly what the identified hazard is, [and] what needs to be done to protect yourself."

Based on the evidence presented at trial, the district court delivered the following oral reasons for judgment, in open court, on January 30, 2020 (in pertinent part):

> The Court finds the display presented an unreasonable risk of harm which was reasonably foreseeable. The Court further finds that Market Basket had at the very least constructive notice of the potentially dangerous condition on its premises and failed to exercise reasonable care to protect its customers.
>
> Market Basket argues it had no reason to suspect that Ms. Jones or anyone else would use the guard as a step. The Court finds it is more than reasonable to foresee that a customer would step up onto the pallet with or without a pallet guard to retrieve a watermelon from its elevated container.
>
> The way the box contain[ing] the watermelons was situated, along with colorful arrows on each corner of the box, pointing down to the word "Step," and also the pallet guards providing additional width to the top of the pallet practically invites someone to use the pallet as a step. One could easily foresee someone instinctively doing that.
>
> The cause for Market Basket to improve the safety condition of this particular watermelon display for its customers is not cost prohibitive and could be easily done.
>
> Mr. English, an expert accepted by the Court as an expert in safety, opined that safety could be improved in several ways that w[ere] not cost prohibitive.
>
> The Court finds … Ms. Jones and her son were credible witnesses in describing the fall. The Court also finds Mr. English to be a credible witness. His opinions and conclusions were thoughtful and well-explained. He did not overreach or go to extremes in providing his testimony by way of answering the questions posited to him.
>
> In consideration of the foregoing, the Court awards the following damages:
>
> Pain and suffering, $35,000; loss of enjoyment of life, $10,000; medicals at seven-hundred, thirty-eight, ninety-five dollars [sic]. All of these matters would include judicial interest, and costs are assessed to Market Basket….

Judgment was signed by the district court on July 14, 2020 awarding the plaintiff damages totaling $45,738.95,[4] along with court costs and legal interest.

[4] We note that, prior to trial, on July 12, 2018, the plaintiff executed a written stipulation, agreeing that "the matter in controversy, exclusive of interest and costs, does not exceed the sum of … $50,000.00…."

On review, the appellate court reversed the award, finding manifest error in the district court factual findings, necessitating a de novo review, and concluding that the watermelon bin set-up did not present an unreasonable risk of harm. **Jones v. Market Basket Stores, Inc.**, 21-354 (La. App. 3 Cir. 3/30/22), ___ So.3d ___ (2022 WL 953657).

The plaintiff thereafter filed a writ application with this Court, which was granted (**Jones v. Market Basket Stores, Inc.**, 22-00841 (La. 11/8/22), 349 So.3d 570), setting forth two assignments of error: (1) the appellate court erred in conducting a de novo review since the record does not establish a reversible error of law or manifestly erroneous finding of fact by the district court; and (2) pursuant to Article V § 8(B) of the Louisiana Constitution and jurisprudence of this court, the plaintiff was deprived of her constitutional right to orally re-argue her case when a five-judge panel was formed by the appellate court to rule on an application for rehearing.

LAW AND ANALYSIS

Merchant Liability

"A merchant owes a duty to persons who use his premises to exercise reasonable care to keep his aisles, passageways, and floors in a reasonably safe condition. This duty includes a reasonable effort to keep the premises free of any hazardous conditions which reasonably might give rise to damage." La. R.S. 9:2800.6(A). In a negligence claim brought against a merchant, by a person lawfully on the merchant's premises, for damages as a result of an injury, death, or loss sustained because of a fall due to a condition existing in or on a merchant's premises, the claimant shall have the burden of proving, in addition to all other elements of his cause of action, all of the following: (1) the condition presented an unreasonable risk of harm to the claimant and that risk of harm was reasonably foreseeable; (2)

the merchant either created or had actual or constructive notice[5] of the condition which caused the damage, prior to the occurrence; and (3) the merchant failed to exercise reasonable care. La. R.S. 9:2800.6(B).

Pursuant to Revised Statute 9:2800.6, generally, a defendant/storeowner owes a duty to a plaintiff to exercise reasonable care to keep its premises in a reasonably safe condition, free of hazardous conditions. **Thompson v. Winn-Dixie Montgomery, Inc.**, 15-0477, p. 7 (La. 10/14/15), 181 So.3d 656, 662. Under Revised Statute 9:2800.6, in order to prove her fall was caused by a breach of Market Basket's duty, Ms. Jones had the burden to prove that some part of the Market Basket watermelon display (either the fruit bin, the wooden pallet, and/or the pallet guard) presented an unreasonable risk of harm, which Market Basket either created or had actual or constructive notice of the alleged defect of, and that Market Basket failed to exercise reasonable care. See **Id**.

In this case, the district court explicitly found credible the testimony of Ms. Jones, her son, and safety expert Jason English. The district court concluded that the watermelon display at issue "presented an unreasonable risk of harm which was reasonably foreseeable" and that "Market Basket had at the very least constructive notice of the potentially dangerous condition on its premises and failed to exercise reasonable care to protect its customers." In so ruling, the district court obviously credited the testimony and evidence presented by the plaintiff, including expert witness Jason English, over the testimony and evidence presented by the defense. Since the plaintiff's testimony and evidence was not contradictory, internally inconsistent, or implausible on its face, the district court's finding of fault on the part of the defendant cannot be manifestly erroneous.

Notwithstanding, the appellate court ruled as manifest error (because it

[5] "Constructive notice" means "the claimant has proven that the condition existed for such a period of time that it would have been discovered if the merchant had exercised reasonable care." La. R.S. 9:2800.6(C)(1).

"directly contradicts Ms. Jones' recounting of the accident") the district court judge's remark in his oral reasons for judgment that "'[w]hen Ms. Jones stepped up onto the pallet guard to get a watermelon from the display, the large cardboard box, it – the box – collapsed, causing her to fall onto the box on her right side and [she] sustained personal injuries for which Market Basket is liable.'" See **Jones v. Market Basket Stores, Inc.**, supra (2022 WL 953657 at 11). Although the district court judge did state that the watermelon "box" collapsed to cause Ms. Jones' accident, he obviously misspoke, as all of his other statements in the oral reasons for judgment made clear his finding that the watermelon bin set-up, as a whole, presented a hazardous condition because it gave no indication to customers that the pallet and pallet guard could not be safely used as a step to reach watermelons in the bin.

Immediately before his misstatement that the cardboard box collapsed, the district court judge discussed the purpose of the pallet guard (to keep customers from accidentally putting their feet in the spaces in the pallet) and the fact that there were no signs near the watermelon display "to discourage shoppers from stepping up onto the pallet and/or pallet guard or warn of a possible hazard." The district court judge went on to state that it was foreseeable that a customer "would step up onto the pallet with or without a pallet guard" in order to reach a watermelon, because of the "colorful arrows on each corner of the box, pointing down to the word 'Step,'" along with the attached pallet guard, which provided "additional width to the top of the pallet," and "practically invites someone to use the pallet as a step."

As this court has consistently held, appellate courts are required to review the entire record to ascertain whether manifest error has occurred; thus, the issue before an appellate court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. **Snider v. Louisiana Medical Mutual Ins. Co.**, 14-1964, p. 5 (La. 5/5/15), 169 So.3d 319, 323 (per curiam); **Clay v. Our**

Lady of Lourdes Regional Medical Center, 11-1797, p. 11 (La. 5/8/12), 93 So.3d 536, 543. The appellate court must not reweigh the evidence or substitute its own factual findings because it would have decided the case differently. **Snider**, 14-1964 at p. 5, 169 So.3d at 323; **Pinsonneault v. Merchants & Farmers Bank & Trust Co.**, 01-2217, p. 11 (La. 4/3/02), 816 So.2d 270, 279. It is only when documents or objective evidence so contradict the witness's story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable factfinder would not credit the witness's story, the court of appeal may well find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination. **Rosell v. ESCO**, 549 So.2d 840, 844-45 (La. 1989). Where the factfinder's determination is based on its decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous; this rule applies equally to the evaluation of expert testimony, including the evaluation and resolution of conflicts in expert testimony. **Snider**, 14-1964 at p. 5, 169 So.3d at 323; **Bellard v. American Central Ins. Co.,** 07-1335, p. 27 (La. 4/18/08), 980 So.2d 654, 672.

Thus, in an La. R.S. 9:2800.6 action, when a district court resolves conflicts in a plaintiff's favor (in the absence of overwhelming objective evidentiary contradiction, internal inconsistency, or implausibility), an appellate court would be unable to say that the district court manifestly erred in its decision to find the defendant liable for the plaintiff's injuries upon its determination that a condition on its premises presented an unreasonable risk of harm that was reasonably foreseeable, that prior to the accident the defendant either created or had actual or constructive notice of the condition that caused the damage, and that the defendant failed to exercise reasonable care. In this case, there was ample evidence in the record for the district court's determination that the watermelon display presented a foreseeable and unreasonable risk of harm to the plaintiff, of which Market Basket had notice,

but failed to warn its customers of the risk.[6] Therefore, in light of the district court's finding the plaintiff and her expert witness credible and under the unique facts and circumstances of this case, we conclude the appellate court erred in finding manifest error in the district court decision.

General Damage Award[7]

General damages are those which may not be fixed with pecuniary exactitude; instead, they involve mental or physical pain or suffering, inconvenience, the loss of intellectual gratification or physical enjoyment, or other losses of life or life-style which cannot be definitely measured in monetary terms. **Duncan v. Kansas City Southern Railway Co.**, 00-0066, p. 13 (La. 10/30/00), 773 So.2d 670, 682. It is well-settled that vast discretion is accorded to the trier of fact in fixing general damage awards, as provided in La. C.C. art. 2324.1 ("In the assessment of damages in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the judge or jury."). **Howard v. Union Carbide Corp.**, 09-2750, p. 5 (La. 10/19/10), 50 So.3d 1251, 1255. This vast discretion is such that an appellate court should rarely disturb an award of general damages. **Howard**, 09-2750 at p. 5, 50 So.3d at 1255-56; **Youn v. Maritime Overseas Corp.**, 623 So.2d 1257, 1261 (La. 1993), cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994).

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[6] The appellate court further concluded that the pallet guard was an open and obvious hazard (see **Jones v. Market Basket Stores, Inc.**, supra (2022 WL 953657 at 22)). We disagree. In order for an alleged hazard to be considered obvious and apparent, this court has consistently stated the hazard should be one that is open and obvious to everyone who may potentially encounter it. See **Bufkin v. Felipe's Louisiana, LLC**, 14-0288 (La. 10/15/14), 171 So.3d 851 (holding that the obstruction of vision to pedestrians, crossing an adjacent street, presented by a large construction dumpster placed on several on-street parking spaces was an open and obvious hazard); **Hutchinson v. Knights of Columbus, Council No. 5747**, 03-1533 (La. 2/20/04), 866 So.2d 228 (holding that a barricaded area containing electric cables being used to power carnival rides on festival grounds was an open and obvious hazard); **Pitre v. Louisiana Tech University**, 95-1466 (La. 5/10/96), 673 So.2d 585 (holding that the danger of striking a fixed object while sledding was obvious and apparent); **Shelton v. Aetna Casualty & Surety Co.**, 334 So.2d 406 (La. 1976) (holding that wet ground created when paint remover was washed off of a garage was an open and obvious condition not unlike normally wet ground).

[7] Since we vacate, herein, the decision of the appellate court to reverse the district court's finding of liability, we will address the defendant's assignment of error put forth in the appellate court (which was not decided therein upon the appellate court's reversal), in the interest of judicial efficiency, rather than remanding to the appellate court.

Thus, the role of the appellate court in reviewing general damage awards is not to decide what it considers to be an appropriate award, but rather to review the exercise of discretion by the trier of fact. **Howard**, 09-2750 at p. 5, 50 So.3d at 1256; **Youn**, 623 So.2d at 1260. The initial inquiry, in reviewing an award of general damages, is whether the trier of fact abused its discretion in assessing the amount of damages. **Howard**, 09-2750 at p. 5, 50 So.3d at 1256; **Reck v. Stevens**, 373 So.2d 498, 504-05 (La. 1979). Only after a determination that the trier of fact has abused its "much discretion" is a resort to prior awards appropriate, and then only for the purpose of determining the highest or lowest point which is reasonably within that discretion. **Howard**, 09-2750 at pp. 5-6, 50 So.3d at 1256; **Coco v. Winston Industries, Inc.**, 341 So.2d 332, 335 (La. 1976).

In this case, the district court awarded Ms. Jones $45,000 in general damages consisting of $35,000 for pain and suffering and $10,000 for loss of enjoyment of life. Our review of the general damages awarded for the particular injuries suffered by the plaintiff in this case does not reveal that the district court abused his vast discretion in the general damage award made; therefore, the award should be affirmed.[8]

DECREE

For the reasons stated, we vacate the appellate court decision, reinstate the district court judgment, and affirm the general damage award.

APPELLATE COURT DECISION VACATED; DISTRICT COURT JUDGMENT REINSTATED; GENERAL DAMAGE AWARD AFFIRMED.

[8] Based on the decision we render herein, we find it unnecessary to address the plaintiff's remaining assignment of error, as to whether, pursuant to Article V § 8(B) of the Louisiana Constitution, the plaintiff was deprived of her constitutional right to have her case reargued before the five-judge panel formed to rule on the motion for rehearing before the court.

APPENDIX "A"

In support of his opinion that the Market Basket pallet guard presented an unreasonably hazardous condition for its customers, safety expert Jason English testified additionally as follows:

> …[T]here's certain hazards associated with these types of displays and … a true pallet guard primarily is to prevent trip-and-falls associated to exposed edges and particularly with these octagon-type containers on a square pallet, it's the exposed corners of that. As people are walking along the aisles and they'll make a turn or as … they see … the top of the box and visually they think that, I'll go around the top of the box and I'm going around the display. But in reality down at the floor level there's additional pallet extending. So the common incident is somebody tripping over the exposed corner of these. ...[A]n effect[ive] pallet guard is one of a proper height to raise that visual notification of the exposed corner up to a level that's closer to your normal line of sight. Preferably, up to the similar level of the bin itself. And also to be of a high visibility color so that way it would be readily apparent. Because in a retail shopping environment there's a lot of competing elements that you're dealing with. This is a very visually rich environment. You know, not only the products themselves, but promotional ads, pricing, everything in that environment is competing for your attention. And normally the least attractive or competitive thing in that environment is … the floor itself or anything near the floor. So that's the reason it's important to try to bring … the notification of that hazard up to a higher level.
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> So that's the reason this particular device that's been referred to as a pallet guard is very deficient for … the purpose of that design. Because, one, … this guard is only … about six inches tall. That's about an inch taller than the pallet, so it really doesn't bring the notification of the trip hazard up to a comparable level to the container itself. And, two, it's black, which is a very poor choice of color because that's the least reflective color you have so it does not stand out against all these other competing attractive things in your environment.
>
> This product, in my opinion, actually creates more hazards than … it solves.
>
> * * *
>
> …[T]he black product … doesn't really serve an effective purpose of a pallet guard because it doesn't protect for the hazards in which they're intended to protect from. But the problem with this is it actually adds hazards to the system. One, being that, from a fall … standpoint it actually extends the pallet even further from the box itself actually increasing the risk of a trip hazard versus reducing the risk. Two, it actually causes the person who's trying to access the bin of, in this case watermelons, they have to stand farther away. And making it actually harder to access the product that's in the bin itself, especially when the product is somewhat depleted and you're having to reach into it. Which not only is it harder to access, but that actually creates, from an ergonomic standpoint, a higher risk of injury for overexertion, specifically back injuries of somebody trying to access product having

to stand farther away than what they would otherwise. So really, in my opinion, it would be safer to not even have that at all versus to add it to this system. But it definitely would not serve the function of what I would consider to be a proper pallet guard.

And also it's foreseeable, which happened in this obviously, it's at a level and since it's now harder to access items in the bin because you're a little bit further away, it's foreseeable, especially since there's no marking otherwise, that somebody may see that or even subconsciously use that as a means to step – possibly place one foot to try to get closer so they can actually access the item – the product that's in the bin, especially when it's somewhat depleted, as it's indicated in the photographs.

…I agree with the … earlier testimony. This is not … designed to support human weight. Market Basket had knowledge of that, that it was not supposed to be a step, that it's not going to support the weight. But unfortunately, that was not communicated to their customers, who are not there to do a safety analysis of every display they approach as they're shopping. They're there to get the product. So they did not communicate that, that this was not to be used as a step when it's foreseeable that that would be used as a step. Because you're going to have people shopping your store of all ages, sizes, abilities, from children, toddlers, all the way up to the elderly … with different physical capabilities. And when you're dealing with probably one of the largest -- or at least one of the larger items in the produce department in the form of a watermelon, your largest and heaviest items, trying to take that out of a large bin and having to reach in there to get it, the natural human factor element is you're going to want to try to get as close to it as you can. Anytime you're getting a larger, heavier item you want to get as close to it as you can because it's easier to lift, and also puts less pressure on your body and your back and all that. So, in my opinion, this particular pallet guard, as it's being termed, which is not a good term in my opinion, … is not a good design for what it's intended.

* * *

…[I]f I was going to make recommendations I'd recommend not to have this [pallet guard]. But if you're going to have it, … I think black is a poor color. So you would need to have something that stands out more to draw your attention to it. So to have preferable something … with the color of a bright yellow. You … could get cheap decals, probably a dollar or less, say "no step" to put on top of those pallet guards themselves, or to put a sign on the side of the box for "no step"…. You want to try to draw their attention down toward floor level, but also to give them information not to use that as a step.

* * *

…[T]hese types of displays, these octagon boxes, especially on square pallets, are well recognized … the hazards they create with the exposed edges of pallets. …[A]s a safety professional, I don't like the use of these, especially in public settings. But to the degree that they're used, they need to be replenished because the more depleted the product becomes, the closer people get to these, and, as you can imagine, you know, if you're trying to reach down in the middle of that container, how difficult that would be.

SUPREME COURT OF LOUISIANA

No. 2022-C-00841

LASHONDRA JONES

VERSUS

MARKET BASKET STORES, INC.

On Writ of Certiorari to the Court of Appeal, Third Circuit
Parish of Calcasieu

WEIMER, C.J., additionally concurring

Although the defendant argues the pallet guard was an open and obvious hazard, a detailed discussion of the so-called "open and obvious defense" in negligence actions is not necessary for purposes of resolving this case. However, the court has addressed the parameters of this concept in **Farrell v. Circle K Stores, Inc. and the City of Pineville,** 22-00849 (La. 3/__/23), ___ So.3d ___, which should serve as a guideline for future cases involving how the defense of "open and obvious" should be applied. See also, Thomas C. Galligan, Jr., *Continued Conflation Confusion in Louisiana Negligence Cases: Duty and Breach,* 97 Tul.L.Rev. (forthcoming March 2023); Frank L. Maraist, H. Alston Johnson III, Thomas C. Galligan, Jr., & William R. Corbett, *Answering a Fool According to His Folly: Ruminations on Comparative Fault Thirty Years On,* 70 La. L.Rev. 1105 (2010).