STATE OF MICHIGAN

COURT OF APPEALS

TERRI PRICE and DOUGLAS PRICE, Plaintiffs-Appellants,	FOR PUBLICATION June 18, 2009
v	No. 281934 Ingham Circuit Court
KROGER COMPANY OF MICHIGAN, Defendant-Appellee.	LC No. 07-000005-NO Advance Sheets Version

Before: Talbot, P.J., and Bandstra and Gleicher, JJ.

GLEICHER, J. (*concurring*).

I write separately to respectfully respond to the legal arguments advanced by the dissent.

The dissent posits that the small wire prong that caused plaintiff's fall constituted a defect so inconsequential that its presence cannot create a legal basis for defendant's liability to plaintiff. According to the dissent, "no reasonable fact-finder could find that . . . the one-inch wire was a dangerous condition presenting an unreasonable risk of harm." *Post* at 3. But this contention is readily refuted by the fact that Josephine Ridge, defendant's employee, discarded the bin immediately after learning that the barb caused plaintiff's fall. The only rational inference to arise from this action is that Ridge believed the bin presented an unreasonable risk of harm to other customers. Furthermore, the question whether the barb constituted an unreasonable danger despite its small size is properly for the jury to decide. In *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995), our Supreme Court held that "[i]f the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide." Ridge's conduct, without more, creates a genuine issue of fact regarding the reasonableness of the danger.

I also respectfully disagree with the basic premise of the dissent that "slight imperfections" cannot qualify as unreasonably dangerous conditions and cannot supply a basis for liability "in the legal course of things." *Post* at 1-2. In *Moning v Alfono*, 400 Mich 425, 450; 254 NW2d 759 (1977), our Supreme Court explained that "[t]he reasonableness of the risk depends on whether its magnitude is outweighed by its utility." The Supreme Court derived the risk-utility analysis from the 2 Restatement of Torts, 2d, § 291, which provides,

> "Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is

> negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done." [*Moning*, *supra* at 450, quoting Restatement Torts, 2d, § 291.]

The Supreme Court emphasized in *Moning* that

> [t]he balancing of the magnitude of the risk and the utility of the actor's conduct requires a consideration by the *court and jury* of the societal interests involved. The issue of negligence may be removed from jury consideration if the court concludes that overriding considerations of public policy require that a particular view be adopted and applied in all cases. [*Id*. (emphasis in original).]

Here, I discern no utility inherent to a bin with a protruding wire at its bottom that may snag clothing or skin. The risk that many shoppers would fall or suffer serious injury because of the barb may be relatively small. Nevertheless, the law attaches a significant social value to providing business invitees with safe premises. See *Bertrand*, *supra* at 609:

> Essentially, social policy imposes on possessors of land a legal duty to protect their invitees on the basis of the special relationship that exists between them. The rationale 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 cost of preventing harm from the bin was apparently negligible, as reflected by Ridge's decision to promptly consign the bin to the trash. Because the risk-utility equation slants convincingly toward risk with no countervailing utility, I disagree with the dissent's contention that the small barb, as a matter of law, did not create an unreasonable risk of harm. At trial, the defense remains at liberty to adopt the dissent's view, and to argue that the prong is simply too small and too inconsequential to have created an unreasonable risk of harm.[1] But because reasonable people can differ regarding the risk presented by the protruding prong compared with its utility, and because no relevant social policy exists exempting defective bins from the reach of tort law, a jury should decide whether to impose liability on defendant for plaintiff's fall.

The dissent embodies a second misapprehension of tort law. According to the dissent, in a premises liability case

> the standard is whether an average person with ordinary intelligence, having casually inspected the premises, *in this case the bin with its protruding wire*, would have noticed the danger presented by the wire. . . . Plaintiffs admit in their

---

[1] If defendant pursues this argument, Ridge's deposition testimony is admissible under MRE 407 as impeachment to rebut that the prong did not present an unreasonable risk of injury. Furthermore, "[w]hen a party deliberately destroys evidence, a presumption arises that if the evidence were produced at trial, it would operate against the party who deliberately destroyed it." *Ritter v Meijer, Inc*, 128 Mich App 783, 786; 341 NW2d 220 (1983).

> brief that Terri "had no reason to casually inspect" the basket, apparently conceding that she did not do so. Further, she admits that "if she had made such an inspection, she would have, or may have seen the wire protruding slightly from the side of the bin." [*Post* at 3-4 (citation omitted; emphasis added).]

No caselaw supports the existence of a duty by plaintiff to inspect the bin. Were that the test, every aspect of an invitor's premises harboring a latent danger would automatically qualify as open and obvious. That plaintiff failed to discern a need to inspect the bin is entirely irrelevant to the question whether the danger posed by the protruding wire was open and obvious to the casual observer. Furthermore, the dissent's assertion that plaintiff bore a duty to inspect the bin turns the law of premises liability on its head. The property owner in control of the premises, and not the invitee, owes a duty to inspect the premises for hazards that might cause injury. As a business invitee, plaintiff was entitled to "the highest level of protection" imposed under premises liability law. *James v Alberts*, 464 Mich 12, 20; 626 NW2d 158 (2001), quoting *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). The landowner's duty encompasses not only warning an 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 . . . .'" *James*, *supra* at 19-20; quoting *Stitt*, *supra* at 597. Ridge claimed to have inspected the bin, but admitted that she failed to notice the wire. The dissent entirely excuses Ridge's negligence by asserting that the barb was too small to create any duty on the part of defendant, but imposes on *plaintiff* the duty to have spotted the barb's presence before reaching into the bin. As the dissent would have it, a landowner's duty to make its premises safe for an invitee simply evaporates if the invitee fails to perform a more careful inspection of the premises than that accomplished by the landowner.

Once again, defendant remains entitled to adopt the dissent's position at trial and to argue to a jury that plaintiff's failure to closely inspect the contours of the bin before reaching into or walking away from it constitutes comparative negligence. But no caselaw suggests that in the absence of an open and obvious danger, plaintiff's negligence in not inspecting the bin eliminates her premises liability claim. In an action based on tort, "a plaintiff's contributory fault does not bar that plaintiff's recovery of damages." MCL 600.2958.

Because genuine issues of material fact exist with regard to whether the protruding wire created an unreasonable risk of harm and was sufficiently visible to qualify as open and obvious, the majority properly concludes that the circuit court improperly granted summary disposition to defendant.

/s/ Elizabeth L. Gleicher