STATE OF MICHIGAN

COURT OF APPEALS

CHARLES F. BUTLER,

Plaintiff-Appellee/Cross-Appellant,

v

WAL-MART STORES, INC., d/b/a/ SAM'S CLUB,

Defendant-Appellant/Cross-Appellee,

and

MARLIN McNICHOLS and JOYCE DOZIER McNICHOLS, d/b/a/ THE ORIGINAL KANSAS CITY COOKER, and JAMES PULLEY,

Defendants.

UNPUBLISHED
March 27, 2001

No. 219203
Kalamazoo Circuit Court
LC No. 96-000949-NO

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

PER CURIAM.

In this personal injury action, the jury returned a verdict finding defendant Wal-Mart Stores, Inc., d/b/a Sam's Club, seventy-five percent negligent, finding plaintiff Dr. Charles F. Butler twenty-five percent negligent, and awarding plaintiff $5,288,500 in damages.[1] Defendant appeals as of right from the judgment in favor of plaintiff in the adjusted amount of $1,600,972.63. On appeal, defendant challenges the trial court's denial of its motions for a directed verdict or for judgment notwithstanding the verdict (JNOV), the admission and exclusion of evidence, the instructions to the jury, and the reduction of collateral source benefits from the judgment. Plaintiff cross-appeals, claiming error in the trial court's application of the collateral source rule. We reverse.

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[1] Defendants Joyce Dozier McNichols and James Pulley were dismissed from the suit with prejudice, and a default judgement was entered against defendant Marlin McNichols at the conclusion of the trial. These parties are not involved in this appeal.

Plaintiff was a cardiac surgeon and Director of Cardiac Surgery at Bronson Methodist Hospital. On the afternoon of Saturday June 10, 1995, plaintiff exited the Sam's Club in Portage carrying a large package of paper towels in front of him.[2] As plaintiff made his way toward his vehicle, he walked alongside a trailer-mounted barbecue assembly, which was situated in the parking lot about 100 to 150 feet from the store entrance. When he attempted to pass between a car and the assembly, he tripped and fell over the trailer tongue of the assembly. The assembly was owned and operated by Marlin McNichols, d/b/a the Original Kansas City Cooker, who had been selling ribs in the parking lot with defendant's permission. The barbecue was neither attended nor in operation at the time of the incident. As a result of the injuries sustained in the fall, plaintiff is no longer able to perform surgery.

The testimony at trial established that the assembly, which included two large barrels that functioned as grills, was six to twenty feet high and eighteen to twenty feet long. The trailer tongue over which plaintiff tripped was angled in a "V", protruded anywhere from three to three-and-a-half feet from the trailer, and was just below knee-level (fourteen to eighteen inches from the ground). A vertical "winch" that raised and lowered the trailer was located about one foot from the tip of the trailer tongue and stood about waist-high (forty-five to fifty inches from the ground). At the time of the incident, the assembly was parked across and at the top of two parking spaces, there was a car parked in the space to the right of the assembly where the trailer tongue and winch were located,[3] and there was a light post mounted on a yellow cement base in front of the space where that car was parked.

Defendant first argues on appeal that the trial court erred in denying his motions for a directed verdict or for JNOV. Defendant contends that it owed no duty to plaintiff because the barbecue assembly and the trailer tongue were open and obvious conditions as a matter of law. We agree.

This Court reviews a trial court's grant or denial of a motion for a directed verdict or for JNOV de novo. *Abke v Vandenberg*, 239 Mich App 359, 361; 608 NW2d 73 (2000). "A motion for a directed verdict or for JNOV should be granted only when, viewing the evidence and all legitimate inferences in the light most favorable to the nonmoving party, there are no issues of material fact with regard to which reasonable minds could differ." *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 14; 596 NW2d 620 (1999); see also *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). If reasonable jurors could have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury. *Clark v Kmart Corp*, 242 Mich App 137, 140; 617 NW2d 729 (2000); *Head v Phillips Camper & Sales Rental, Inc*, 234 Mich App 94, 115; 593 NW2d 595 (1999).

Here, as in all negligence cases, plaintiff was required to prove that defendant owed him a duty. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). A business invitor must exercise reasonable care to protect invitees from unreasonable risks of

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[2] The package contained fifteen rolls of paper towels and consisted of three rows of five rolls.

[3] The exact distance between the trailer tongue and the car was not established by the trial testimony.

harm caused by dangerous conditions that the invitor knows or should know the invitees will not discover or protect themselves against. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995), citing 2 Restatement Torts, 2d, § 343, pp 215-216. However, an invitor has no duty to warn or protect an invitee from dangers that are so obvious and apparent that an invitee can be expected to discover them himself. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 94; 485 NW2d 676 (1992). A danger is open and obvious if "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). "[T]he analysis . . . does not revolve around whether steps could have been taken to make the danger more open or more obvious" but, rather, "whether the danger, as presented, is open and obvious." *Id.* at 474-475 (noting that the inquiry was not whether the handicap ramp at issue could have been made more noticeable or safer by issuing warnings or painting the ramp in a contrasting color). Further, "it is not relevant to the disposition of [the] matter whether [the] plaintiff actually saw the [alleged hazard]." *Id.* at 475.

After reviewing the testimony and the photographs of the assembly in the light most favorable to plaintiff, we cannot conclude that a question of fact existed regarding whether the trailer tongue constituted an open and obvious condition. At trial, plaintiff's expert offered several reasons to explain why the low-lying protrusion would have been difficult for the typical pedestrian to see while walking in a normal manner.[4] The expert admitted, however, that the trailer tongue was in plain view had one been looking at it. He specifically stated that the trailer tongue was "not invisible," that it was "shown in the photographs," and that a person "could stand right there and see every detail of it." Plaintiff also acknowledged that the trailer tongue and the waist-high winch were visible from the view depicted in the photographs. In any event, plaintiff's actual theory at trial was that the trailer tongue was not open and obvious from the angle at which he approached it by walking alongside the huge barbecue assembly and sharply turning the corner where the trailer tongue and winch were located. Plaintiff has not cited, nor have we found, authority for the proposition that the manner in which a person approaches the alleged hazard, or the fact that plaintiff chose a path that hewed so closely to the assembly that he could not see around it, negates its obvious nature.

Moreover, plaintiff testified that although he believed he was being "very attentive" to his surroundings, he admitted that he was "looking straight out," was "not looking down at my feet," was carrying the package of paper towels, and was "looking for a way to get back to my car as – as quickly as I could." Plaintiff's own expert even acknowledged that the fact that plaintiff was holding a "relatively large, bulky package" in front of him interfered with his "cone-of-vision" and made it difficult for him to see fewer than seven feet in front of him. *Bertrand*, *supra* at 611 ("if the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off

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[4] Plaintiff's expert specifically opined that (1) the mass of the assembly itself and the presence of a light post mounted on a yellow base near the trailer tongue acted as "orientation edges" that diverted the pedestrian's attention from the protrusion (2) the trailer tongue was not marked or contrasted from the rest of the assembly and (3) "any obstruction below knee level is difficult for most pedestrians to see."

liability if the invitee should have discovered the condition or realized its danger"); *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 492; 595 NW2d 152 (1999) ("the plaintiff admitted that 'if I was looking for it I would have seen it'"). The record is devoid of evidence establishing that a person such as plaintiff would not have seen the trailer tongue "upon casual inspection." *Novotney*, *supra* at 475. We therefore conclude that plaintiff failed to present sufficient evidence to create an issue of material fact upon which reasonable minds could differ as to whether an average user would not have discovered the alleged hazard upon casual inspection.

Defendant also argues that the trial court erred in denying his motions because no questions of fact existed regarding whether its duty of care remained because the alleged hazard posed an unreasonable risk of harm despite its obviousness. Again, we agree.

Even where a dangerous condition is open and obvious, an invitor remains liable for harm arising from the condition when the invitor "should anticipate the harm despite knowledge of it on behalf of the invitee." *Riddle*, *supra* at 96. In other words, an invitor may still have a duty to protect an invitee against a foreseeably dangerous condition if the risk of harm remains unreasonable despite its obviousness or despite knowledge of it by the invitee. *Bertrand, supra* at 610-611, citing 2 Restatement Torts 2d, § 343A(1), p 218.[5] "Thus, the open and obvious doctrine does not relieve the invitor of [the] general duty of reasonable care." *Id.* at 611. Our Supreme Court in *Bertrand* explained the general rule and its exception as follows:

> [T]he rule generated is that if the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger. *On the other hand, if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions.* The issue then becomes the standard of care and is for the jury to decide. [*Bertrand, supra* at 611 (emphasis added).][6]

After quoting this proposition, a panel of this Court summarized the reasoning employed by the *Bertrand* Court:

> Accordingly, the Court reasoned that while the danger of tripping and falling on a step is generally open and obvious, there may be special aspects of particular steps

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[5] The Restatement provides:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. [2 Restatement Torts, 2d, § 343A(1), p 218.]

[6] "If 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." *Id.* at 617; *Hughes v PMG Building, Inc*, 227 Mich App 1, 12; 574 NW2d 691 (1997).

> [because of their "character, location, or surrounding conditions"] that make a risk of harm unreasonable nonetheless. With respect to the *Bertrand* case, the Court concluded that evidence regarding the "congested pedestrian traffic" resulting from the "construction of the step, when considered with the placement of the vending machines and the cashier's window, along with the hinging door" was sufficient to prevent summary disposition for the defendant. *Id.* at 624. Because of this evidence, "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." *Id.* (emphasis in original). [*Millikin*, *supra* at 498-499.]

Unlike in *Bertrand*, there is no indication that the barbecue assembly and its attachments were unusual in "character, location, or surrounding conditions." It is not uncommon for parking lots to contain trailers, vehicles with protruding attachments, or low-lying obstacles. Nor is it unusual for pedestrians to have to navigate around vehicles, trailers, or other low-lying obstacles as they negotiate their way through a parking lot. Further, although plaintiff's expert testified that the manner in which the assembly was parked created the impression of a walkway both in front of the assembly and along the end of it where the trailer tongue was located, plaintiff was not required to follow the path he chose to return to his vehicle. Indeed, plaintiff testified that he took a different route from his vehicle to the store than he took from the store to the vehicle, so an alternative route was available and known to plaintiff. Cf. *Perry v Hazel Park Harness Raceway*, 123 Mich App 542, 550; 332 NW 2d 601 (1983) (holding that the trial court did not err in denying the defendant's motion for a directed verdict where the plaintiff "attempt[ed] to safely negotiate an *unavoidable* hazard").

Nor does the evidence establish that defendant should have anticipated that the placement of the barbecue assembly in the parking lot would cause patrons to trip and fall. *Bertrand*, *supra* at 611-612, quoting 2 Restatement Torts 2d, § 343A, comment f, p 220 (a reason "to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious . . . ."). The trailer on which the barbecue grills were placed was parked lengthwise across two parking spaces. The photographs show that the trailer tongue ended near the center of one of the parking spaces, leaving enough room for a person to walk between the trailer tongue and any vehicle that might be parked next to it. It was also reasonable for defendant to expect that patrons would carry the large bulky items purchased from the store in the shopping carts provided and not in a manner that would obstruct their view of objects in the parking lot. Finally, to the extent plaintiff maintains that he was "distracted" by trying to get to his car without being hit by other vehicles, there is no indication that plaintiff was in imminent danger of being hit by a car as he walked to his vehicle. See, e.g., *Gjelaj v Wal-Mart Stores, Inc*, 27 F Supp 2d 1011, 1014 (ED Mich, 1998). We recognize that directed verdicts are generally viewed with disfavor in negligence cases. *Hunt v Freeman*, 217 Mich App 92, 99; 550 NW2d 817 (1996). Nevertheless, upon reviewing the evidence in the light most favorable to plaintiff, we hold that reasonable jurors could not have reached different conclusions regarding whether the alleged hazard created a foreseeable and unreasonable risk of harm.

Because plaintiff's evidence failed to establish a claim as a matter of law, the trial court should have granted defendant's motions for a directed verdict or for JNOV. We therefore reverse and remand for entry of a directed verdict or JNOV in favor of defendant. We do not retain jurisdiction.

In light of our disposition, we need not address defendant's remaining issues or the issues raised in plaintiff's cross-appeal concerning the proper application of the collateral source rule.

/s/ Michael J. Talbot
/s/ Michael R. Smolenski