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UNPUBLISHED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.

Hood, J. (*dissenting*).

I must respectfully dissent. Although I would reverse and remand for a new trial for reasons stated later in this opinion, I believe that there were material questions of fact regarding whether the danger was open and obvious and whether it posed an unreasonable risk of harm. Therefore, defendant was not entitled to a directed verdict or a judgment notwithstanding the verdict.

I agree with the majority's statement of the state of the law regarding open and obvious. Generally, whether a duty exists is a question of law and does not require resolution of factual disputes; however, "if there are factual circumstances that give rise to a duty, the existence of those facts must be determined by a jury." *Howe v Detroit Free Press*, 219 Mich App 150, 156; 555 NW2d 738 (1996). A business invitor must exercise reasonable care to protect invitees from unreasonable risks of harm caused by dangerous conditions that the invitor knows or should know that invitees will not discover or protect themselves against. *Bertrand v Allen Ford*, 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 than an invitee can be expected to discover them himself. *Riddle v McClouth Steel Products Corp,* 440 Mich 85, 94; 485 NW2d 676 (1992). A danger is open and obvious if an average user of ordinary intelligence could have discovered the danger as well as the risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). "[T]he analysis…does not revolve around whether steps could have been taken to make the danger more open and obvious," but rather, "whether the danger as presented is open and obvious." *Id.* at 475.

In *Bertrand, supra*, our Supreme Court examined two companion cases and established that the factual circumstances surrounding a slip and fall determine whether a jury submissible question arises. In *Maurer v Oakland Co Parks & Recreation Dep't*, the plaintiff alleged that she stumbled and fell on a cement step when she was exiting a rest room area at a park. The plaintiff entered the rest area without incident. However, as she was leaving the area, she negotiated the first step, but then turned to ensure that her children saw the step. The plaintiff fell on the second step. There was indication that the plaintiff presented expert deposition testimony to support her claim. Furthermore, in her own deposition, the plaintiff could not identify any problem attributable to the step other than the fact that she did not see it. Our Supreme Court concluded that summary disposition was appropriate because the plaintiff failed to present any facts to demonstrate that the step posed an unreasonable risk of harm. *Id*. at 621.

However, in the companion case, *Bertrand v Alan Ford, Inc*, the plaintiff and her husband brought their car to the defendant's service garage for repair. The plaintiff had visited the defendant's service area six or eight times before. They waited for their vehicle in a lounge area. When their car was fixed, the plaintiff and her husband exited the lounge to return to the service area. The plaintiff was exiting the door as other people entered. In order to leave the narrow passage area, the plaintiff had to step down off the sidewalk, negotiate vending machines in the area, walk around the door, and step back up onto the sidewalk to reach the cashier's window. To allow people to pass, the plaintiff had to step back, lost her balance on the curb edge, and fell and broke her leg. Viewing the evidence in the light most favorable to the plaintiff, our Supreme Court concluded that a genuine issue regarding an unreasonable risk of harm existed for submission to the jury. Specifically, based on the construction of the step in light of the placement of the vending machines, the cashier's window, and the hinging of the doorway, it could be argued that the defendant should have reasonably anticipated a congested pedestrian traffic pattern that could cause an invitee to fall off the step. *Id*. at 624.

In this case, I conclude that the issues of open and obvious and whether the trailer hitch created an unreasonable risk of harm despite its open and obvious condition were properly submitted to the jury. Viewing the evidence in the light most favorable to plaintiff, a question of fact existed regarding whether the trailer tongue and winch constituted an open and obvious danger. It is virtually undisputed, as the majority emphasizes, that the knee high trailer tongue which protruded 3 to 3 ½ feet and the waist high winch were open and obvious from the view depicted in the pictures which were in evidence. Plaintiff's theory, however, was that the tongue and winch were not obvious given the manner in which plaintiff approached them by walking along the huge barbecue assembly and turning the corner where the tongue and winch were located. The *Bertrand* Court established that the circumstances surrounding the open and

obvious condition are relevant considerations in determining whether a question for the jury has been presented. *Id*. Furthermore, plaintiff's expert testified that the low-lying protrusion would have been difficult for a person to see while walking in a normal manner because the enormous mass of the grill itself distracted the pedestrian's attention from the protrusion and because the protrusion was not marked or contrasted from the rest of the assembly. There was also testimony that the large barbecue assembly obstructed the view of objects that might be at the opposite end of the structure, that a person following the path plaintiff took would have no occasion to see the tongue and winch until after turning the corner, and that a person might not have time to see and react to the obstruction if the person sharply turned the corner as plaintiff apparently did in this case. Accordingly, the testimony given by plaintiff, his son, and his expert indicated that an average user of ordinary intelligence would not have been able to discover the danger and the risk presented upon casual inspection in light of the approach taken by plaintiff. *Novotney, supra*. Neither defense counsel nor plaintiff's counsel elicited testimony which could be construed as conclusively establishing that plaintiff did not see the trailer tongue simply because he was not looking where he was going.[1] To the contrary, plaintiff testified that while he was carrying the large package of paper towels, he *was* watching where he was going. In my opinion, there was sufficient evidence to present this matter to the jury, which was also instructed as to open and obvious dangers.

Defendant also argues that aside from the question of openness and obviousness, the trial court erred in denying his motions on the ground that questions of fact existed regarding whether the condition still presented an unreasonable risk of harm. I disagree. 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*. In other words, an invitor may still have a duty to protect an invitee against foreseeably dangerous conditions if the risk of harm remains unreasonable despite its obviousness or despite knowledge of it by the invitee. *Bertrand, supra* at 610-611. "Thus, the open and obvious doctrine does not relieve the invitor of [the] general duty of reasonable care." *Id.*, at 611.

In this case, even if the trailer tongue was open and obvious, reasonable jurors could have reached different conclusions regarding whether the condition was unreasonably dangerous under the circumstances. While large vehicles and trailers may indeed not be uncommon in parking lots, the trailer on which the barbecue grills were located was parked lengthwise across two parking spaces. The trailer tongue itself protruded into the area between two parking spaces rather than at the end of one parking space. At the time of the incident, there was also a car parked in the space across from where the trailer tongue was located, and in front of that space there was a light pole mounted on a large, yellow, concrete base. 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. While plaintiff's testimony established that he could have taken a different route back to his car, and was not "forced" to confront the hazard, he testified that the parking lot was very busy that Saturday

[1] The record does not support defendant's representation in its brief that plaintiff "admitted that he did not see the trailer tongue simply because he was not looking at it."

afternoon, and that he chose to walk in the spaces in front of the barbecue assembly because it was the one inanimate object that looked "closed, abandoned, and safe." Whether plaintiff was negligent (which the jury found that he was) does not convert a question of fact into a question of law.

It must be noted that the majority opinion strays from the issues of open and obvious and unreasonable risk of harm to fault plaintiff for his own injuries. That is, the majority concludes that plaintiff took a different route from his vehicle to the store than the route taken back to his vehicle. However, the majority opinion ignores the fact that plaintiff had to exit from a different door because of the configuration of defendant's store to monitor customers and package purchases. Furthermore, plaintiff explained that he chose to take a different route in light of the pedestrian and vehicle traffic. Specifically, plaintiff testified that it was a busy Saturday and vehicles were not traveling down aisles in accordance with the flow of traffic. Therefore, the issue of contributory negligence, in light of defendant's store configuration and the flow of traffic, is for the determination of the trier of fact, *Bofysil v Dep't of State Highways*, 44 Mich App 118, 133; 205 NW2d 222 (1972), and should not be removed by the majority. Additionally, the majority's conclusion that plaintiff is at fault for failing to utilize the cart provided by defendant is without record support. Specifically, plaintiff's son testified that their four items were not placed a cart after being purchased. Rather, the items were merely handed to plaintiff, and he was not given a decision regarding the need or any use for a cart. In any event, assuming that carts were available for use, this fact does not result in holding plaintiff at fault, but rather is an issue of contributory negligence that is for the trier of fact. *Bofysil, supra*.[2] Accordingly, the issue of open and obvious and unreasonable risk of harm despite any open and obvious condition was properly submitted to the jury who rejected defendant's position.

Further it can be argued that defendant should have anticipated that leaving a barbecue assembly with a low-lying trailer in a busy parking lot could cause patrons to trip and fall. It is not uncommon for persons to walk between parked cars in busy parking lots or to walk over open parking spaces. It is also reasonable to expect that patrons in parking lots will be focusing on moving cars or pedestrians, and not knee-level obstructions. Viewing the evidence in the light most favorable to the plaintiff, I conclude that reasonable jurors could have reached different conclusions regarding whether awareness of the location of the tongue and winch would have eliminated the risk of falling. The jury was, as indicated earlier, instructed on the open and obvious danger doctrine and still found defendant negligent. Accordingly, the trial court did not err in denying defendant's motions for directed verdict and for judgment notwithstanding the verdict.

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[2] Finally, it should be noted that the majority concludes without citation to the record or other authority that this barbecue assembly is the equivalent of a trailer that a pedestrian would expect to navigate around. Review of the photographs reveals that the barbecue assembly was not identified as such, and it is questionable whether an ordinary user upon casual inspection would be able to identify that the barbecue assembly would be the equivalent of a trailer and require special navigation to avoid any protrusions.

I would, however, reverse and remand for a new trial because error requiring reversal occurred by admitting the testimony of Donald Dunning, the operator of another mobile barbecue business, who had previously set up a grill in defendant's parking lot. Defendant objected to testimony by Dunning. Plaintiff responded that the witness would establish (1) that the then manager of the store gave Dunning permission to operate his grill, but did not give him any safety instructions; (2) that Dunning had placed his grill in an unused portion of the lot, that he used caution tape, and that he never left it unattended; (3) that he knew to take these precautions because other retail stores and other places where he placed his barbecue insisted that he take such precautions; (4) that Dunning's presence and procedure should have provided defendant with notice that "there was a problem when McNichols set it up the wrong way, in the wrong spot on the lot; " (5) that defendant was negligent in failing to follow the "standard in the industry;" and (6) to rebut defendant's implication that it had no notice because McNichols' barbecue was brought in the night before the incident at issue. The trial court allowed the testimony, apparently on grounds that the testimony was admissible to show that defendant had "notice" of the prevailing standards in the industry for safeguarding invitees from mobile vendors' equipment. This was error.

"Although evidence of an industry custom is clearly admissible to prove negligence, the custom must be certain, uniform and notorious." *Braden v Workman*, 146 Mich App 287, 293; 380 NW2d 84 (1985). "A custom, to be relevant, must be reasonably brought home to the actor's locality, and must be so general, or so well known, that the actor may be charged with knowledge of it or with negligent ignorance." Prosser & Keeton, Torts (5th ed), §33, p. 195; see also *Fogarty v Michigan Central R Co*, 180 Mich 422, 432-433; 147 NW 507 (1914). The customary usage and practice is relevant evidence to be used in determining whether the standard of a reasonably prudent person under the same or similar circumstances has been met; however, such usage cannot be determinative of the standard. *Marietta v Cliff's Ridge, Inc.* 385 Mich 364, 371; 189 NW2d 208 (1971).

The trial court abused its discretion in admitting testimony concerning the manner in which Dunning set up and maintained his assembly for the proffered purpose of showing that defendant had notice of prevailing industry standards for protecting invitees from the hazards of mobile barbecues. Plaintiff did not lay a sufficient foundation to establish that Dunning's experiences rose to the level of an industry or local standard regarding the proper and safe maintenance of a mobile barbecue assembly in retail store parking lots. Dunning merely gave brief and vague testimony regarding what other businesses told him about setting up his own barbecue assembly. He did not identify any individual or organization that told him to do anything in particular, there was no effort to show that the practices Dunning followed represented industry or local standards, and the hearsay statements concerning the precautions others told him to take mostly involved atmospheres distinct from the circumstances presented in this case.

Further, what operators of festivals and picnics asked Dunning to do while operating his grill around densely populated events does not establish that these same precautions must generally be employed wherever a grill is used. This is particularly true when the precautions at issue might well be partially or primarily due to the fact that Dunning, unlike here, was *operating* his grill at the time he was asked to barricade it. The precautions could as easily be designed to

prevent contact with a hot, smoky grill as opposed to preventing persons from tripping over a trailer tongue. What a few enterprises in different contexts asked a different grill operator to do hardly establishes an "industry norm." Accordingly, plaintiff never established that the precautions Dunning used when operating his grill (as conveyed to him by others) were so general or so-well known that defendant could have been charged with knowledge of them. *Braden, supra*; *Fogarty, supra*. Therefore, the testimony was not probative as establishing an industry or local standard in the retail industry.

Even assuming some relevance, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice and jury confusion, in misleading the jury into believing that defendant had violated a standard practice that defined the degree of care that it owed to plaintiff. Contrary to plaintiff's contention, the testimony did not buttress the testimony of plaintiff's expert regarding industry standards, because the expert never identified any industry standards with respect to mobile barbecue assemblies; he only stated that it was standard practice for retailers to inspect the premises for hazards.

An error in the admission of evidence does not require reversal unless a substantial right of a party is affected. MCR 2.613(A); MRE 103(a); *Cox v Flint Board of Hospital Managers (On Remand)*, 243 Mich App 72; 620 NW2d 859 (2000). A substantial right of defendant was affected in this case. By making it appear as if standard practice required certain precautions defendant did not employ, Dunning's testimony created a strong impression that defendant did not take the precautions it was required to take. It also allowed the jury to find defendant negligent by comparing its conduct of a grill operator in distinct circumstances. Particularly where there was no limiting instruction, the erroneously admitted testimony could easily have played a key role in the jury's deliberative process, and, thus, affected defendant's substantial rights. The trial court even relied on this invalid testimony as a basis for supporting its decision to deny defendant's motion for a directed verdict.

Defendant also contends that the trial court erred reversibly in refusing to allow Marjorie Kobylinski, a previously unlisted witness, to testify at trial to refute plaintiff's assertion that he had never purchased ribs or chicken from the Sam's Club parking lot. The trial court concluded that adding the witness might unnecessarily prolong the trial, and that defendant had not shown good cause for failing to add the witness until the last minute. The decision whether to allow an undisclosed witness is a matter within the trial court's discretion. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 90; 618 NW2d 66 (2000). We find no abuse of discretion, and note that the matter of claimed surprise will not be present at a new trial.

Defendant also claims that the trial court abused its discretion in refusing to admit evidence of plaintiff's collateral source income before the jury. I disagree. At the time of trial, .plaintiff was receiving over $27,000 a month in collateral source benefits from three different sources: (1) about $11,800 from a disability policy from Northwestern Mutual Life, (2) over $14,000 a month from a disability policy from UNUM Mutual Life Insurance Company and (3) about $1250 in social security benefits. Defendant argued at trial that this evidence was relevant to show that plaintiff had a motive not to seek employment, when the testimony would show that he could obtain employment. The trial court concluded that even if the evidence were relevant to show motive, its probative value was far outweighed by the danger of unfair prejudice, confusion

of the issues and misleading the jury. The trial court did not abuse its discretion. *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 59-60; 457 NW2d 637 (1990). Moreover, it is unlikely that defendant was prejudiced by the trial court's ruling. MCR 2.613(A); MRE 103(a); *Cox*, *supra*. The trial court instructed the jury on plaintiff's duty to use reasonable means to avoid or minimize his damages, and defendant had the opportunity to use the testimony of Drs. Caraccino and Mangrum during closing argument to argue that plaintiff failed to mitigate his damages. See *Morris v Clawson Tank Co*, 459 Mich 256, 263-264; 587 NW2d 253 (1998).[3]

Since a new trial is warranted, it is not necessary to address the remaining issues involved in defendant's appeal and in plaintiff's cross appeal. For the reasons previously stated, I would reverse and remand for a new trial.

/s/ Harold Hood

[3] We note that plaintiff argues that the exception created for the admission of collateral source benefits under the common law was abrogated by the enactment of the collateral source statute in 1986. MCL 600.6303(1); MSA 27A.6303(1). However, this issue was not raised by either party below, except in plaintiff's response to defendant's motion for JNOV/New Trial. There, the trial court did not address the statute and relied on its previous ruling at trial. We therefore need not reach the issue, since defendant's claim fails even under the common law rule argued by the parties and decided by the trial court.