STATE OF MICHIGAN

COURT OF APPEALS

TERESA HINES, Plaintiff-Appellee,	UNPUBLISHED June 22, 2001
v	No. 221418 Oakland Circuit Court
KMART CORPORATION, Defendant-Appellant.	LC No. 97-541653-NO

Before: Bandstra, C.J., and White and Collins, JJ.

PER CURIAM.

Following a jury trial in this trip and fall premises liability action, plaintiff was awarded $78,220.58, plus costs, interest and attorney fees. Defendant appeals the judgment in plaintiff's favor and the denial of its motion for new trial. We affirm.

Testimony at trial established that plaintiff visited defendant's store on November 1, 1996, walked from the parking lot to the main entrance, and tripped and fell over a raised concrete slab in the sidewalk approaching the door. Plaintiff testified that she did not see the uneven portion of the sidewalk before her fall. Defendant admitted negligence, in order to preclude the introduction of evidence regarding a prior trip and fall and reports regarding the defect, but did not admit liability for plaintiff's alleged injuries. Plaintiff claimed she sustained a serious neck injury requiring surgery. Defendant maintained that plaintiff's neck problems were the result of a preexisting condition and, therefore, the fall was not a proximate cause of her injuries. The jury found in plaintiff's favor and a judgment to that effect was entered.

Defendant filed a motion for a new trial, arguing that the trial court erred in precluding it from presenting evidence of plaintiff's comparative negligence and defending on the basis that the dangerous condition was open and obvious. The trial court denied the motion. Defendant raises the same issues on appeal.

A new trial may be granted if a verdict is contrary to law or if an error of law has occurred in the proceedings. MCR 2.611(A)(1)(e) and (g). Moreover, a new trial may be granted based upon the improper exclusion of relevant and admissible evidence. *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535, 542-543; 506 NW2d 890 (1993). A trial court's decision regarding a motion for a new trial is reviewed for an abuse of discretion. *Meyer v Center Line*, 242 Mich App 560, 564; 619 NW2d 182 (2000).

The record does not support defendant's argument that the trial court precluded it from presenting evidence of comparative negligence. On the first day of trial, before testimony was taken, defendant moved in limine to preclude plaintiff from raising a prior trip and fall incident that occurred at the same location in 1995, or mentioning field reports prepared by defendant regarding the defective condition. In response, plaintiff's counsel agreed that if defendant was admitting negligence - - that there was a hazardous condition of which it was aware and nevertheless failed to remedy - - the evidence would be irrelevant. However, plaintiff's counsel stated that if defendant would be arguing comparative negligence, plaintiff would reserve the right to re-address the issue because the evidence might then be relevant. The trial court stated that if defendant brought up the issue of comparative negligence, plaintiff would be allowed to present the evidence sought to be excluded. Defendant did not assert that the court's reasoning was somehow flawed. Later, before beginning his opening statement, defense counsel sought clarification of the court's position. The court made clear that if defendant argued comparative negligence, it *might* give plaintiff the right to show that it happened before.[1] Again, defense counsel did not argue that the evidence would be irrelevant even if he raised the issue of comparative negligence, and did not otherwise object to the court's ruling. Thereafter, defendant *elected* not to present evidence of comparative negligence. This was a tactical decision made by defendant as a matter of trial strategy. Defendant may not assign error on appeal to a matter that its own lawyer deemed proper at trial. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). To do so would allow a defendant to harbor error as an appellate parachute. *Id.* Because it was defendant who chose not to present evidence of comparative negligence, the trial court did not abuse its discretion in denying defendant's request for a new trial as to this issue. Moreover, we are not persuaded that there is error in a ruling that if defendant raised the issue of comparative negligence it would open the door to the introduction of the excluded evidence, under the circumstance that the jury would then have been required to apportion fault by allocating a percentage to plaintiff.

---

[1] The colloquy was as follows:

> [DEFENSE COUNSEL]: Okay, Judge, just one, I wanna be clear on one issue because I don't wanna . . .
>
> THE COURT: Mmhhmm.
>
> [DEFENSE COUNSEL]: . . . run afoul of your Order. On the issue of comparative negligence. You've indicated that if in fact I wanna argue comparative negligence, then Plaintiff can introduce the . . .
>
> THE COURT: Depending on whether he lays a foundation for it, sure. But it's potentially, it may come in. If you recall, the Motion in Limine was to prevent any additional information regarding any other negligence with regard to this location. That, if you go into comparative, it may conceivably give him the right to show that it's happened before. And then it's not, your, your contention isn't reasonable. I don't know what the evidence is gonna say. But, if you proceed on that, you proceed at your own risk.
>
> [DEFENSE COUNSEL]: I gotcha.

Defendant also argues that the trial court erroneously precluded it from pursuing a defense based on the open and obvious nature of the danger presented. Defendant asserts that it should have been permitted to argue this defense even though it admitted negligence. We disagree.

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Case v Consumers Power Co,* 463 Mich 1, 6; 615 NW2d 17 (2000); *Ellsworth v Hotel Corp,* 236 Mich App 185, 194; 600 NW2d 129 (1999). Plaintiff was an invitee on defendant's property because her visit can reasonably be said to confer a business, commercial, monetary, or other tangible benefit on the owner of the premises. *Kreski v Modern Wholesale Elec Supply Co,* 429 Mich 347, 359 415 NW2d 178 (1987). A business invitor owes a duty to its customers to maintain its premises in a reasonably safe condition and to exercise ordinary care and prudence to keep the premises reasonably safe. *Id.* This duty does not extend to conditions from which an unreasonable risk cannot be anticipated or to dangers so obvious and apparent that an invitee can be expected to discover them himself. *Williams v Cunningham Drug Stores, Inc,* 429 Mich 495, 500; 418 NW2d 381 (1988); *Ellsworth, supra* at 194.

The "no duty to warn of open and obvious danger" rule is a defensive doctrine that attacks the duty element which a plaintiff must establish in a prima facie negligence case. *Riddle v McLouth Steel Products Corp,* 440 Mich 85, 95-96; 485 NW2d 676 (1992); *Millikin v Walton Manor,* 234 Mich App 490, 495; 595 NW2d 152 (1999). Because defendant admitted negligence, i.e., admitted owing a duty to plaintiff and a breach of that duty, evidence of the open and obvious nature of the danger was irrelevant. Such evidence would only serve to undermine plaintiff's claim that defendant owed her a duty and had breached that duty, elements that defendant already admitted. Therefore, evidence pertaining to the open and obvious nature of the danger was properly excluded by the trial court, and the trial court did not abuse its discretion in denying defendant's motion for a new trial as to this issue.

Affirmed.

/s/ Richard A. Bandstra
/s/ Helene N. White
/s/ Jeffrey G. Collins