STATE OF MICHIGAN

COURT OF APPEALS

DEREK AUITO,

Plaintiff-Appellee/Cross-Appellant,

v

CLARKSTON CREEK GOLF CLUB, INC.,

Defendant-Appellant/Cross-Appellee,

and

JEFFREY HARRIS,

Defendant.

UNPUBLISHED
June 8, 2004

No. 240621
Oakland Circuit Court
LC No. 00-023307-NP

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right a judgment on the jury verdict awarding plaintiff $842,537.82 plus interest. Plaintiff cross-appeals by leave granted the same judgment. We affirm in part, reverse in part, and remand.

I. Facts and Procedure

Plaintiff was a participant in a golf scramble held at defendant golf course. Plaintiff had never golfed at the course before. After finishing the seventeenth hole, plaintiff and two of his teammates, Steve Noto and Matthew McGinnis, walked toward their carts to go to the eighteenth hole tee. The carts were parked next to the cart path in a tunnel-like stand of trees and brush between the seventeenth green and the eighteenth tee. There was a sign in the stand of trees, next to the cart path, pointing toward the eighteenth tee. Plaintiff testified that, from where his cart was parked near the seventeenth green, he could not see the eighteenth tee or hear golfers on the eighteenth tee. Unbeknownst to plaintiff, the eighteenth tee was just beyond the edge of the trees at the end of the cart path, about ten to fifteen yards away. McGinnis testified that the only way to tell if somebody was golfing on the eighteenth tee was to walk beyond the trees and brush where their carts were parked.

As plaintiff was by his cart near the path, Jeffrey Harris was teeing off on the eighteenth tee. Harris testified that he did not see plaintiff or any member of the group coming off of the seventeenth green when he addressed the ball. Harris further testified that he would not have teed off had he had known where plaintiff was standing. Samuel Prabakaran, a member of Harris's foursome, also did not see plaintiff or any other golfer as Harris was teeing off. Because Harris did not see anyone in his driving path, he proceeded to hit the ball. The golf ball hit by Harris struck plaintiff in the eye. After the ball struck plaintiff, Harris looked over and saw plaintiff lying on the ground next to a cart. Prabakaran actually saw the ball as it struck plaintiff and testified that plaintiff was in full view from the eighteenth tee. Prabakaran testified that plaintiff was standing stationary when the ball hit him. The impact from the golf ball caused plaintiff to permanently lose vision in his right eye.

Prabakaran testified that the layout of the seventeenth green and the eighteenth tee was unusual, because golfers entered the eighteenth tee from the front of the tee. Prabakaran testified that, by the time someone was in position to see the eighteenth tee, that individual was already in danger of being struck by a ball hit by a golfer on the eighteenth tee. Prabakaran stated that this was unusual, because most holes were arranged so that people could enter the tee from the back or side to avoid the danger of being struck by a ball hit from the tee. There were no signs warning people that they were in danger of being hit by golf balls upon leaving the wooded area to go to the eighteenth tee.

Robert Wiar, the chief operating officer and general manager for defendant golf club, testified that, before plaintiff's injury, he had never received any notification of anyone being injured between the seventeenth green and the eighteenth tee. Nobody had complained to Wiar of near injury in the area or voiced concerns over problems with the configuration of the tee.

Plaintiff filed a complaint against Harris and defendant golf course, alleging negligence and two theories of premises liability. Plaintiff argued that defendant failed to warn of the danger created by the location of the eighteenth tee in relation to the seventeenth green, and that the design of the golf course was defective where the cart path from the seventeenth green led to the eighteenth tee. The trial court granted Harris's motion for summary disposition, concluding that plaintiff had failed to show that Harris, as a coparticipant in a recreational activity, had acted recklessly under *Ritchie-Gamester v City of Berkley*, 461 Mich 73; 597 NW2d 517 (1999). At the close of proofs at trial, the trial court granted defendant's motion for directed verdict on plaintiff's defective design claim, because of "plaintiff's failure to produce the required expert testimony regarding a design defect." The trial court allowed plaintiff's failure to warn claim to be considered by the jury. The jury found that plaintiff was forty percent negligent, defendant was fifty-five percent negligent, and Harris was five percent negligent, and awarded plaintiff past damages of $900,000 and future damages of $24,606.30 a year through 2052. After calculating the present value of plaintiff's future damages by the simple reduction method, adding additional past medical damages, and subtracting the percentages of plaintiff's and Harris's fault from the award, the judgment for plaintiff amounted to $842,537.82.

Defendant filed a motion for judgment notwithstanding the verdict (JNOV), a new trial, or remittitur, arguing that (1) the directed verdict regarding plaintiff's design defect claim should have been extended to the remainder of his premises liability claims, because plaintiff did not produce any expert testimony that the configuration of the golf course presented a known danger, (2) the recklessness standard of *Ritchie-Gamester* should be applied to sports facilities such as

defendant golf course and (3) the jury verdict was excessive. The trial court denied defendant's motion, concluding that (1) plaintiff was not required to present expert testimony to support his failure to warn claim, (2) the *Ritchie-Gamester* recklessness standard applies to coparticipants in recreational activities, not the owners of the recreational activity facilities, and (3) the jury verdict was within the acceptable range of damages for such an injury.

Plaintiff filed a motion for entry of judgment, to which defendant objected. In relevant part, plaintiff argued that the damages award should not have been reduced five percent for the negligence of Harris, because defendant failed to give notice under MCR 2.112(K) that Harris was a nonparty at fault. The trial court rejected defendant's argument, holding that MCR 2.112(K) did not apply because the purpose of the court rule is to provide the identification of parties who are not known, and Harris was known by the parties. In objecting to plaintiff's motion for entry of judgment, defendant argued that the compound reduction method should have been used to reduce plaintiff's future damages to their present value. The trial court disagreed, explaining that Supreme Court precedent must be followed and the simple reduction method used.

II. Analysis

A. Defendant's Motion for JNOV

1. Standard of Review

Defendant argues that the trial court erred when it denied defendant's motions for directed verdict and JNOV regarding plaintiff's failure to warn theory of premises liability. We review de novo the trial court's decisions regarding both the motion for directed verdict and JNOV. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). Thus, we review the evidence and all legitimate inferences from the evidence in a light most favorable to the nonmoving party. *Id.* "A motion for directed verdict or JNOV should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law." *Id.*

2. Expert Testimony

Defendant first argues that the trial court erred when it denied defendant's motions for directed verdict and JNOV regarding plaintiff's failure to warn theory of premises liability, because this theory of recovery was inextricable from plaintiff's dismissed defective design claim and required the support of expert testimony. We disagree. "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). The invitor's duty to warn extends to hidden or latent defects, but does not extend to known or open and obvious dangers unless the invitor should anticipate harm despite knowledge of it on behalf of the invitee. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 91, 96; 485 NW2d 676 (1992).[1] There are two

[1] Here, defendant does not argue that, because any danger presented by the configuration of the
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theories in Michigan that will support a finding of negligent design: (1) a properly designed product may be rendered defective based on a failure to warn about dangers regarding the intended uses and foreseeable misuses of the product; and (2) a product is designed negligently where a risk-utility analysis favors an available safer alternative. *Gregory v Cincinnati, Inc*, 450 Mich 1, 11; 538 NW2d 325 (1995). Defendant's argument seems to rely on the erroneous assumption that plaintiff's premises liability failure to warn claim was reliant on the success of his design defect claim. However, the two claims are separate and distinct, and a plaintiff may bring a failure to warn premises liability claim without also bringing a design defect claim. Proving negligence in a premises liability claim does not require the plaintiff to prove that the premises was "defective." Rather, the plaintiff must show that a "dangerous condition" existed on the premises. *Lugo, supra* at 516. There are situations where a golf course may be flawlessly designed, but circumstances create a dangerous condition that may cause a possessor of land to be liable for a failure to warn of that danger.

The cases cited by defendant do not support its argument that expert testimony was required to support plaintiff's premises liability failure to warn claim. In *Lawrenchuk v Riverside Arena, Inc*, 214 Mich App 431, 432; 542 NW2d 612 (1995), the plaintiff, who fell while stepping down from the rink area onto the carpet at the defendant's roller-skating rink, alleged that the defendant failed to warn of a dangerous condition and that the rink was defectively designed. The trial court granted summary disposition of the plaintiff's failure to warn claim because the plaintiff was aware of the existence of the step, and granted summary disposition of her design defect claim because she did not provide expert testimony that the step and lack of handrails constituted a design defect. *Id.* The plaintiff appealed the dismissal of her design defect claim. *Id.* This Court affirmed the dismissal of the plaintiff's design defect claim, holding that the plaintiff was required to produce expert testimony regarding the magnitude of the risk posed by the design, alternatives to the design, or other factors concerning the unreasonableness of the risk of the particular design. *Id.* at 435-436. However, this Court did not hold that the plaintiff's premises liability failure to warn claim was reliant on the success of her design defect claim. Instead, this Court clarified that the analysis differed for failure to warn cases and design defect cases. *Id.* at 436 n 2. There is nothing in *Lawrenchuk* or the other Michigan cases cited by defendant requiring plaintiffs to present expert testimony in failure to warn premises liability cases.

Plaintiff further argues that the trial court should have required plaintiff to support his failure to warn claim with expert testimony, because a lay person could not possibly understand what would constitute a dangerous condition that would require defendant to give a warning in this particular case. However, the cases cited by plaintiff do not support his position. In *Paul v Lee*, 455 Mich 204, 211-212; 568 NW2d 510 (1997), overruled on other grounds *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999), our Supreme Court held that, in professional malpractice cases, a plaintiff's assertion that a professional breached the applicable standard of care must generally be supported by expert testimony. The cases requiring expert testimony involve matters of special knowledge strictly involving professional skill that would

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golf course was open and obvious, it had no duty to warn of any such danger. Accordingly, we decline to consider this issue.

not be known by a layperson. *Id.* *Paul* applies to professional malpractice cases and is not applicable to the present case.

In *Johnson v Detroit*, 79 Mich App 295, 296; 261 NW2d 295 (1977), the plaintiff, who was struck in the eye with a golf ball, sued the owner of the golf course for maintaining and operating an unsafe golf course. The plaintiff sought to introduce the testimony of an expert in the design and construction of golf courses to show negligence both in the design of the course and the defendant's failure to maintain the course. *Id.* at 298. The trial court excluded the expert's testimony, and this Court held that this exclusion constituted an abuse of discretion. *Id.* at 299. This Court held that the trial court's error required reversal, because, among other reasons, "there was knowledge which belonged more to the offered expert than to the common man." *Id.* at 301-302. *Johnson* does not support defendant's argument that expert testimony is necessary to support the plaintiff's failure to warn claim. *Johnson* holds that the expert witness's testimony should not have been excluded in that particular case, because the expert had more knowledge regarding the issues than the common person, and his testimony would have helped understand the plaintiff's design defect and failure to maintain claim. *Johnson* does not hold that expert testimony is always necessary to support a failure to warn claim based on an unsafe condition on the land.

The present case involves matters that could be understood by a layperson. It involves a condition of the land where plaintiff was unknowingly placed in danger of being struck by a golf ball as he approached the eighteenth tee. Special knowledge was not required to understand the evidence or to make an informed decision regarding whether defendant inappropriately failed to warn of a dangerous condition. Although expert testimony may have been admissible to support plaintiff's failure to warn claim, it was not required. Plaintiff's premises liability failure to warn claim was not reliant on his design defect claim, and this claim was not defeated by his failure present expert testimony.

3. Notice

Defendant also argues that the trial court erred in denying its motion for directed verdict and JNOV regarding plaintiff's failure to warn claim because there was no evidence that defendant had actual notice or reason to know of any danger presented by the configuration of the golf course.

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if the owner: (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that the condition involves an unreasonable risk of harm to such invitees; (b) should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect invitees against the danger. [*Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000), on remand 243 Mich App 461; 624 NW2d 427 (2000).]

The landowner has a duty not only to warn the invitee of any known dangers, but to inspect the premises and warn of any discovered hazards. *Id.*

Here, there was testimony that golfers approaching the eighteenth tee via the cart path could not see golfers teeing off from the eighteenth tee until the approaching golfer was literally in front of the tee. By the time the approaching golfer was in position to see the eighteenth tee, that individual was in danger of being struck by a ball hit by a golfer on the tee. There were no signs warning golfers to proceed with caution. Furthermore, because the cart path was enclosed by a wooded area, it was not possible for a golfer approaching via the cart path to observe the eighteenth tee before being placed in danger of a ball struck from that tee.

Defendant argues that, because nobody had previously been struck by a golf ball hit from the eighteenth tee, defendant had no notice of the allegedly dangerous condition. In support of its argument, defendant cites several cases holding that, in order for a storekeeper to be liable for a dangerous condition not caused by the storekeeper, he must have known of the condition, or the condition must have existed for a sufficient length of time that he should have known of it. See, e.g., *Clark v Kmart Corp*, 465 Mich 416; 634 NW2d 347 (2001), on remand 249 Mich App 141; 640 NW2d 892 (2002) (where the evidence established that spilled grapes had been on the floor of the store for at least an hour before the accident, the evidence was sufficient for the jury to find that the dangerous condition existed for a sufficient period of time for the defendant to have known of its existence).

The cases cited by defendant are inapplicable to the present case. Unlike spilled or dropped goods on the floor of a grocery store, the configuration of the golf course is a static condition; it does not suddenly occur and create a dangerous condition without the landowner's knowledge.[2] There is no dispute that defendant was aware of the configuration of the golf course in this case; defendant routinely inspected the eighteenth tee. Contrary to defendant's assertion, a plaintiff is not required to show that a dangerous condition caused a prior injury in order to establish that a landowner was aware or should have been aware of the hazard. Furthermore, as discussed, expert testimony is not required to show that a landowner should have known that a condition was dangerous. Therefore, we conclude that the trial court did not err when it determined that there was sufficient evidence introduced at trial to establish that defendant knew or should have known of a dangerous condition between the seventeenth green and the eighteenth tee.

4. "Recklessness" Standard

Defendant next argues that the trial court erred in denying its motion for directed verdict and JNOV, because the "recklessness" standard of care set forth in *Ritchie-Gamester, supra*

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[2] Arguably, the configuration of the golf course would change with the placement of the tee markers on the eighteenth tee. There was testimony to suggest that the dangerous condition on the eighteenth tee could have been alleviated had the tee markers been placed at the front of the tee box, thus making the golfers teeing off visible to persons approaching the tee from the wooded area of the cart path. Significantly, the placement of the tee markers was a matter within the control of the defendant. Thus, defendant actually created the dangerous condition of allowing unsuspecting golfers to approach the front of a tee box without warning that other golfers may be teeing off.

should extend to sports facilities, and there is insufficient evidence that defendant's conduct was reckless. We disagree. In *Ritchie-Gamester, supra* at 89, our Supreme Court adopted "reckless misconduct as the minimum standard of care for *coparticipants* in recreational activities." (Emphasis added.) Defendant argues that *Benejam v Detroit Tigers, Inc*, 246 Mich App 645; 635 NW2d 219 (2001), supports the argument that the recklessness standard should extend from coparticipants in recreational activities to premises liability cases involving sports facilities. In *Benejam, supra* at 649, this Court adopted the "limited duty" rule: a baseball stadium proprietor cannot be liable for spectator injuries if it has satisfied the "limited duty" to erect a screen to protect the most dangerous area of the spectator stands, and to provide a number of seats in this area sufficient to meet the ordinary demand for protected seats.

We conclude that the holding in *Benejam* does not extend the *Ritchie-Gamester* "recklessness" standard to owners of sports facilities. First, the limited duty rule adopted in *Benejam* applies to baseball, where the zone of danger in the stadium is well-defined, not golf, where hazardous areas are not well-defined. Second, *Benejam* does not imply that baseball stadium proprietors, much less the owners of other sports facilities, should be held to a recklessness standard of care. *Id.* at 654 ("the limited duty rule does not ignore or abrogate usual premises liability principles. . . . The limited duty precedents 'do not eliminate the stadium owner's duty to exercise reasonable care . . . .' "). Instead, the limited duty rule merely "identifies the duty of baseball stadium proprietors with greater specificity than the usual 'ordinary care/reasonably safe' standard provides." *Id.* Third, this Court pointed out that *Ritchie-Gamester* was not directly on point because it involved a coparticipant in a recreational activity, rather than a spectator. *Id.* at 654-655. Therefore, we reject defendant's argument that the recklessness standard of care for coparticipants in recreational activities set forth in *Ritchie-Gamester* should also apply to sports facility owners in premises liability cases.

B. Damages

1. Reduction of Future Damages

Finally, defendant argues that plaintiff's future damages award should have been reduced to its present cash value by the compounded reduction method rather than the simple reduction method, because compounded reduction method is more accurate. We disagree. In *Nation v W D E Electric Co*, 454 Mich 489, 499; 563 NW2d 233 (1997), our Supreme Court rejected this argument, holding that "future damages under [MCL 600.6306] are to be reduced to present cash value using the same simple interest that has been employed under the common law for at least eighty years in Michigan." This Court is bound by the Supreme Court's decision in *Nation. Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993).

2. Allocation of Fault to Harris

On cross-appeal, plaintiff argues that, under *Jones v Enertel, Inc*, 254 Mich App 432; 656 NW2d 870 (2002), Harris's percentage allocation of fault should not have been deducted from the damages award, because defendant did not, and could not, give notice that Harris was a non-party at fault under MCR 2.112(K). As an initial matter, defendant argues that plaintiff's argument is barred under res judicata and the law of the case doctrine. We conclude that neither res judicata nor the law of the case doctrine apply in this case.

"Res judicata serves to bar any subsequent action where the first action was decided on its merits, the second action was or could have been resolved in the first action, and both actions involve the same parties or their privies." *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 376; 652 NW2d 474 (2002). This appeal does not involve two separate actions, but involves two separate *appeals* involving the same suit. Therefore, res judicata does not apply to this case.

This Court has explained the law of the case doctrine as follows:

> "The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. Thus, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case. The primary purpose of the doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." [*Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 91; 662 NW2d 387 (2003), quoting *Ashker v Ford Motor Co (After Remand)*, 245 Mich App 9, 13; 627 NW2d 1 (2001).]

The law of the case only applies to issues actually decided, either implicitly or explicitly, in the prior appeal. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000).

In Docket No. 242153, plaintiff applied for leave to appeal the judgment in this case, arguing that fault could not be assigned to Harris, because defendant never filed a notice of non-party at fault as required by MCR 2.112(K). This Court denied plaintiff's application "for lack of merit in the grounds presented." *Auito v Harris*, unpublished order of the Court of Appeals, entered September 30, 2002 (Docket No. 242153). However, regardless whether an issue was actually decided in the prior appeal, the law of the case doctrine does not apply where there has been a change in the law after the initial decision of the appellate court. *Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 138; 580 NW2d 475 (1998). Plaintiff argues that, under *Jones, supra*, which was decided after this Court denied plaintiff's application for leave to appeal in Docket No. 242153, Harris could not be a non-party at fault under MCR 2.112(K), because he had been dismissed from the action.

In *Jones, supra* at 433, the plaintiff sued a contractor and the city of South Lyon after she tripped and fell on a sidewalk. The trial court dismissed the plaintiff's claims against the contractor, holding that the danger was open and obvious. *Id.* The trial court then ultimately denied the plaintiff's motion to name the contractor as a nonparty at fault under MCR 2.112(K), because the contractor did not owe a duty to the plaintiff due to the open and obvious condition of the sidewalk. *Jones, supra* at 434. This Court agreed with the trial court, holding that "the adoption of a comparative negligence doctrine does not act to create negligence where none existed before. . . . Similarly, a party adjudicated to be without fault may not have fault allocated to him under the guise of the doctrine of several liability." *Id.* at 437. This Court concluded that "[a]bsent a legal duty to plaintiff, [the contractor] could not be named a nonparty at fault in this negligence action." *Id.* at 438. Because *Jones* changed the law regarding this issue, the law of the case doctrine does not apply in this case.

We conclude that the present case is controlled by *Jones*, and that Harris, as a dismissed party who did not breach his duty to plaintiff, could not be properly named as a nonparty at fault and included in the allocation of fault. The trial court dismissed plaintiff's claims against Harris because Harris did not act recklessly as a matter of law and was therefore not liable for plaintiff's injuries. In order to establish a prima facie negligence claim, the following must be proven: (1) a duty, (2) a breach of that duty, (3) proximate cause, and (4) damages. *Jones, supra* at 436-437. Under *Ritchie-Gamester, supra* at 89, Harris had a duty not to act recklessly toward the other golfers. The trial court determined that he did not breach that duty as a matter of law. As discussed in *Jones, supra* at 437, the comparative negligence doctrine does not create negligence where none existed, and because Harris was adjudicated to be without fault, fault may not be allocated to him under the comparative negligence doctrine. Because Harris did not breach his duty to plaintiff, he should not have been named a nonparty at fault in this action.

Plaintiff requests that this Court modify the judgment "insofar as its determination of damages reflects an allocation of fault to a nonparty[.]" While we agree with plaintiff that the jury improperly allocated five percent of the fault to Harris, we may not merely modify the judgment by assigning to either party this five percent fault, as the allocation of fault is a task for the trier of fact. MCL 600.2957(1). Therefore, the portion of the judgment allocating five percent fault to Harris is vacated, and the matter is remanded to the trial court for a new trial to reallocate the five percent fault that the jury erroneously assigned to Harris. However, the total amount of damages found in the jury verdict, as well as the allocation of fault to parties other than Harris, is affirmed.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra