STATE OF MICHIGAN

COURT OF APPEALS

DALAL DAHER,

Plaintiff-Appellee,

v

AL-SAHA RESTAURANT INC,

Defendant-Appellant,

and

BADIE MUNASSER and TALAH PEZ,

Defendants.

UNPUBLISHED
May 20, 2021

No. 352995
Wayne Circuit Court
LC No. 17-009454-NO

Before: MARKEY, P.J., and M. J. KELLY and SWARTZLE, JJ.

PER CURIAM.

In this premises-liability action, defendant, Al-Saha Restaurant, appeals by right a judgment entered following a jury verdict awarding plaintiff, Dalal Daher, $260,732.87. For the reasons stated in this opinion, we affirm.

I. BASIC FACTS

In May 2015, defendants Badie Munasser and Taleh Paz were co-owners of the Al-Saha Restaurant.[1] Relevant to this appeal, on May 10, 2015, Munasser was working as a cook at the restaurant. Daher, who had been a waitress and a cashier at the restaurant for approximately three and a half years to four years, was the only waitress working that day. She explained that her shift had started at 10:00 a.m., and that, at 11:00 p.m., she closed the cash register, turned off the open sign, and locked the front door. The busboy began to mop the floors using a soapy, wet mixture.

[1] Daher's claims against Munasser and Paz were dismissed with prejudice and they are not parties to the present appeal.

Munasser told Daher that his friends were coming over to eat, and, although the restaurant was closed, those friends were allowed in and sat themselves in a booth in an area of the restaurant where the floor was "clean and wet still." Daher, who was standing behind the cash register, told Munasser that she could not take food to his friends because the floor was wet and slippery. She also noted that it was past closing time and questioned why he had let them in while the floor was wet. Because she believed it would be dangerous, Daher refused two times to take the food, but Munasser repeatedly told her to do it and she eventually complied because he was "the boss."

Sometime near 11:30 p.m., Daher took three plates of hot food toward Munasser's friends. In route, she slipped, fell, and landed on her arms. As a result of her fall, she sustained a significant facture of her elbow area. Daher testified that she was told she needed surgery within 2 to 3 days. She explained that although she did not have any insurance, Munasser told her he would pay for her medical bills. After she showed him that the surgery was anticipated to cost $45,000, he told her that was too expensive and directed her to Dr. Ramsey Hammoud. Dr. Hammoud testified that he performed the surgery, and he opined that it was a successful surgery because the elbow function restored. He explained that the fracture occurred in the olecranon process, which he described as "very important in kind of hinging into the elbow and [allowing] the motion of the elbow and extension and flexion." Dr. Hammoud further explained that the cartilage in Daher's elbow area was also damaged, so it was "a given" that no matter "how well the joint is fixed or repaired, there is going to be some degree of arthritis. In particular, he testified that the risk from disrupting the cartilage layer is that post-traumatic arthritis can develop, and he discussed that with Daher when he first met with her. He added that "[t]he fact that she still complains of pain" four years after sustaining the injury indicates that his initial assessment of arthritis in the elbow was correct. He explained that arthritis progresses with time and opined with a reasonable degree of medical certainty that she would continue to have pain in the future. He opined that it was "fair to say" that the problems she was experiencing would be permanent.

Daher testified that Dr. Hammoud told her that her post-traumatic arthritis was going to be permanent. She explained that before the accident she was a strong, hard-working waitress, but now she cannot carry heavy trays, had to stop working out at the gym, and must wear long-sleeved shirts to cover the scar on her elbow. She added that she is 51 years old, has no one to help take care of her, and is worried that she will be unable to care for herself in the future because of the pain.

The jury returned a verdict in Daher's favor. Subsequently, Al-Saha Restaurant filed a motion for judgment notwithstanding the verdict (JNOV) or, in the alternative, a new trial. The trial court denied the motion. This appeal follows.

II. JNOV

A. STANDARD OF REVIEW

Al-Saha Restaurant argues that the trial court erred by denying its motion for a JNOV. A trial court's decision to deny a motion for a JNOV is reviewed de novo. *Nahshal v Fremont Ins Co*, 324 Mich App 696, 718; 922 NW2d 662 (2018). A JNOV motion is essentially a challenge "to the sufficiency of the evidence in support of a jury verdict in a civil case." *Taylor v Kent Radiology, PC*, 286 Mich App 490, 499; 780 NW2d 900 (2009). Thus, we must "review the

evidence and all legitimate inferences in the light most favorable to the nonmoving party." *Id*. (quotation marks and citation omitted). The motion should be granted only if the evidence viewed in the light most favorable to the nonmoving party fails to establish a claim as a matter of law. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). "If reasonable persons, after reviewing the evidence in the light most favorable to the nonmoving party, could honestly reach different conclusions about whether the nonmoving party established his or her claim, then the question is for the jury." *Taylor*, 286 Mich App at 499.

B. ANALYSIS

"A claim based on the condition of the premises is a premises liability claim." *Finazzo v Fire Equipment Co*, 323 Mich App 620, 626; 918 NW2d 200 (2018). A premises possessor generally "owes a duty to an invitee to exercise reasonable care to protect the invitee from an 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 duty to protect, however, does not extend to dangerous conditions on the land that are open and obvious unless there are special aspects of that condition. *Id*. at 516-517. A danger is open and obvious if "it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012). "Special aspects exist when an open and obvious hazard remains unreasonably dangerous or when it is effectively unavoidable." *Wilson v BRK, Inc*, 328 Mich App 505, 513; 938 NW2d 761 (2019). "[W]hen a plaintiff demonstrates that a special aspect exists or that there is a genuine issue of material fact regarding whether a special aspect exists, tort recovery may be permitted if the defendant breaches his duty of reasonable care." *Hoffner*, 492 Mich at 463.

In *Hoffner*, our Supreme Court examined what constituted an effectively unavoidable hazard. The Court explained:

> Unavoidability is characterized by an *inability to be avoided*, an *inescapable* result, or the *inevitability* of a given outcome. Our discussion of unavoidability in *Lugo* was tempered by the use of the word "effectively," thus providing that a hazard must be unavoidable or inescapable in effect or for all practical purposes. Accordingly, the standard for "effective unavoidability" is that a person, for all practical purposes, must be required or compelled to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a choice whether to confront a hazard cannot truly be unavoidable, or even effectively so. [*Hoffner*, 492 Mich at 468 (footnotes omitted).]

Thus, in cases in which invitees have a practical alternative to confronting a dangerous hazard, it has been determined that the condition is not effectively unavoidable. See *Joyce v Rubin*, 249 Mich App 231, 242; 642 NW2d 360 (2002) (holding that a slippery sidewalk was not effectively unavoidable because the plaintiff could have returned another day to collect her personal items and because the plaintiff testified that she could have used an alternate route to avoid the snow-covered sidewalk); *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 6-7; 649 NW2d 392 (2002) (holding that slippery steps at a college dormitory were not effectively unavoidable because there was a close, alternate route into the building); *Hoffner*, 492 Mich at 469, 473 (holding that a slippery sidewalk in front of a fitness center was not effectively unavoidable

because, although there was no alternative route to enter the building, the plaintiff nevertheless had a choice as to whether she would confront the hazard); and *Wilson*, 328 Mich App at 515-516 (holding that an entranceway step at a bar was not effectively unavoidable because the plaintiff could have chosen not to patronize that bar).

Yet, in cases where a person is trapped in a building and thus compelled to confront a hazard in order to exit, the dangerous condition might be effectively unavoidable. For example, in *Lugo*, 464 Mich at 518, our Supreme Court provided the following example of a hazard that is effectively unavoidable:

> An illustration of such a situation might involve, for example, a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable. [*Lugo*, 464 Mich at 518.]

Notably, the Supreme Court did not require that the only exit for the building be the one that was covered in standing water. Rather, notwithstanding that there might be an alternate route from the building, it was the availability of that route to the customer, i.e. "one exit for the general public," that was relevant. The Supreme Court also did not require the customer to make nonpractical choices to avoid the hazard, such as remaining in the store until the standing water covering the floor was removed.

A condition is also effectively unavoidable if a person is compelled by extenuating circumstances to confront the hazard. See *Hoffner*, 492 Mich at 473 (holding, in part, that the hazard the plaintiff faced was not effectively unavoidable because she was not "compelled by extenuating circumstances . . . ."). For example, in *Lymon v Freedland*, 314 Mich App 746, 762-763; 887 NW2d 456 (2016), this Court found that an ice- and snow-covered driveway was effectively unavoidable because extenuating circumstances compelled the plaintiff to attempt to enter the defendant's premises to perform her work as a home healthcare aid. Distinguishing *Hoffner*, this Court held:

> Contrary to *Hoffner*, [492 Mich 460], in this case, there was a question of fact as to whether plaintiff was compelled to confront the hazardous risk posed by the snowy and icy conditions at the Freedland home. A reasonable juror could conclude that, unlike the plaintiff in *Hoffner*, plaintiff in this case did not have a choice about whether to confront the icy conditions. As a home healthcare aide, plaintiff did not have the option of abandoning her patient, an elderly woman who suffered from dementia and Parkinson's disease. Plaintiff did not confront the hazard merely because she desired to participate in a recreational activity; instead, a rational juror could conclude that she was "compelled by extenuating circumstances" and had "no choice but to traverse . . . [the] risk." *Id*. at 473. [*Lymon*, 314 Mich App at 763-764.]

On appeal, Al-Saha Restaurant argues that the trial court erred by determining that the fact that Daher's employer ordered her to confront the hazard made the hazard effectively unavoidable. At the outset, this Court has held that "[t]he mere fact that a plaintiff's employment might involve

facing an open and obvious hazard does not make the open and obvious hazard effectively unavoidable." *Bullard v Oakwood Annapolis Hosp*, 308 Mich App 403, 412; 864 NW2d 591 (2014). In *Bullard*, however, the facts showed that, notwithstanding that the plaintiff was required by his employment to inspect a generator on a roof, he had a number of practical alternatives to facing the danger posed by the ice on the roof. *Id*. at 412. In holding that the danger was not effectively unavoidable, this Court carefully examined the facts and circumstances surrounding the plaintiff's injury and concluded that his injury was the culmination of a number of choices, including his decision to confront the hazard in the early morning while it was still dark and his decision to continue to attempt to traverse a slippery roof notwithstanding his ability to return inside at any time. *Id*. at 412-413. This Court also noted that the plaintiff "could have refused to inspect the generator" until the weather had improved because "the inspection was a monthly occurrence and not necessitated by an emergency." *Id*. at 413.

Here, unlike the plaintiff in *Bullard*, Daher did not have the option of waiting until the floor dried before bringing Munasser's friends their food. Daher was the only waitress present. She attempted to exercise a practical alternative to confronting the hazard posed by the wet and slippery floor. It is undisputed that she twice refused to take the food to Munasser's friends. Munasser did not accept her refusal. He repeatedly ordered her to take the food, and she testified that she finally did so because he was "the boss." There were no other practical alternatives. Daher was an employee of Munasser. Requiring her to quit (or get fired from) the job that she relied upon to support herself is not a practical alternative to confronting the hazard. Again, *Hoffner* focuses on whether the plaintiff has a choice, but also recognizes that the hazard must be "unavoidable of inescapable in effect *for all practical purposes*." *Hoffner*, 492 Mich at 468. Stated differently, the mere fact that an impractical alternative exists does not defeat a finding that a hazard is effectively unavoidable.

Next, Al-Saha Restaurant suggests that the condition was avoidable because Daher could have taken an alternate route to bring the food to Munasser's friends. Al-Saha Restaurant does not direct this Court to any evidence in the record supporting that assertion. And, even if such evidence existed, we must view the evidence in the light most favorable to Daher, the nonmoving party. Daher testified that Munasser's friends were seated in the area of the restaurant where the floor was wet and slippery. Again, that evidence was not controverted, and there is no testimony indicating that if she had walked toward the table from a different direction she would have been able to avoid the wet and slippery floor.

Al-Saha Restaurant also argues that Daher chose to confront the hazard because despite knowing that she had to deliver food to the tables in the wet and slippery section, she did not take any actions to alleviate the danger. For example, she did not attempt to dry the floor, nor did she ask the busboy to dry the floor. Absent from the argument, however, is any citation to caselaw indicating that a hazard should be considered avoidable if the invitee compelled or required to confront the hazard can, but does not, attempt to make the hazard less dangerous before proceeding. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Consequently, we consider this aspect of Al-Saha Restaurant's argument abandoned.

Moreover, it is undisputed that the Al-Saha Restaurant failed to maintain worker's compensation insurance or its equivalent as required by MCL 418.611. An employer who fails to comply with the insurance requirement of MCL 418.611 "is liable in tort for injuries to its employees." *State Farm Mut Auto Ins Co v Roe*, 226 Mich App 258, 265-266; 573 NW2d 628 (1997), citing MCL 418.641(2). If a plaintiff brings such a suit, "an employer may not assert as a defense the negligence of the employee, unless that negligence is wilful." *Smeester v Pub-n-Grub, Inc (On Remand)*, 208 Mich App 308; 527 NW2d 5 (1995), citing MCL 418.141. Here, the trial court determined that there was no evidence that any negligence on Daher's part was willful, and Al-Saha Restaurant does not direct us to any testimony supporting a finding of willful negligence. Again, this Court is not tasked with discovering the basis for an appellant's claims. *Mitcham*, 355 Mich at 203. So this aspect of Al-Saha Restaurant's claim is considered abandoned.

Al-Saha Restaurant also makes a cursory argument that the jury was not properly instructed because the trial court did not provide a written instruction in accord with M Civ JI 19.03. Before the jury was instructed, the court asked whether everyone agreed with M Civ JI 19.03; Al-Saha Restaurant's lawyer stated that he did and made no further objection related to it. Moreover, the record shows that the jury was, in fact, instructed in accord with M Civ JI 19.03. The court also stated that it would provide a written copy of those instructions to the jury. Although Al-Saha Restaurant suggests that this was not done, it has not directed us to any part of the record supporting that assertion. Again, a party may not simply announce an argument and then leave it to this Court to find support for it. *Micham*, 355 Mich at 203. Accordingly, this argument has been abandoned.

III. REMITTITUR

A. STANDARD OF REVIEW

Al-Saha Restaurant argues that the trial court abused its discretion by denying its motion for remittitur. Our review of a denial of remittitur is limited to the determination of whether an abuse of discretion occurred. *Majewski v Nowicki*, 364 Mich 698, 700; 111 NW2d 887 (1961). A trial court abuses its discretion when it chooses an outcome outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388, 719 NW2d 809 (2006).

B. ANALYSIS

In *Andreson v Progressive Marathon Ins Co*, 322 Mich App 76, 84; 910 NW2d 691 (2017), this Court explained:

> "Broadly defined, remittitur is the procedural process by which a verdict of the jury is diminished by subtraction." *Pippen v Denison Div of Abex Corp*, 66 Mich App 664, 674; 239 NW2d 704 (1976) (emphasis omitted). "As long as the amount awarded is within the range of the evidence, and within the limits of what reasonable minds might deem just compensation for such imponderable items as personal injuries sustained and pain and suffering, the verdict rendered should not be set aside." *Id*. at 675 (quotation marks and citation omitted).

The determination of whether the jury award was supported by the evidence "must be based on objective criteria relating to the actual conduct of the trial or the evidence presented." *Id*. (quotation marks and citation omitted).

Here, Al-Saha Restaurant challenges the part of the jury verdict awarding $200,000 for future non-economic damages, contending that it was not based on any evidence and was instead the product of passion, bias, or anger. We disagree.

Dr. Hammoud testified that it was a "given" that cartilage damage could lead to post-traumatic arthritis. He elaborated that post-traumatic arthritis is a progressive condition and that Daher would continue to experience pain in the future. He opined with a reasonable degree of medical certainty that the condition caused by her injury is permanent, and Daher, in fact testified that Dr. Hammoud had told her that her post-traumatic arthritis was permanent. Al-Saha Restaurant also stipulated that Daher, who was 51 at the time of the trial, was reasonably expected to live for 32 more years. Finally, Daher testified that she still suffers pain in her elbow, that it impacts her ability to perform her duties as a waitress, and that she has anxiety about her ability to support herself in the future due to her injury. Taken together, there is plainly evidentiary support for the jury's verdict. The trial court did not abuse its discretion by denying the motion for remittitur.

Affirmed. Daher, as the prevailing party, may tax costs. MCR 7.219(A).

/s/ Jane E. Markey
/s/ Michael J. Kelly
/s/ Brock A. Swartzle