STATE OF MICHIGAN

COURT OF APPEALS

CAROL J. DRAKE and GAYLE A. DRAKE,

Plaintiffs-Appellees,

v

K-MART CORPORATION, a Michigan corporation,

Defendant-Appellant.

UNPUBLISHED
December 20, 1996

No. 189099
LC No. 93-001896-NO

Before: Hood, P.J., and Neff and M. A. Chrzanowski,* JJ.

PER CURIAM.

Defendant appeals as of right from the August 28, 1995 order of judgment issued in favor of plaintiffs in the amount of $102,373.50. The judgment was entered pursuant to a jury verdict awarding damages to Carol Drake for the injuries she sustained as the result of defendant's negligence. We affirm.

I

Defendant first argues on appeal that the "open and obvious danger" doctrine bars plaintiff's claim. Plaintiff Carol Drake was injured in defendant's retail store when she fell over a flat-bed cart used to stock merchandise on the sales floor. Defendant admittedly raises the application of the open and obvious danger doctrine for the first time on appeal. Defendant pleaded the doctrine as an affirmative defense, but chose not to pursue the issue before the trial court. Nevertheless, the open and obvious danger defense went to the jury through the reading of SJI2d 19.03.

Issues raised for the first time on appeal ordinarily are not subject to review. *Garavaglia v Centra, Inc*, 211 Mich App 625, 628; 536 NW2d 805 (1995). As defendant has not presented any extraordinary circumstances that would merit review of this issue for the first time on appeal, this issue is not properly before this Court. Notwithstanding this, however, defendant would not prevail on the merits.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Whether the open and obvious danger doctrine applies to bar plaintiff's claim is a question of law reviewed de novo by this Court. See *Riddle v McLouth Steel Products,* 440 Mich 85, 95; 485 NW2d 676 (1992). As a general rule, a business invitor owes a duty to its customers to maintain its premises in a reasonably safe condition and to exercise ordinary care to keep the premises reasonably safe. *Schuster v Sallay*, 181 Mich App 558, 565; 450 NW2d 81 (1989). The "open and obvious danger" rule is a defensive doctrine that attacks the duty element of a negligence claim. *Riddle, supra,* at 95. The doctrine is based on the standard outlined in 2 Restatement Torts, 2d, § 343A(1), which 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*." [*Riddle, supra* at 94, emphasis added.]

Therefore, a business invitor owes no duty to warn or protect customers from dangers that are so obvious that invitees should be reasonably expected to discover them on their own. *Id*. Whether a danger is open and obvious depends upon whether it is reasonable to expect an average user with ordinary intelligence to discover the danger upon casual inspection. *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995). However, the duty of reasonable care continues if the invitor should anticipate the harm despite the invitee's knowledge or the obvious nature of the danger. *Novotney v Burger King (On Remand),* 198 Mich App 470, 473; 499 NW2d 379 (1993) (quoting *Riddle, supra,* at 95). Thus, even if there is no absolute duty to warn, the open and obvious doctrine does not relieve the invitor of his general duty of reasonable care to protect invitees against known or discoverable dangerous conditions. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 613; 537 NW2d 185 (1995).

In *Bertrand, supra* at 611, our Supreme Court quoted a portion of a comment accompanying § 343A of the Restatement, which stated that an invitor would have reason to expect harm to an invitee notwithstanding a known or obvious danger when the invitee's attention is distracted so that he or she will not discover what is obvious. This concept was embraced by our Supreme Court in *Jaworski v Great Scott, Inc*, 403 Mich 689; 272 NW2d 518 (1978). In *Jaworski,* the plaintiff slipped and fell on spilled cottage cheese in the dairy section of a grocery store. *Id*. at 695. In discussing whether the jury should have been instructed on contributory negligence, the Court stated:

> "The displays of merchandise in modern stores are so arranged and are intended to catch the customer's attention and divert him from watching the floor. . . . The public does not expect to shop at its own risk and it is unreasonable to expect a person in a retail store to use the same degree of lookout as he would on a public street." *Steinhorst v HC Prange Co*, 48 Wis 2d 679, 685-686; 180 NW2d 525, 528 (1970). [*Jaworski, supra* at 699.]

Moreover, because storekeepers intend for customers to focus their attention on the merchandise stocked on shelves and displays rather than the floor, customers are entitled to rely on the presumption that the proprietor will provide reasonably safe aisleways. *Id*. at 699-700.

We cannot conclude that an average user in this case could have discovered the danger upon casual inspection. Even if the flat-bed cart were determined to be "open and obvious," defendant's duty continued because defendant should have anticipated that plaintiff's attention would be focused on promotional signs and merchandise displays. Furthermore, the jury was instructed on the open and obvious danger doctrine, but nevertheless found defendant negligent. The jury must have found either that the cart was not "open and obvious," or that plaintiff was not in a position to discover the danger and protect herself against it despite its obvious nature. Because defendant owed plaintiff a duty of reasonable care, the "open and obvious danger" doctrine does not bar plaintiff's claim.

II

Defendant next argues on appeal that the trial court erred by admitting the expert testimony of safety engineer Walter Cygan. According to defendant, Cygan's testimony was superfluous and prejudicial because it gave "expert" status to key issues that could have been decided by the average person, such as whether defendant had violated its safety manual provisions, and whether the flatbed cart was a safety hazard.

According to MRE 702, expert testimony may be admitted "[i]f the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." This Court has held that the admission of expert testimony requires that: (1) the witness is qualified as an expert; (2) the expert's proposed testimony gives the trier of fact a better understanding of the evidence or assists in determining a fact in issue; and (3) the witness' testimony is from a recognized discipline. *Berryman v K mart Corp*, 193 Mich App 88, 98; 483 NW2d 642 (1992). Defendant challenges only the second requirement.

The critical inquiry is whether Cygan's testimony aided the jury in reaching its ultimate decision. *Id*. Expert testimony may be admitted not only if it is "needed" or "necessary," but also when it will assist the trier of fact. *Loeks Theatres v Kentwood*, 189 Mich App 603, 611; 474 NW2d 140 (1991), modified on other grounds 439 Mich 968 (1992). We will not reverse a trial court's decision to admit Cygan's testimony absent a clear abuse of discretion. *Green v Jerome-Duncan Ford, Inc*, 195 Mich App 493, 498; 491 NW2d 243 (1992).

Here, defendant maintained that the location of the flat-bed cart did not violate defendant's safety manual, and insisted that plaintiff's comparative negligence in not seeing the cart caused her injuries. Cygan was uniquely qualified to render an opinion regarding whether the cart's location created an unreasonable safety hazard or was a violation of defendant's own safety policy. Given Cygan's considerable experience identifying and evaluating hazards in industrial and retail settings, he certainly assisted the jurors in appraising these safety issues at trial. Cygan's usefulness as a safety

expert was further demonstrated by the fact that he worked in various K-mart stores analyzing similar types of customer accidents. The admission of Cygan's testimony was not a clear abuse of discretion.

III

Finally, defendant claims on appeal that evidence of plaintiff's hospitalization in the 1970's for psychiatric treatment should have been admitted to rebut plaintiff's claim of mental anguish. Defendant failed to demonstrate how plaintiff's hospitalization for psychological treatment was probative of the mental anguish suffered by plaintiff as the result of her injuries in this case. MRE 401. Moreover, any scintilla of probative value was outweighed by the danger of unfair prejudice and misleading the jury. MRE 403.

Plaintiff's hospitalization for psychological treatment occurred at least sixteen years ago. The hospitalization resulted from family related problems, and did not relate whatsoever to plaintiff's response to physical pain or unexplained physical pain. The evidence may have misled the jury to believe that plaintiff exaggerated or imagined the pain and injuries she suffered from the fall, and could very well have cast a shadow over the jurors' impression of plaintiff's character and credibility as a whole. Such a result would have been highly prejudicial to plaintiff given the age and questionable probative value of the evidence. Therefore, exclusion of the evidence was not an abuse of discretion. See *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993).

Affirmed.

/s/ Harold Hood
/s/ Janet T. Neff
/s/ Mary A. Chrzanowski