IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

JAMES FARRELL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N17C-12-301 JRJ
	)	
ALBERTSONS, LLC,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: February 24, 2020
Date Decided: July 6, 2020

Upon Defendant Albertsons, LLC's Motion for New Trial: **DENIED**.

Timothy E. Lengkeek, Esquire, Young Conaway Stargatt & Taylor, LLP, 1000 North King Street, Wilmington, Delaware 19801, Attorney for Plaintiff.

Richard D. Abrams, Esquire (argued) and Sean A. Dolan, Esquire, Mintzer, Sarowitz, Zeris, Ledva & Meyers, LLP, 919 North Market Street, Suite 200, Wilmington, Delaware 19801, Attorneys for Defendant.

Jurden, P.J.

I. INTRODUCTION

Before the Court is Defendant Albertsons, LLC's ("Albertsons") Motion for New Trial following a verdict for Plaintiff James Farrell ("Farrell") in a one-day jury trial.[1] Farrell was injured when he tripped and fell over a wheel stop on the sidewalk in front of Albertsons' Safeway store ("Safeway").[2] Albertsons argues the Court should throw out the jury verdict and grant it a new trial because the jury did not find Farrell contributorily negligent.[3]

II. FACTS

On September 28, 2017, Farrell was walking towards the entrance of the Safeway when he tripped and fell over a black concrete barrier that was in the middle of the sidewalk.[4] As a result of the fall, Farrell suffered injuries to his right elbow.[5] Farrell sued Albertsons, alleging it negligently permitted a dangerous condition to exist on its premises, failed to properly inspect and maintain the area, and failed to warn him of the dangerous condition.[6]

---

[1] Defendant Albertsons LLC's Motion for New Trial (Trans. ID. 64525921); Defendant Albertsons LLC's Amended Motion for New Trial ("Def. Am. Mot."), (Trans. ID. 64745825).
[2] Compl. ¶ 5 (Trans. ID. 61497451).
[3] Def. Am. Mot. at 2–3.
[4] Compl. ¶ 5. The black concrete barrier is a wheel stop for shopping carts and will be referred to *infra* interchangeably as a "wheel stop" or "concrete barrier."
[5] *Id.* ¶ 12.
[6] *Id.* ¶ 11.

On December 2, 2019, the case was tried before a jury. The jury heard testimony from Farrell and two experts who testified on his behalf. Albertsons did not call any witnesses.

Farrell's Testimony

Farrell testified that immediately before he tripped, he was looking straight ahead at the Safeway entrance, was not distracted, and was not carrying anything in his hands.[7] During Farrell's direct examination, his counsel introduced a black and white photograph ("Photo 1") of the sidewalk in front of the Safeway where Farrell tripped.[8] Photo 1 depicts a row of black shadows on the sidewalk cast by the pillars in front of the Safeway.[9] Farrell testified that the shadows looked like black lines, and the first black line in Photo 1 is what he believed to be the black concrete wheel stop he tripped over.[10] During cross-examination, Albertsons' counsel introduced a different black and white photograph of the sidewalk ("Photo 2"), which is a close-up of the wheel stop at issue.[11] Referring to Photo 2, Albertsons' counsel asked Farrell, as he did during Farrell's deposition, whether it was true that there was

[7] December 2, 2019 Trial Transcript ("Trial Tr.") at 49:22–51:4 (Trans. ID. 64752572).
[8] *Id.* at 53:14–16, 54:21–22, Trial Pl. Ex. 3 ("Photo 1"). Farrell testified he took the photograph immediately after his fall. Albertsons' counsel did not object to admitting Photo 1 into evidence.
[9] Photo 1. In its briefing, Albertsons attached color copies of the photos admitted at trial while the photos submitted to the jury were black and white.
[10] Trial Tr. at 53:20–54:5.
[11] *Id.* at 60:21-61:7, Trial Def. Ex. 1 ("Photo 2").

nothing to prevent him from seeing the concrete barrier.[12] Farrell responded, "[t]hat is true."[13]

Liability Expert's Testimony

Walter Green, Farrell's liability expert, testified that the placement of the wheel stop on the sidewalk was inappropriate and created a tripping hazard.[14] Green explained that the wheel stop should not have been placed in a pedestrian walkway because it is low to the ground and easily overlooked.[15] Green stated that the fact that the barrier was painted black did not do Farrell "any favors because, . . . for example, on the day of the incident, . . . a shiny, bright, and sunny day, the shadows themselves were casting black shadows across the walkway."[16] When examining Photo 2, Green testified that a pedestrian looking ahead at the entrance would not necessarily perceive the barrier because it would appear "very similar to the shadow."[17]

Medical Expert's Testimony

[12] *Id.* at 63:4–9.
[13] *Id.* at 63:10.
[14] Testimony of Walter Green ("Green Tr.") at 10:13–17 (Trans. ID. 64752572) ("[P]rimarily, the use of a wheel stop is typically used and intended to stop a car from pulling too far into a parking space. The use of a wheel stop on a pedestrian walkway, like the sidewalk, was inappropriate, and it created a tripping hazard.").
[15] *Id.* at 26:7–13.
[16] *Id.* at 26:16–20.
[17] *Id.* at 32:16–22.

Randeep Kahlon, M.D., an orthpaedic surgeon, testified that Farrell sustained a right elbow radial head fracture and a dislocated right elbow as a result of the fall.[18] Dr. Kahlon further testified that due to the severity of Farrell's injuries, he was required to undergo surgery in order to implant a prosthetic to replace his right radial head.[19] Dr. Kahlon concluded that Farrell's injuries were permanent in nature.[20]

Albertsons' Defense

Albertsons argued at trial that Farrell was contributorily negligent. It did not call any witnesses. It did not move for summary judgment on liability or for judgment as a matter of law. It stipulated to the jury instructions, which contained the following instruction with respect to contributory negligence:

> A business invitee must maintain a proper lookout for hazards on the premises. This duty implies a duty to see things that are in plain view. It is negligent not to see what is plainly visible if there is nothing to obscure one's vision. If you find James Farrell failed to maintain a proper lookout, you must find that he was contributorily negligent.[21]

[18] Trial Ct. Ex. 1 – Testimony of Randeep S. Kahlon, M.D., at 12:5–9.
[19] *Id.* at 19–32.
[20] *Id.* at 47:1–6.
[21] Jury Instructions (Trans. ID. 64471995); Trial Tr. at 69:8–70:7, 80:16–81:2. With respect to Albertsons' duty, the jury was instructed as follows:

> A business owner owes a duty to the public to see that parts of the premises ordinarily used by customers are kept in reasonably safe condition. With this duty, the business owner is responsible for injuries that are caused by defects or conditions that the business had actual notice of, or that could have been discovered by reasonably prudent inspection.

Trial Tr. at 76:16–77:2.

The jury returned a verdict in favor of Farrell, finding Albertsons entirely at fault for Farrell's injuries.[22] Albertsons now seeks a new trial.

III. STANDARD OF REVIEW

Under well-established Delaware law, there is a high bar for granting a new trial.[23] When considering a motion for new trial, the Court is mindful that there is a presumption the jury verdict is correct,[24] and historically the Court has exercised its power to grant a new trial with caution and extreme deference to the findings of a jury.[25] For this reason, barring exceptional circumstances, the Court will not set aside a jury's verdict unless it contradicts the great weight of the evidence, or the Court is convinced the jury disregarded the applicable rules of law.[26] Upon review, the Court views the record from the perspective most favorable to the jury's verdict.[27]

---

[22] Special Verdict Form (Trans. ID. 64478298).

[23] *See Galindez v. Narragansett Housing Assoc., L.P.*, 2006 WL 3457628, at *1 (Del. Super. Ct. Nov. 28, 2006).

[24] *Id.* at *2.

[25] *Amalfitano v. Baker*, 794 A.2d 575, 577 (Del. 2001); *see Storey v. Camper*, 401 A.2d 458, 460 (Del. 1979) (holding that the Court's discretion to grant a motion for new trial should be sparingly and cautiously and only in cases in which the evidence preponderates heavily against the verdict); *see also* Del. Const. Art. IV, § 11(1)(a) ("[T]he findings of the jury, if supported by evidence, shall be conclusive.").

[26] *Galindez*, 2006 WL 3457628, at *1; *see Walker v. Shoprite Supermarket, Inc.*, 864 A.2d 929, 2004 WL 3023089, at *2 (Del. 2004) (TABLE) (quoting *Mercedes-Benz of N. Am., Inc. v. Norman Gershamn's Things to Wear, Inc.*, 596 A.2d 1358, 1362 (Del. 1991)) ("The factual findings of a jury will not be disturbed if there is 'any competent evidence upon which the verdict could reasonably be based.'").

[27] *Walker*, 2004 WL 3023089, at *2 (quotations omitted) (citation omitted); *see Clean Harbors, Inc. v. Union Pac. Corp.*, 2017 WL 5606953, at *1 (Del. Super. Ct. Nov. 15, 2017), *aff'd*, 201 A.3d 1161 (Del. 2019) ("In the face of any reasonable difference of opinion, courts will yield to the

IV. DISCUSSION

Under Delaware law, a "[business owner] owes a duty to the public to see that portions of its premises ordinarily used by its customers are kept in a reasonably safe condition for their use."[28] This duty includes employing reasonable measures to warn or protect its customers from dangerous conditions that the business owner knew or should have known existed on its premises.[29] A business owner who fails to maintain this duty is liable for those injuries caused by such dangerous conditions existing on its premises.[30] Conversely, business invitees are under the affirmative obligation to exercise reasonable care while walking in the store.[31] "It is negligent for a [business invitee] not to see what is plainly visible when there is nothing to obscure his or her view."[32]

A. The Jury Verdict Is Not Contrary To The Jury Instructions.

Albertsons argues it is entitled to new trial because the verdict is contrary to the jury instructions, and therefore, the jury must have disregarded or misunderstood

jury's decision."); *see also Galindez*, 2006 WL 3457628, at *1 ("[T]he Court cannot ignore the legitimate role of the jury.").

[28] *Walker*, 2004 WL 3023089, at *2 (citation omitted).

[29] *Duran v. Eastern Athletic Clubs LLC*, 2018 WL 3096612, at *2 (Del. Super. Ct. June 7, 2018).

[30] *Winkler v. Del. State Fair, Inc.*, 608 A.2d 731, 1992 WL 53412, at *3 (Del. 1992) (TABLE).

[31] *Walker*, 2004 WL 3023089, at *2.

[32] *Id.* (citing *Winkler*, 608 A.2d 731, 1992 WL 53412, at *2); *see Jones v. Clyde Spinelli, LLC*, 2016 WL 3752409, at *2 (Del. Super. July 8, 2016) (explaining that generally, the questions of whether a dangerous condition exists and whether the danger was apparent to the plaintiff are for the jury).

the instructions.[33] In Albertsons' view, the jury was obligated to find Farrell contributorily negligent as a matter of law because Farrell's testimony establishes he was negligent by not seeing the open and obvious condition of the wheel stop.[34]

In opposition, Farrell asserts that Albertsons' argument is undermined by the fact it never moved for summary judgment or judgment as a matter of law before or after the close of evidence at trial with regard to Farrell's alleged contributory negligence.[35] In addition, Farrell argues that the evidence establishes that Farrell was maintaining a proper lookout, which, in turn, demonstrates the jury understood the Court's instructions and correctly applied that law to the facts.[36]

The Court does not find the evidence presented at trial established Farrell was negligent as a matter of law.[37] Albertsons' post trial argument that the jury should have found Farrell negligent as a matter of law rests solely on the following testimony from Farrell:

> Defense Counsel: [Y]ou told me at your deposition before that, as you approached the store, you said that you were looking straight ahead, and I asked you whether there was anything to prevent you from seeing that concrete barrier, and you told me, no, there was not. Is that true?

[33] Def. Amend. Mot. at 3.
[34] *Id.* at 2–3.
[35] Plaintiff's Opposition to Defendant's Motion for a New Trial ("Pl. Opp.") at 2 (Trans. ID. 64541381).
[36] *Id.* at 3.
[37] Apparently, neither did Alberstons at the time, or presumably it would have moved for Summary Judgment or Judgment as a Matter of Law.

Farrell: That is true.[38]

Albertsons claims this testimony alone establishes Farrell was not maintaining a proper lookout prior to his fall, and therefore, the jury was obligated to find him negligent.[39] But in advancing this argument, Albertsons ignores the following testimony from Farrell:

Plaintiff's Counsel:	Where were you looking right before you fell?
Farrell:	I was looking straight ahead . . . at what I would call up towards the door.
Plaintiff's Counsel:	And why were you looking up towards the door?
Farrell:	Well, because . . . I want to make sure I know exactly where that entrance is, and I'm looking for people, or - - people coming out with their carts, which I would have seen, obviously.
Plaintiff's Counsel:	Did you have anything in your hands?
Farrell:	I did not.
Plaintiff's Counsel:	You weren't using your cell phone at the time?
Farrell:	No.
Plaintiff's Counsel:	Were you distracted by anything?
Farrell:	No.[40]

[38] Trial Tr. at 63:4–10.
[39] Def. Amend. Mot. at 2–3.
[40] Trial Tr. at 50:11–51:4.

Farrell did not testify he was not paying attention to where he was walking before he fell. To the contrary, Farrell testified he was looking ahead at the entrance of Safeway while he was walking, looking out for people and shopping carts. Based on this testimony and Photo 1, a reasonable jury could find that Farrell was keeping a proper lookout, but the black wheel stop was not visible because it blended in with the shadows cast by the pillars. Based on the record before it, the Court does not find "overwhelming uncontroverted evidence" supporting a finding that Farrell was negligent as a matter of law.[41]

At trial, the jury was asked to determine whether a dangerous condition existed, whether the wheel stop was "plainly visible," and whether Farrell maintained a proper lookout.[42] The Court and counsel for both parties reviewed the jury instructions and Albertsons' counsel had no objections.[43] Now, after losing at trial, Albertsons argues that the jury instructions were incomplete. According to Albertsons, the Court should have included (on its own, since Albertsons did not request that this be added) the following instruction:

[41] *See Winkler*, 608 A.2d 731, 1992 WL 53412, at *2 (affirming trial court's finding that plaintiff was negligent as a matter of law because there was "overwhelming uncontroverted evidence" elicited at trial that supported no other conclusion but for the trial court to find the plaintiff was negligent as a matter of law).
[42] *See* Jury Instructions; *see also* Trial Tr. at 80:16–81:2.
[43] *See* Trial Tr. at 69:8–70:7.

> A person is under the affirmative obligation to watch where he or she is walking, to exercise the sense of sight in a careful and intelligent manner to observe what a reasonable person would see.[44]

Albertsons argues that if the jury had been given this additional instruction, it would have found Farrell contributorily negligent. Putting aside for the moment the fact that Albertsons stipulated to the jury instructions and now, in hindsight, wants to supplement the jury instructions, the Court does not find that the jury instructions given to the jury were erroneous or incomplete. Moreover, the Court does not find that the addition of this language would have resulted in a finding of negligence on Farrell's part.

Albertsons wants a do-over with a different result. The trial judge recalls this trial, and specifically recalls Farrell was a likeable, credible witness. He did not embellish or overstate his injuries. The verdict indicates the jury believed Farrell's testimony and the testimony of his liability expert. The instructions given to the jury correctly set forth the law of comparative negligence for a business invitee.[45] If Albertsons thought the jury instructions were incomplete, it should have said so before the jury was charged.[46] Albertsons has not met the high bar for a new trial. Based on the evidence submitted at trial and the jury instructions, which correctly

---

[44] *Walker*, 2004 WL 3023089, at *2.
[45] *See* DEL. P.J.I. CIV. § 15.3 (2000); *see also Russell v. K-Mart Corp.*, 761 A.2d 1, 5 (Del. 2000) ("Although a party is not entitled to a particular jury instruction, a party does have the unqualified right to have the jury instructed with a correct statement of the substance of the law.").
[46] *See* Trial Tr. at 69:8–70:7.

state the applicable law, the Court finds that the verdict demonstrates the jury understood and complied with the jury instructions.

B. The Jury Verdict Is Not Against The Great Weight Of The Evidence.

Albertsons argues in the alternative that even if the jury understood the applicable law, a new trial is warranted because the verdict is against the great weight of evidence.[47] The Court disagrees. The jury obviously found Farrell's testimony credible, and his testimony — coupled with Green's testimony and Photo 1 — support the jury's conclusion that Farrell maintained a proper lookout and exercised reasonable care, and that the black wheel stop was not in "plain view," but camouflaged as a result of the shadows cast by the pillars.

Green's unrebutted testimony established that the industry standard for safe walkway conditions does not permit concrete barriers like the one at issue here to be placed on pedestrian walkways.[48] In addition, Green testified that the placement of the concrete barrier on the sidewalk created a tripping hazard for pedestrians.[49] A reasonable jury could find (and did) that, based on Green's testimony, Albertsons was negligent by failing to maintain its premises in a reasonably safe condition.

[47] Def. Amend. Mot. at 4.
[48] Green Tr. at 9:9–10:17.
[49] *Id.* at 10:12–17. Green explained that, generally, a concrete barrier of the type at issue here should not have been placed on the sidewalk because "it is low to the ground" and "easily overlooked" by pedestrians. *Id.* at 26:7–13.

Moreover, Farrell testified the shadows on the sidewalk looked like black lines and that one of the black lines is what he believed to be the black concrete barrier that he tripped over. A reasonable jury looking at Photo 1 could find that the barrier looked like a shadow, not a raised concrete wheel stop. Albertsons had the opportunity to object to the admission of Photo 1. It did not. Albertsons had the opportunity to question Farrell about the shadows on the sidewalk. It did not.[50]

With regard to proximate cause and damages, Dr. Kahlon's unrebutted medical testimony established the nature and severity of Farrell's injuries caused by the trip and fall. Dr. Kahlon described the treatment of the dislocated, right elbow fracture and torn medial collateral ligament that Farrell sustained and the permanency of such injuries.

As noted earlier, the Court is cautious when deciding whether to set aside a jury verdict, and will do so only in those exceptional circumstances where the evidence preponderates so heavily against the jury verdict that no reasonable jury could have reached the result.[51] Upon review of the evidence and viewing it in the light most favorable to the jury's verdict,[52] the Court finds there was sufficient evidence for a reasonable jury to find that Albertsons was negligent by failing to

[50] Albertsons' cross-examination of Farrell was very brief with respect to the manner in which he was walking and where he was looking prior to the fall.
[51] *See Storey*, 401 A.2d at 460.
[52] *See id* at 465; *see also Walker*, 2004 WL 3023089, at *2 ("Upon review, this Court views the record from the perspective most favorable to the jury's verdict.").

keep the walkway in a reasonably safe condition and such negligence proximately caused Farrell's injuries. Moreover, based on the evidence presented at trial, a reasonable jury could also find that Farrell was exercising reasonable care when he tripped and fell, and therefore, was not negligent. Thus, concluding that the evidence sufficiently supports the jury's verdict and a reasonable jury could have reached such a result, the Court will not set aside the jury verdict.

V. CONCLUSION

For the reasons explained above, the Court finds the jury did not disregard the applicable rules of law and the jury verdict does not contradict the great weight of the evidence. Therefore, Defendant Albertsons, LLC's Motion for New Trial is **DENIED**.

IT IS SO ORDERED.

Jan R. Jurden

Jan R. Jurden, President Judge

cc: Prothonotary