RENDERED: September 20, 1996; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 94-CA-2248-MR

BRIAN BRUENDERMAN — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS J. KNOPF, JUDGE
ACTION NO. 90-CI-8359

THOMAS E. ENGLE; CHEVRON U.S.A, INC.; GEORGE J. HUFF, JR., a/k/a SAMUEL HUFF; THE VENDO COMPANY; and PEPSI COLA GENERAL BOTTLERS, INC. — APPELLEES

OPINION AFFIRMING

* * * * * * * *

BEFORE: GUDGEL, HUDDLESTON, and SCHRODER, Judges.

GUDGEL, JUDGE: This is an appeal from a judgment entered by the Jefferson Circuit Court in a personal injury action. On appeal, appellant contends that the court erred by improperly limiting his right to discovery, by failing to grant his motion for a mistrial following opening statements, and by granting three of the appellees a directed verdict. We disagree with all of appellant's contentions. Hence, we affirm.

On the evening of October 13, 1989, and continuing into the early morning hours of October 14, appellant Brian Bruenderman, appellee George (Sam) Huff, and two companions were

involved in a night of underage drinking, petty theft, and vandalism that culminated in appellant's injury when at least one of the men tried to steal soft drinks by tipping a vending machine. This action followed.

The proof at trial showed that after drinking beer at Shenanigan's bar until closing, appellant and his friends drove around the Highlands area of Louisville. During this period they stole a wicker table from a homeowner's porch, picked up traffic pylons from the side of the road, tore down banners advertising beer at a convenient store, and stole campaign yard signs. They finally ended up at appellee Tom Engle's Chevron Service Station on the corner of Westport Road and Hubbards Lane. After an unsuccessful attempt, by either Huff alone or Huff in concert with appellant, to tilt a Coke machine in order to obtain free Cokes, a Pepsi machine was tried next. There was affixed upon the Pepsi machine a label clearly warning not only that tipping or rocking the machine could cause serious injury or death, but also a statement that the machine contained an antitheft device which prevented persons from obtaining free products. According to Huff, another companion, and a female friend of appellant, appellant was injured when he, along with Huff, tried to rock the Pepsi machine and steal the product. Because soft drink vending machines can weigh in excess of 1,200 pounds, once the machine was rocked past its point of equilibrium, it toppled over. Appellant was standing in front of the machine and as a result sustained a broken leg. Appellant claimed, by contrast, that he

was only attempting to help Huff push the machine back upright after it had been rocked when it started to fall.

At the conclusion of the trial, the court granted appellees Huff, Tom Engle, and Chevron USA a directed verdict. The jury in turn rendered a verdict in favor of Vendo and Pepsi. This appeal followed.

First, appellant contends that the court erred by improperly limiting his right to discovery regarding similar incidents involving Vendo's machines. We disagree.

As part of his discovery, appellant directed an interrogatory to Vendo which was answered by Vendo on May 26, 1993. The interrogatory and answer state as follows:

> INTERROGATORY NO. 7: Please identify the date, location, model, model year, claim status and resolution of any and all incidents, accidents or complaints associated with use of any soft drink vending machine designed or sold by Defendant which are substantially similar to the incident set forth in this lawsuit.
>
> (a) Please state the ways in which defendant attempts to ascertain the existence of any malfunctions or complaints associated with its product other than the receipt of legal action.
>
> (b) Please describe the documents and indicate their present location which relate to incidents or complaints associated with soft drink vending machines as set forth herein.
>
> RESPONSE: OBJECTION. This Interrogatory is overly broad and

> expansive as to be oppressive and unduly burdensome. The Interrogatory poses what appears to be three separate questions. The Interrogatory does not define such terms as "incidents", "accidents", "complaints", "substantially similar" or "malfunctions". Moreover, the Interrogatory potentially encompasses all "products" manufactured by Vendo whether they have any conceivable relationship to Plaintiff's case or not. The Interrogatory also potentially encompasses "complaints" or "incidents" of any nature, whether they have any relevance to this action or not and to that extent is totally irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.
>
> Subject to the above objection Vendo states that, to its knowledge, no claims or complaints have ever been made concerning any of the Superstack vending machines involving incidents which are substantially similar to the incident set forth in this lawsuit.

Subsequently appellant filed a motion seeking an order compelling Vendo to "completely answer" the quoted interrogatory. The court sustained the motion to the extent that Vendo was ordered to provide information regarding any claims or lawsuits concerning stability problems arising out of the same model of vending machine involved in the instant action. Accordingly, on July 29, 1993, Vendo amended its answer to state as follows:

> The Pepsi-Cola vending machine involved in this incident was designed in 1973. The particular machine herein involved was manufactured in 1981. The model involved here was a Model 476 "SuperStack" machine. This machine was designed to comply with all Underwriters Laboratories standards involving stability. Since the manufacture of this machine began in 1971, to the

> present date there has been only one incident or claim involving someone injured when this model machine fell or was pushed over. That issue involved a lawsuit styled Spooner v. Pellamar Community College, et al., No. 43906, Superior Court of the State of California, North County Judicial District. It is the position of Vendo that that incident is not in any way similar to the incident involved in this action. This information is supplied pursuant to the Court's directive that Vendo supply information in regard to any other fall or tipover [sic] situations involving this particular model vending machine.

On the morning of trial, almost one year later, appellant made a motion for a continuance and a motion to strike both Vendo's and Pepsi's answers on the ground that the quoted supplemental answer was incomplete or misleading. Specifically, appellant claimed that there were at least two other cases of injury involving model number 476 machines which had been manufactured in 1982. Appellant asked for a continuance in part so that he could engage in additional discovery concerning the safety of the model number 476 vending machine involved in the instant action. The court denied appellant's motions.

Appellant argues that the trial court abused its discretion by denying his motions. We disagree.

Appellant cites Montgomery Elevator Company v. McCullough, Ky., 676 S.W.2d 776 (1984), in support of his argument. In Montgomery Elevator, a products liability claim was brought against an escalator manufacturer after a child sustained serious injuries when his tennis shoe was caught up into the

space between the treads and the side skirt of the escalator. The accident was determined to be caused by a latent defect in the design of the escalator. The court held that evidence as to other accidents or injuries under substantially similar circumstances was admissible in such an action. However, in doing so, the court stated, "[a] requirement of 'substantial similarity' between the earlier accidents and the one at issue is a matter of relevance to be decided in the discretion of the trial judge and will not be reversed unless there has been an abuse of discretion." Id. at 783.

Here, the court correctly ordered Vendo to supplement its answer regarding claims concerning stability problems with the same model vending machine involved in the instant action. However, subsequent to the filing of the supplemental answer, further discovery was not undertaken by appellant, even though on the morning of trial appellant produced an undated Vendo document which he allegedly acquired a year earlier, which reported two tip-over incidents in 1986 involving model number 476 vending machines manufactured in 1982. Moreover, the testimony at trial indicated that the year after the model number 476 machine involved in the instant action was manufactured, the design was changed. We fail to perceive therefore that there was any abuse of discretion in the court's denial of appellant's motions. Further, appellant's complaint that he was denied a right to investigate his claim against Vendo is simply without merit. If appellant was unsatisfied with the answers provided by Vendo he

was free to pursue further discovery in a timely manner prior to trial. This he failed to do.

Next, appellant contends that the court erred by failing to grant a mistrial after the term "wilding" was used by counsel for appellees Engle and Chevron USA during his opening statement. We disagree.

Counsel used the term once to describe the activities of appellant and his friends. Appellant objected to the remark and the court then admonished the jury that counsel's choice of words in an opening statement is not evidence, but rather is merely argument of counsel. Appellant then made a motion for a mistrial one day after opening statements were made. The court overruled appellant's motion, but once again admonished the jury to disregard the term "wilding."

As noted in Mason v. Stengell, Ky., 441 S.W.2d 412 (1969), as a general rule, improper argument of counsel requires reversal only when it is prejudicial and results in injustice or deprives a party of a fair and impartial trial. Further, "if the attention of the court is called to an improper argument and if the jury is admonished in regard to it, a reversal will not be had unless it appears that the argument was so prejudicial under the circumstances that the admonition of the court would not cure it." Id. at 416. While it is arguable that the use of the term "wilding" could denote more serious criminal acts than appellant admittedly committed, we cannot say that this single use of the word resulted in any injustice or prevented appellant from

receiving a fair trial. Indeed, the fact that appellant committed illegal acts was undisputed. Thus, we fail to perceive how counsel's use of the word prejudiced appellant's substantial rights.

Next, appellant contends that the court erred by directing verdicts in favor of appellees Engle and Chevron USA. Appellant argues that appellees Engle and Chevron USA were liable for appellant's injuries because they knew or should have known that the Pepsi vending machine on the property created a dangerous condition. We disagree.

Appellant's claims against Engle and Chevron USA are based upon a theory of premises liability. According to appellant, Engle and Chevron USA had a duty to exercise reasonable care in the control and location of the offending machine in order to avoid foreseeable injuries to others. The trial court disagreed, granting motions for a directed verdict on the ground that the evidence adduced did not establish a breach of a duty owed to appellant by Engle and Chevron USA. We agree with the trial court's ruling.

Under a negligence theory, as here, reasonable care on the part of the possessor of business premises does not ordinarily require precaution or even warning against dangers that are known to the visitor or so obvious to him that he may be expected to discover them. Bonn v. Sears Roebuck & Co., Ky., 440 S.W.2d 526, 528 (1969). For purposes of this rule, the term "obvious" means that both the condition and the risk are apparent

to and would be recognized by a reasonable man in the position of the visitor exercising ordinary perception, intelligence and judgment. Id. at 529. In other words, appellees Engle and Chevron USA only owed a duty to appellant to exercise reasonable precautions regarding a danger that he could not reasonably be expected to observe, appreciate, or avoid. See Perry v. Williamson, Ky., 824 S.W.2d 869 (1992). However, if the danger was open, obvious, and voluntarily incurred by appellant no liability could attach. See Carlotta v. Warner, 601 F.Supp. 749 (E.D. Ky. 1985); Peak v. Barlow Homes, Inc., Ky. App., 765 S.W.2d 577 (1988).

Here, the evidence showed that Engle's station is located in a middle class neighborhood at a busy and well-lighted intersection, one block away from a police station. There was no showing that there had been any incidents before or since the one in the instant action in which a vending machine had been rocked or tipped. Moreover, appellant admitted that he was aware that the machine was heavy, and that if it was tipped too far it could fall over. Given the fact that the danger of the machine tipping over was obvious and the fact that appellant realized and appreciated the danger but voluntarily assumed it nonetheless, it is clear that the court did not err by granting appellees Engle and Chevron USA a directed verdict.

Finally, we also reject appellant's contention that the court erred by granting a directed verdict in favor of appellee Huff.

Huff owed appellant a duty to exercise ordinary care in his actions to prevent a foreseeable injury from occurring. Watters v. TSR, Inc., 904 F.2d 378 (6th Cir. 1990). However, appellant also had the duty to exercise ordinary care for his own safety. Moreover, if a risk of injury is obvious, an individual must be charged with knowledge of the danger. Smith v. Louis Berkman Co., 894 F.Supp. 1084 (W.D. Ky. 1995).

As Huff has pointed out, appellant admitted that when he knew the machine was going to fall, no one was in a position to be hurt. Appellant then chose to place himself in front of the falling machine and was injured. Viewing the evidence in the light most favorable to appellant, it is clear that Huff breached no duty of care owed to appellant because it was not foreseeable or probable that appellant would elect to place himself in a zone of danger in front of a falling Pepsi vending machine. We hold, therefore, that the court did not err by granting Huff's motion for a directed verdict.

The court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Norman E. McNally
Louisville, KY

BRIEF FOR THOMAS E. ENGLE AND CHEVRON:

William P. Swain
John F. Parker, Jr.
Louisville, KY

BRIEF FOR GEORGE J. HUFF, JR., a/k/a SAMUEL HUFF:

William A. Hoback
Louisville, KY

BRIEF FOR THE VENDO COMPANY:

Robert C. Ewald
Stephen R. Price
Louisville, KY

BRIEF FOR PEPSI COLA GENERAL BOTTLERS, INC.:

Robert M. Connolly
Louisville, KY