STATE OF MICHIGAN

COURT OF APPEALS

IBTIHAJ SHAMMOUT, a Minor, by her Next Friend, HANI SHAMMOUT,

Plaintiff-Appellant,

and

ARWA SHAMMOUT,

Plaintiff,

v

KALAMAZOO JAYCEE,

Defendant/Cross-Defendant/Cross-Plaintiff-Appellee,

and

DASTOLI & ASSOCIATES, INC. a/k/a UNITED RENTAL,

Defendant/Cross-Plaintiff-Appellee,

and

SHAWARMA KING, INC.,

Defendant,

and

SHAWARMA KING FOUR, INC.,

Defendant/Cross-Defendant-Appellee,

and

EVENTS, INC.,

UNPUBLISHED
March 29, 2016

No. 323532
Kalamazoo Circuit Court
LC No. 12-000251-NI

Defendant/Cross-Plaintiff/Cross-
Defendant-Appellee.

Before: BECKERING, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

In this suit to recover for injuries, plaintiffs, Arwa Shammout and Ibtihaj Shammout, by her next friend, Hani Shammout, appeal by right the trial court's order granting the motions for summary disposition by defendants, Kalamazoo Jaycee (Jaycee), Dastoli & Associates, Inc. (Dastoli), Shawarma King Four, Inc. (Shawarma)[1], and Events, Inc. (Events). The trial court determined that the undisputed evidence showed that Jaycee, Dastoli, Shawarma, and Events did not breach any duty that they owed to Arwa or Ibtihaj. Accordingly, it dismissed their claims under MCR 2.116(C)(10). We agree that the undisputed evidence showed that Jaycee, Dastoli, and Events were entitled to summary disposition. However, we conclude that the trial court erred when it dismissed the claims against Shawarma; as a premises possessor, Shawarma owed Arwa and Ibtihaj a duty of care and there was evidence that—when considered in the light most favorable to them—would permit a reasonable jury to find that Shawarma breached the duty and caused the injuries at issue. For these reasons, we affirm in part, reverse in part, and remand for further proceedings.

I. BASIC FACTS

In June 2010, Arwa and her then six-year-old daughter, Ibtihaj, went to the Kalamazoo Island Festival. Arwa went to the festival to deliver food to her son, Kameel, who was working in a food booth operated by Shawarma in the food vendor tent.

Jaycee organized and sponsored the Festival. It contracted with Events to manage the Festival, and Dastoli delivered and installed the tents and other rented implements. Shawarma operated a portable hot-oil fryer in the preparation of its food, which it placed on a table in the food tent. At some point relatively soon after Arwa and Ibtihaj arrived, a strong storm hit the Festival. The winds billowed in the tent walls, which apparently struck and knocked over the table with the hot-oil fryer. The hot oil splattered and burned Arwa. When she saw that her mother was hurt, Ibtihaj ran over to her and was also burned.

Plaintiffs sued Jaycee, Dastoli, Events, and Shawarma for ordinary negligence and premises liability. Jaycee, Dastoli, Events, and Shawarma each moved for summary disposition under MCR 2.116(C)(10). They argued that they did not owe Arwa or Ibtihaj any duty under the facts. The trial court agreed and granted their motions.

Arwa and Ibtihaj now appeal in this Court.

---

[1] Defendant, Shawarma King, Inc., appears to be a prior corporate name for Shawarma.

II. SUMMARY DISPOSITION

A. STANDARDS OF REVIEW

On appeal, Arwa and Ibtihaj argue that the trial court erred when it dismissed their claims under MCR 2.116(C)(10). Specifically, they maintain that the trial court erred when it determined that Jaycee, Dastoli, Events, and Shawarma did not owe them any duty of care. This Court reviews de novo a trial court's grant of summary disposition under MCR 2.116(C)(10). *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007). This Court reviews de novo whether a defendant owed a duty in a negligence action. See *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004).

B. ANALYSIS

"Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Ernsting*, 274 Mich App at 509. "A genuine issue of material fact exists when the record, giving the benefit of any reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ." *Id.* at 510. All reasonable inferences are to be drawn in favor of the nonmoving party. *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010).

In a negligence action, the plaintiff must be able to prove that the defendant owed him or her a duty of care. *Doe v Henry Ford Health Sys*, 308 Mich App 592, 600; 865 NW2d 915 (2014). As our Supreme Court has stated, "there can be no tort liability unless defendants owed a duty to plaintiff." *Fultz*, 470 Mich at 463 (quotation marks and citation omitted).

The common law imposes a duty upon "every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others." *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967). Every person has a duty to "so act, or to use that which he controls, as not to injure another." *Id.* Although a person has a duty to refrain from acting or using that which he controls in a way that injures another, a "person generally does not have a duty to protect or intervene to help others who might be in danger." *Bailey v Schaaf (On Remand)*, 304 Mich App 324, 340; 852 NW2d 180 (2014), vacated not in relevant part 497 Mich 927, citing *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498-499; 418 NW2d 381 (1988). Nevertheless, "a person may become obligated to act to protect another on the basis of certain special relationships." *Bailey*, 304 Mich App at 340. One such special relationship is the relationship between a premises possessor and his or her invitees or licensees. *Id.* at 341.

1. JAYCEE AND EVENTS

Here, there was no evidence that Jaycee or Events took any action that caused the hot-oil fryer to fall and injure Arwa and Ibtihaj. Moreover, to the extent that Arwa and Ibtihaj's visit to the festival gave rise to a special relationship with Jaycee and Events—as the organizer and manager of the festival—this Court has held that there is no duty on the "organizer of an outdoor event . . . to warn a spectator of approaching severe weather." *Dykema v Gus Macker Enterprises, Inc*, 196 Mich App 6, 10; 492 NW2d 472 (1992). Instead, inclement weather is

"readily apparent to reasonably prudent people" and, as such, it is "one's own responsibility to protect himself from the weather." *Id.* at 11. Because Jaycee and Events did not actively contribute to the creation of the danger at issue and had no duty to warn of impending inclement weather, the trial court did not err when it determined that Arwa and Ibtihaj could not establish that either Jaycee or Events breached its duty of care to them.

Arwa and Ibtihaj argue that Events and Dastoli owed them a duty to exercise reasonable care in their contractual undertakings. Specifically, they cite a provision in the Events-Dastoli contract wherein Events agreed not to allow cooking underneath the tents. However, in *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 170; 809 NW2d 553 (2011), the Supreme Court noted that "the mere existence of a contractual promise does not ordinarily provide a basis for a duty of care to a third party in tort." Instead, they must plead and be able to prove that Events and Dastoli breached a duty to them that was separate and distinct from the duties owed under the contract. See *Bailey*, 304 Mich App at 339. As already noted, neither Jaycee nor Events took any action to create the danger posed by the hot-oil fryer and neither had a duty to warn or protect Arwa or Ibtihaj from the weather.

In the alternative, Arwa and Ibtihaj argue that Events voluntarily undertook the task of monitoring the weather and using the information to protect the festivalgoers. For that reason, they contend, Events agreed to conduct this task with reasonable care and failed to do so by warning the festivalgoers belatedly and inadequately.

"If one voluntarily undertakes to perform an act, having no prior obligation to do so, a duty may arise to perform the act in a nonnegligent manner." *Fultz*, 470 Mich at 465. However, "a promise to guarantee the personal safety of another cannot be inferred from circumstances or from ambiguous representations." *Scott v Harper Recreation, Inc*, 444 Mich 441, 451 n 12; 506 NW2d 857 (1993). Here, there is no evidence that Jaycees or Events explicitly guaranteed the safety of Arwa or Ibtihaj with regard to inclement weather or the appliances used by vendors. Thus, there is no evidence to support the imposition of this duty.

Additionally, even if Events voluntarily assumed a duty to warn about the weather, there is no evidence that the steps it took to do so were unreasonable. Arwa and Ibtihaj assert that Events "belatedly and ineffectively" executed its voluntarily assumed duty to warn of the impending storm, but they failed to present any evidence to establish a breach of that duty. See *Badiee v Brighton Area Schs*, 265 Mich App 343, 379; 695 NW2d 521 (2005). Testimony showed that Events told security personnel to tell patrons and vendors of the impending storm and advise them to either leave the vendor tent or move to the middle. And there was no evidence to establish that this was an unreasonable response. The evidence, even when viewed in the light most favorable to Arwa and Ibtihaj, established that Events took reasonable steps to insure that the warning would reach the vendors and visitors in time to allow them to get to safety. Consequently, even if Events voluntarily undertook a duty to monitor the weather and inform vendors and visitors of the danger, the undisputed evidence showed that it executed that duty with reasonable care.

The trial court did not err when it dismissed the claims against Jaycee and Events. Having determined that the trial court did not err in granting summary disposition in favor of Events, we need not address Arwa and Ibtihaj's argument that Jaycee is vicariously liable for Events' alleged negligence.

2. DASTOLI

Arwa and Ibtihaj argue that Dastoli breached its duty of reasonable care when it installed the tent flap behind the fryer despite knowing that a storm was imminent. John Dastoli, the owner of Dastoli, testified that he personally hung the tent flap behind Shawarma's cooking station approximately two hours before the storm hit. He stated that he installed the flap to "a hundred percent of [its] ability" and "made sure everything was tightened down as much as possible." Dastoli stated that, at the time, he was only aware that a storm was coming, not that anything "out of the ordinary" would occur and, that, under those circumstances, such tent flaps were not normally taken down.

Dastoli was required to exercise reasonable care in its installation of the tent flap. See *Hill v Sears, Roebuck & Co*, 492 Mich 651, 660; 822 NW2d 190 (2012). To the extent the trial court ruled that Dastoli owed no duty, that ruling was in error. Nevertheless, there is no evidence that Dastoli incorrectly installed the tent flap. Dastoli also testified that tent flaps are normally left up during storms without incident. Indeed, Dastoli testified that leaving the tent flaps in place often increases the safety of the tent, as they can direct wind up and over the tent. Accordingly, even viewing the facts in the light most favorable to Arwa and Ibtihaj, the undisputed evidence established that Dastoli correctly installed the tent flap and that it was not unreasonable to install the tent flap under the circumstances. Thus, even though Dastoli owed Arwa and Ibtihaj a duty of reasonable care in installing the tent flap, Arwa and Ibtihaj failed to present evidence that—if believed—would establish a question of fact as to whether Dastoli breached that duty. See *Doe*, 308 Mich App at 600. Consequently, the trial court did not err in dismissing the claim against Dastoli. See *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 470; 628 NW2d 577 (2001) (noting that this Court will not reverse a trial court's order if it reached the right result even if for the wrong reason.).

3. SHAWARMA

Arwa and Ibtihaj argue that Shawarma owed them a duty under common-law negligence and premises liability. Specifically, they contend that Shawarma had a duty to move the fryer away from the tent wall when the wind picked up because Shawarma had created that dangerous condition. Shawarma responds that the claim by Arwa and Ibtihaj sounds only in premises liability and, therefore, is barred by the open and obvious danger doctrine.

> Courts are not bound by the labels that parties attach to their claims. Indeed, it is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim. Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land. In the latter case, liability arises solely from the defendant's duty as an owner, possessor, or occupier of land. If the plaintiff's injury arose from an

> allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury. [*Buhalis v Trinity Continuing Care Services*, 296 Mich App 685, 691-692; 822 NW2d 254 (2012) (quotation marks and citations omitted).]

This distinction is particularly important because the open and obvious danger doctrine is available as a defense to a premises liability claim "whether the plaintiff has pleaded the claim as a failure to warn of a dangerous condition or as a breach of duty in allowing the dangerous condition to exist[.]" *Laier v Kitchen*, 266 Mich App 482, 489-490; 702 NW2d 199 (2005). In addition, an injury arising from an instrumentality on the land may give rise to a claim of premises liability. See *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995).

Arwa and Ibtihaj assert that Shawarma created a dangerous condition on the premises by placing the fryer too close to the tent edge and failing to take reasonable steps to secure the fryer or reduce the hazard once warned of the incoming storm. Arwa and Ibtihaj did not allege that Shawarma's negligent operation of the fryer (or other instruments) caused the injuries at issue. Rather, it is clear that Arwa and Ibtihaj alleged that Shawarma is liable for either failing to warn them of the danger posed by the fryer, especially under the emerging conditions, or for allowing the danger to persist under the circumstances. These claims sound in premises liability. Accordingly, the open and obvious danger doctrine is a defense. *Laier*, 266 Mich App at 489-490.

The undisputed evidence shows that Arwa and Ibtihaj were in the area under Shawarma's possession and control by consent and were not there for a commercial purpose;[2] as such, they were licensees. See *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). A premises possessor owes a duty "to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved." *Id.* at 596. However, a premises possessor does not have a duty to warn about or rectify dangerous conditions that are so obvious that the licensee might reasonably be expected to discover them. *Pippin v Atallah*, 245 Mich App 136, 143; 626 NW2d 911 (2001). "A dangerous condition is open and obvious if an average user with ordinary intelligence acting under the same conditions would have been able to discover the danger and the risk presented by the condition upon casual inspection." *Grandberry-Lovette v Garascia*, 303 Mich App 566, 576-577; 844 NW2d 178 (2014).

The evidence showed that Shawarma operated the fryer on an open table that was between seven and eight feet from where Arwa sat. Shawarma was actively cooking food prior to the storm and an average person with ordinary intelligence would have realized that the fryer was in operation. Similarly, an average person with ordinary intelligence knows that there is some danger of burns from an operational fryer and will ordinarily be able to take reasonable

[2] Contrary to Arwa and Ibtihaj's argument on appeal, Arwa's decision to deliver food to her son at his request did not amount to a visit for a business purpose.

steps to avoid the risk. Under the totality of the circumstances present on the day at issue, a reasonable jury might also infer that an average user with ordinary intelligence would have realized that the danger posed by the fryer included a risk that the fryer might tip over and spill hot oil. But a reasonable jury could also infer that an average user with ordinary intelligence would not have realized the full danger. An average user would not be able to discern on casual inspection a variety of factors that affected the danger posed by the fryer. By way of example, an average user would not on casual inspection know the amount of hot oil in the fryer, the weight of the fryer, whether it was secured in some way, or whether the table on which it sat was stable. It is thus unclear whether an average user with ordinary intelligence would have understood that the fryer could fall and injure a person sitting seven to eight feet away from it. Because there was a question of fact as to whether an average user with ordinary intelligence would have realized the danger posed by the fryer under the conditions present at the time, see *Grandberry-Lovette*, 303 Mich App at 576, it was for the jury to determine whether the open and obvious danger doctrine applied. See, e.g., *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11-12; 574 NW2d 691 (1997) ("After reviewing the record, we conclude that a genuine issue of material fact exists regarding whether the danger posed by the overhang could have been discovered upon casual inspection by a reasonable person in plaintiff's position.").

The trial court erred when it dismissed the premises liability claim against Shawarma.

III. CONCLUSION

The trial court did not err when it dismissed the claims by Arwa and Ibtihaj against Jaycee, Events, and Dastoli. However, the trial court erred when it dismissed their premises liability claim against Shawarma. Whether the open and obvious danger doctrine applies under the facts of this case must be determined by the finder of fact.

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

/s/ Jane M. Beckering
/s/ Michael J. Kelly

STATE OF MICHIGAN

COURT OF APPEALS

IBTIHAJ SHAMMOUT, a Minor, by her Next Friend, HANI SHAMMOUT,

Plaintiff-Appellant,

and

ARWA SHAMMOUT,

Plaintiff,

v

KALAMAZOO JAYCEE,

Defendant/Cross-Defendant/Cross-Plaintiff-Appellee,

and

DASTOLI & ASSOCIATES, INC. a/k/a UNITED RENTAL,

Defendant/Cross-Plaintiff-Appellee,

and

SHAWARMA KING, INC.,

Defendant,

and

SHAWARMA KING FOUR, INC.,

Defendant/Cross-Defendant-Appellee,

and

EVENTS, INC.,

UNPUBLISHED
March 29, 2016

No. 323532
Kalamazoo Circuit Court
LC No. 12-000251-NI

Defendant/Cross-Plaintiff/Cross-
Defendant-Appellee.

Before: BECKERING, P.J., and GLEICHER and M. J. KELLY, JJ.

GLEICHER, J. (*concurring in part and dissenting in part*).

I concur with the majority's holding that defendant Kalamazoo Jaycee is entitled to summary disposition and that defendant Shawarma King Four, Inc. is not. I respectfully disagree with the majority's resolution of plaintiffs' claims against Events, Inc. and Dastoli & Associates, Inc. In my view, the evidence supports that Dastoli negligently breached a duty of care and that Events owed plaintiffs a duty of care.

I. BACKGROUND FACTS

A powerful summer storm, packing high winds, swept through a Jaycee-sponsored festival in Kalamazoo. Shawarma occupied a booth within the festival's food tent. When the winds hit the tent, a billowing flap knocked over a table holding Shawarma's oil fryer and rotisserie machine. Hot oil splashed on plaintiffs Arwa and Ibtihaj Shammout, severely burning both. Arwa Shammout suffered an additional injury when the airborne rotisserie struck her back. Plaintiffs filed this lawsuit against the four defendants alleging different negligence theories as to each.

The festival took place on the grounds of the Arcadia Creek Festival Place. Jaycee hired Events, Inc. to administer the festivities. These parties' written contract provided that Events would maintain all of the festival's accounts, manage the festival personnel, direct the entertainment, procure the "supplies and services," hire security, and make "[a]ny other decisions essential to the operation of the event."

Wayne Deering, Events' manager and "event coordinator," arranged for the tables used by the food vendors to be delivered, designated the location of each food booth, directed the placement of necessary electrical connections to the booths, and required each food vendor to pay Events a percentage of its take. Deering rented the festival's tents from Dastoli.

More than an hour before the storm struck the festival, Deering spoke with meteorologist Vernon Keith Thompson. Thompson advised Deering that an oncoming storm was "certain[]" to hit Kalamazoo, bringing with it "an intense burst of wind." Deering visited the festival site and, in his words, "informed various folks that we could have some severe weather." As the storm drew nearer, Deering advised the festival-goers to retreat into two tents securely anchored to the ground; the food tent was not one of them. Deering claimed that he tried to evacuate the food tent, but "some people didn't leave that tent." Food vendor Mike Chow heard the severe weather warning and turned off his cooking equipment.

Arwa Shammout and her young daughter, Ibtihaj, arrived at the food tent shortly before the storm struck, on a mission to deliver a dessert to Arwa's son Kameel, who worked for

Shawarma. The Shammouts remained in the food tent after the storm warning issued. Several minutes before the full force of the storm hit the food tent, Deering ordered someone to install a flap behind the table holding Shawarma's cooking equipment. Once installed, the canvas flap (also called a sidewall or curtain) simply hung from the upper portion of the tent; it was not secured to the ground in any manner. Kameel testified that when the wind hit the flap, the flap struck the table holding the cooking equipment, sending the fryer and its oil flying.

I agree with the majority's conclusion that Jaycee had no involvement in the events leading to plaintiffs' injuries, and bears no liability under any tort theory. My analysis differs from that of the majority regarding Dastoli and Events.

II. THE LIABILITY OF DASTOLI

I respectfully submit that the majority has misunderstood plaintiffs' negligence claim against Dastoli. According to the majority, Dastoli "correctly installed the tent flap and . . . installing the tent flap was not contraindicated by the weather," and accordingly breached no duty. Plaintiffs' negligence claim against Dastoli flows from the *timing* rather than the method of the flap's installation. I agree that Dastoli correctly installed the tent flap, but respectfully take issue with the majority's conclusion that as a matter of law, hanging the flap qualified as a nonnegligent act. According to record testimony, Dastoli or one of his crew hung the tent flap behind Shawarma's booth only moments before the storm struck, despite Dastoli's admitted awareness that the tent flaps could act "like a sail." This conduct potentially qualifies as negligence.

I concede that the evidence concerning the timing of the tent flap installation conflicts. Dastoli claims that he hung the flap "a couple of hours maybe" before the storm hit the tent. But Awad testified that the flap was lowered within minutes before high winds propelled the flap against the table holding the cooking equipment, and Deering recalled that Dastoli was on the site "when the problem was happening."[1] Kameel recalled that someone named "Tory" installed the curtain, and that Tory advised that he worked for "the tent company."

Those familiar with tents and storms knew that in windy conditions, the tent flaps posed a very real danger. Michael Downey, the owner of the security company employed by Deering during the festival, testified as follows:

> *Q.* Were you receiving your directions from Wayne [Deering] as far as whether to evacuate or whether to tell the vendors to move the tables in?
>
> *A.* Correct.

[1] Dastoli and Deering explained that once installed, the flaps have only one position: down. Unlike window shades, they are not capable of being raised and lowered at will. Viewed in the light most favorable to plaintiffs, Awad's testimony supports that Dastoli or one of his employees installed the flaps (rather than "lower[ing]" them) just before the accident occurred rather than hours before.

Q. Did you have any input in this, or was he just strictly commanding you what to do?

A. He likes to open and tell me what I need to do.

Q. All right.

A. I took all directions from him, yes.

Q. . . . Was it his direction to tell people to move the table in, or was this something the two of you had kind of discussed?

A. The two of us.

Q. The two of you had input on that?

A. Yeah.

Q. And why was it said that, "We should tell people to move the - - to tell the vendors to move the tables toward the center"?

A. So the tables don't get knocked over by the sides.

The evidence supports an argument that before hanging the flap behind the Shawarma booth, Dastoli should have instructed Awad to move the table holding the cooking gear inward and away from the side of the tent, or to store the cooking gear on the ground (as vendor Chow had done). Given the weather conditions, the flap was a potentially dangerous addition to the tent precisely because it could strike the table, or objects on the table, and send things flying. Hanging it moments before the storm and in a dangerous location could constitute actionable negligence. I would reverse the trial court's grant of summary disposition to Dastoli on this basis.

II. THE LIABILITY OF EVENTS

The majority affirms the trial court's grant of summary disposition to Events, holding "there was no evidence that . . . Events took any action that caused the hot-oil fryer to fall" and injure plaintiffs. Relying on this Court's opinion in *Dykema v Gus Macker Enterprises, Inc*, 196 Mich App 6; 492 NW2d 472 (1992), the majority further holds that Events had no duty to warn of "approaching severe weather." I respectfully disagree for two reasons. First, Events voluntarily undertook to monitor the weather conditions and to warn festival patrons of the approaching storm, thereby assuming a duty of care. In this sense, *Gus Macker* is wholly distinguishable. Second, Events ordered the installation of the flap behind the Shawarma booth. In undertaking these affirmative acts, Events subjected itself to legally cognizable duties of care.

Viewed in the light most favorable to plaintiffs, the record evidence substantiates that 60 to 90 minutes before the storm arrived, meteorologist Thompson advised Deering to expect that extremely high winds would hit the festival. In response to this warning, Deering ordered Downey to notify patrons and vendors of the approaching storm, thereby voluntarily shouldering

an obligation to warn festival participants that an incoming storm would bring particularly powerful winds. Deering further testified that when he learned of the storm's potential, he personally "went about the site, informed various folks that we could have some severe weather, and . . . took precautions such as putting objects down because maybe if we have wind, things that could harm somebody." Additionally Deering recounted that he "made the decision to tell that [sic] people go to the two permanently-anchored tents which did survive this perfectly, and evacuated the middle tent where the problem happened."

Thus, Deering recognized that the oncoming storm presented a danger to the festival patrons. Indeed, he foresaw the *specific* danger posed by the anticipated high winds—that tent flaps would billow inward, strike nearby objects, and create dangerous projectiles. Armed with this knowledge, Deering proactively attempted to protect festival-goers from the foreseeable hazards. He explained:

> I personally do recall telling one of the vendors who had a glass vase to please put that down below, no matter how much wind we have, this could be a problem and I didn't want it to shatter where there are people. But at the early stage of, I would say, maybe an hour before the storm came through, we were taking those precautions, talking to people about potential problems.

In my view, this testimony substantiates that Events assumed a duty of care.

In *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 205; 544 NW2d 727 (1996), this Court drew on firmly established caselaw to observe that a defendant may face liability when it undertakes a duty that it otherwise does not bear:

> Courts have imposed a duty where a defendant voluntarily assumed a function that it was under no legal obligation to assume. *Sponkowski v Ingham Co Rd Comm*, 152 Mich App 123, 127; 393 NW2d 579 (1986); *Rhodes v United Jewish Charities of Detroit*, 184 Mich App 740, 743; 459 NW2d 44 (1990) [holding ltd in *Scott v Harper Recreation, Inc*, 444 Mich 441; 506 NW2d 857 (1993)]; *Terrell v LBJ Electronics*, 188 Mich App 717, 720; 470 NW2d 98 (1991); *Holland v Liedel*, 197 Mich App 60, 64-65; 494 NW2d 772 (1992); *Babula [v Robertson*, 212 Mich App 45, 50-51; 536 NW2d 834 (1995)].[2]

Baker involved the defendant pharmacy's use of a computer system to "monitor its customers' medication profiles for adverse drug interactions." *Id.* The defendant in *Baker* advertised that its computer system "was designed in part to detect harmful drug interactions." *Id.* Based on these facts, this Court concluded that the defendant pharmacy "voluntarily assumed a duty of care when it implemented" the computer system and advertised its function. *Id.* at 205-206.

---

[2] Like other seminal tort principles, perhaps this one was first clearly articlulated by then-Judge Cardozo: "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." *Glanzer v Shepard*, 233 NY 236, 239; 135 NE 275 (1922).

In *Schanz v New Hampshire Ins Co*, 165 Mich App 395, 401-402; 418 NW2d 478 (1988), this Court adopted and applied the following principles advanced in the Restatement Torts, 2d, § 323, p 135:

> Negligent Performance of Undertaking to Render Services
>
> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize is necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance on the undertaking.

The plaintiffs in *Schanz* owned a building insured by the defendant. *Id.* at 398-399. The defendant retained Commercial Services, Inc., another company, to inspect the building and to estimate its replacement cost. *Id.* at 399. Commercial Services prepared a report containing several serious errors. *Id.* The defendant reviewed the report but failed to detect the errors, and insured the building for an amount well under its actual replacement value. *Id.* at 399-400. After the building burned down, the plaintiffs sued the defendant for the difference, and the jury found in the plaintiffs' favor. *Id.* at 400.

On appeal, the defendant averred that it owed no duty to inspect and appraise the plaintiffs' building. *Id.* The plaintiffs countered that "once defendant undertook to appraise the building for purposes of informing plaintiffs of the required insurance coverage, defendant assumed a duty to use reasonable care in establishing the replacement cost value of the building." *Id.* This Court explained, "[t]he law does not impose a duty on insurers to inspect the premises of their insureds, although such an obligation may be undertaken." *Id.* at 401. This Court held that the trial court properly determined "that defendant owed a duty to plaintiffs to exercise reasonable care in determining the replacement cost coverage under the policy issued to plaintiffs" because material questions of fact existed with respect to whether the defendant undertook the duty described in § 323 of the Restatement. *Id.* at 401-402, 404-405. See also *Hart v Ludwig*, 347 Mich 559, 564; 79 NW2d 895 (1956) ("The law imposes an obligation upon everyone who attempts to do anything even gratuitously, for another, to exercise some degree of care and skill in the performance of what he has undertaken, for nonperformance of which duty an action lies.") (quotation omitted).

I draw from this line of cases and the Restatement that Events faces liability in this case because it undertook a duty of care that it otherwise did not bear: to warn patrons of the storm. And Events undertook two additional affirmative actions that it was not obligated to perform: it ordered the installation of the tent flaps that it knew or should have known could smash into objects during a storm, and it instructed some (but not all) vendors to place movable objects out of harm's way. These affirmative acts render Events potentially liable for any failure to perform its voluntarily-assumed duties with reasonable care.

Citing *Gus Macker*, 196 Mich App 6, the majority opines that Events owed no duty "to warn a spectator of approaching severe weather," and I agree. But the facts of *Gus Macker* do

not correspond with the facts of this case, as in *Gus Macker* the defendants made no effort whatsoever to protect the basketball tournament participants from the storm. Events did. The majority concedes that "[i]f one voluntarily undertakes to perform an act, having no prior obligation to do so, a duty may arise to perform that act in a nonnegligent manner," (quotation marks and citation omitted), but inexplicably fails to apply this noncontroversial legal precept, finding no evidence that Events "explicitly guaranteed the safety of Arwa or Ibtihaj with regard to inclement weather or the appliances used by vendors." Respectfully, this analysis simply does not apply to these facts, since the duties Events undertook had nothing to do with "guarantee[ing]" anyone's safety. Rather, Events voluntarily attempted to protect those present at the festival from the risks of the severe weather bearing down on the site. It did so through explicit weather warnings, instructions to stow possible projectiles and to vacate the food tent, and by hanging the flap. The latter act falls squarely within the reach of Restatement Torts, 2d, § 323(b), as it arguably increased the risk of harm "resulting from [a] failure to exercise reasonable care" in performing the undertaking.

In summary, having undertaken a responsibility to "batten down the hatches" and make the festival premises safe, Deering was obliged to exercise reasonable care. I believe that Events' voluntary rendering of services to the festival-goers gave rise to a tort duty that survives Events' summary disposition motion.

III. SHAWARMA

I concur with the majority that the open and obvious danger doctrine does not bar plaintiffs' claim against Shawarma. In *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992), our Supreme Court defined open and obvious hazards as dangers "known to the invitee" or "so obvious that the invitee might reasonably be expected to discover them." That plaintiffs qualify as licensees does not change the definition of an open and obvious danger. Here, the trier of fact could find that on casual inspection, an ordinary visitor to the food tent would not comprehend that during a wind storm, a flapping tent curtain could knock over the table holding the cooking gear. See *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). Because the evidence creates a genuine issue of material fact in this regard, I concur with the majority's determination that summary disposition was improperly granted to Shawarma.

/s/ Elizabeth L. Gleicher