

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D19725
X/prt

_____AD3d_____

Argued - May 19, 2008

WILLIAM F. MASTRO, J.P.
PETER B. SKELOS
RUTH C. BALKIN
JOHN M. LEVENTHAL, JJ.

2007-08329

DECISION & ORDER

Miriam McLachlan, etc., et al., respondents, v R&S,
Inc., d/b/a Five Corners Super Deli, appellant.

(Index No. 7624/04)

MacCartney, MacCartney, Kerrigan & MacCartney, Nyack, N.Y. (Harold Y. MacCartney, Jr., and Catherine Friessen of counsel), for appellant.

Sobo & Sobo, LLP, Middletown, N.Y. (Gregory M. Sobo of counsel), for respondents.

In an action to recover damages for personal injuries, etc., the defendant appeals from a judgment of the Supreme Court, Orange County (McGuirk, J.), entered August 16, 2007, which, upon the denial of its motion pursuant to CPLR 4401 for judgment as a matter of law, made at the close of evidence, and upon a jury verdict on the issue of liability finding it 100% at fault in the happening of the accident and a separate jury verdict on the issue of damages finding, inter alia, that the plaintiff Jacob McLachlan sustained damages in the principal sums of \$90,000 for past pain and suffering and \$70,000 for future pain and suffering, is in favor of the plaintiffs and against it.

ORDERED that the judgment is affirmed, with costs.

The plaintiff Miriam McLachlan brought this action on behalf of her son, Jacob, a 10-year-old boy at the time of the incident, who injured his thumb when he tripped over a small cardboard box on the floor of the defendant's store. At the close of evidence, the defendant moved pursuant to CPLR 4401 for judgment as a matter of law. Judgment as a matter of law in favor of a landowner is appropriate where the complained of condition on the land is "both open and obvious and, *as a matter of law, [is] not inherently dangerous*" (*Cupo v Karfunkel*, 1 AD3d 48, 52). Based

June 17, 2008

Page 1.

McLACHLAN v R&S, INC., d/b/a FIVE CORNERS SUPER DELI

on the trial evidence here, the trial court properly denied the defendant's motion (*see Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 70).

The jury's awards of \$90,000 for past pain and suffering and \$70,000 for future pain and suffering were not excessive, as they did not deviate materially from what would be reasonable compensation (*see CPLR 5501; Beijanov v Guttman*, 34 AD3d 710; *Harris v City of New York*, 2 AD3d 782; *Louis v St. Victor*, 202 AD2d 479; *Rodriguez v City of New York*, 191 AD2d 420).

The defendant's remaining contentions are without merit.

MASTRO, J.P., SKELOS, BALKIN and LEVENTHAL, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court