

# boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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## Not Your Garden-Variety Open and Obvious Lawsuit

By Sante S. Fratarcangeli

Karen MacAskill tripped and fell on a garden hose in front of the entrance to a Kroger. The events giving rise to the incident were videotaped by the store's security camera and, accordingly, were undisputed.

Karen's husband pulled his car into a yellow-striped asphalt area directly in front of the store's entrance to drop off Karen before searching for a parking space. The yellow-striped area covered the full width of the entrance and extended out about 15 feet into the parking lot. The parking lot was gray asphalt. Cars routinely pulled up into the yellow-striped area to drop off customers, particularly older customers or customers who experienced difficulty walking, before locating a parking spot. The practice was not improper or unforeseeable.

On the date of the incident, Kroger kept flowers for sale along the front wall outside the store. Minutes before the MacAskills arrived, a store manager asked a grocery bagger to water the flowers. Having never performed the task, the bagger connected a hose from a spigot in the bottle return area, through an employee designated exit/entrance, outside, and onto the asphalt. The hose was approximately  $\frac{3}{4}$  of an inch in diameter. The bagger extended the hose to the flowers by laying it across a substantial portion of the front of the store, including the entire yellow-striped area. The bagger then went inside the store and returned with a gray floor mat which he placed over a portion of the hose within the yellow-striped area. Rather than covering the entire length of the hose that ran across the yellow-striped area, the bagger placed the mat in such a fashion as to cover only 80% of the hose, leaving sections on either side of the mat exposed.

When Karen exited the front seat of the vehicle she was "close" to the hose. She faced the front entrance and appeared to be looking where she was going. She only took one or two steps before tripping on the hose.

The trial court granted summary disposition in favor of Kroger on claims of negligence and premises liability. In granting Kroger's motion for summary disposition, the trial court found that the partially obscured hose was an open and obvious hazard and, therefore, Kroger's duty to keep the premises reasonably safe for its customers did not apply to the hose. In light of the recent decision in *Jahnke v. Allen*, unpublished (December 16, 2014) (No. 317625), the trial court rejected Plaintiff's negligence claim, finding that it properly sounded in premises liability. "A plaintiff cannot avoid the open and obvious doctrine by claiming ordinary negligence, when the facts only support a premises liability claim. *Id.*"

### SECRET WARDLE NOTES:

In a 2-1 decision, the Michigan Court of Appeals says it cannot be "seriously disputed" that a garden hose near a store entrance is unexpected. The 69-year-old Plaintiff tripped on a hose and later suffered a fatal heart attack linked to injuries. The hose was partially covered by a mat while the store's employee was watering flowers outside the store.

## CONTINUED...

The Court of Appeals affirmed the trial court's grant as to the negligence claim, but reversed and remanded as to the premises liability claim. The Court of Appeals concluded that under the *unusual circumstances*, there was a question of fact whether the hazard was open and obvious, i.e., "whether a reasonable person in plaintiff's position" would have seen and avoided the hose. *Watts v. Michigan Multi-King, Inc.*, 291 Mich App 98, 102-103; 804 NW2d 569 (2010).

The trial court never concluded that the hose would be readily apparent to someone in *Plaintiff's position*, stating rather that "the hose is clearly visible *from a substantial distance* away" a position plaintiff was never in. As stated above, the Court of Appeals emphasized the *reasonable person test*; what a reasonable person would have observed and done upon exiting a vehicle in the location from which the MacAskill vehicle was located. The Court of Appeals did not consider whether Karen had any personal limitations on her ability to observe, but only the limits faced by anyone exiting a car at that particular position.

"It cannot be seriously disputed that it would be unexpected to encounter a garden hose on the walkway into a supermarket. We find no cases involving similar circumstances and this case bears no resemblance to the many cases in which a plaintiff failed to keep watch for routinely present conditions such as potholes or ice on cold days. See, e.g., *Hoffner v Lanctoe*, 492 Mich 540; 821 NW2d 88 (2102). Such conditions present daily hazards in Michigan. *Id.* at 454. And even if a hose, fully exposed in such an inappropriate location, would be considered open and obvious, such a conclusion cannot be reached as a matter of law where the portion of the hose in the entryway was largely camouflaged by the mat that covered most, but not all of it." *MacAskill v. Kroger, unpublished* (March 5, 2013) (No. 319297).

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