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Court of Appeals May Invoke Rarely-Used Conflict Procedure to Revive "Distracted Shopper" Exception to the Open and Obvious Defense

By Drew Broaddus

In *Quinto v CVS*, __ Mich App __, rel'd 4/29/14 (No. 311213), a panel of the Court of Appeals – Judges Douglas Shapiro and Michael Kelly, with Judge Mark Cavanagh dissenting – requested "that this Court convene a special conflict panel pursuant to MCR 7.215(J)(2)" in order to consider whether *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710 (2007) should be overruled. If convened, the special conflict panel could resolve a decades-old debate among premises liability practitioners that seemingly ended seven years ago.

Attorneys representing businesses and their insurers have become very familiar with the "Open and Obvious Doctrine" of *Lugo v Ameritech Corp*, 464 Mich 512 (2001). *Lugo* states that a property owner has a duty to protect invitees from "an unreasonable risk of harm caused by a dangerous condition on the land," but the duty *does not* "encompass removal of open and obvious dangers." *Id*. Open and obvious dangers are those which an average person with ordinary intelligence could reasonably be expected to discover upon casual inspection. Although some form of this defense had existed under Michigan law for decades, *Lugo* made the open and obviousness of a hazard determinative of the defendant's duty – an issue of law decided by a judge – whereas it had previously related to the plaintiff's contributory or comparative negligence – something typically argued before a jury. *Lugo* thereby expanded the class of trip and fall cases that may be dismissed via motion.

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An ordinary panel of the Michigan Court of Appeals has no authority to overrule published Court of Appeals decisions issued after November 1, 1990, no matter how strongly the subsequent panel disagrees with the prior decision. MCR 7.215(C)(1) & (J)(1). That is why the *Quinto* panel described itself as "bound … by the decision in" *Kennedy, supra*.

Although the majority requested a conflict panel, this does not mean that one will necessarily be convened. Within 28 days of the *Quinto* decision, the Chief Judge of the Court of Appeals must poll all 28 judges "to determine whether the particular question is both outcome determinative and warrants convening a special panel to rehear the case for the purpose of resolving the conflict…." MCR 7.215(J)(3)(a). So if there is not sufficient support at that stage, no conflict panel will be convened. Also, per MCR 7.215(J)(3)(a), the procedure terminates if the Michigan Supreme Court grants leave to appeal "in the controlling case."

In the retail setting, a storekeeper is generally entitled to raise the open and obvious defense when a customer falls inside the store. However, in the years after *Lugo*, the plaintiff's bar argued (sometimes successfully) that there was a "distracted customer" exception to the open and obvious defense. The argument essentially claimed that if a plaintiff was "distracted" by something a premises possessor had on their property (such as product displays), and the plaintiff was injured due to a condition that was otherwise been open and obvious, then the open and obvious defense would be inapplicable. But *Kennedy* held that there is no such exception.

The distracted customer exception appears to have its origins in a Louisiana intermediate-level appellate decision, *Provost v Great Atlantic & Pacific Tea Co*, 154 So2d 597 (La App 1963). *Provost* suggested that store owners display merchandise on their counters and shelves for the specific purpose of allowing customers to look at the merchandise as they walked by. However, that the open and obvious defense was not an issue in *Provost*. Therefore *Provost* – which was not precedentially binding in Michigan regardless – did not actually create an

exception to the open and obvious defense, even under Louisiana law. But the Michigan Supreme Court later looked to *Provost* in deciding *Jaworski v Great Scott Supermarkets*, 403 Mich 689 (1978), where the Court approved of the distracted customer exception. However, subsequent decisions expressed doubt upon whether *Jaworski* survived *Lugo*. Courts also questioned whether *Jaworski* – a contributory negligence case – remained relevant after contributory negligence was abrogated in favor of comparative negligence. *Kennedy, supra* at 716.

Against this historical backdrop, the Court of Appeals recently considered *Quinto*. In *Quinto*, the plaintiff was shopping in defendant's retail store. She walked down a display aisle and began to turn the corner at the end of the aisle. Projecting from the end of the aisle was a very low platform used to support heavy displays of items, such as high stacks of cases of pop. The platform was not affixed to the floor. The store was not using the platform on the date in question (there was no inventory on it), and it could easily have been removed. Plaintiff stated that when she reached the end of the aisle, she was "looking at cereal and turned the corner" and then "tripped over the end cap display," i.e., the floor-level platform. Plaintiff was not looking down at the floor while walking. Defendant moved for summary disposition, arguing that the platform was open and obvious. The trial court agreed, and Plaintiff appealed by right.

The majority found that, under Supreme Court precedent, "the merchandise-display aisleways of a self-service retail store present particular circumstances such that the open and obvious doctrine does not eliminate the duty of the store to take reasonable actions to make the those aisleways reasonably safe for its customer-invitees." Although this conclusion would have otherwise required reversal, the majority found it itself "bound … by the decision in *Kennedy* … which rejected this view." In *Kennedy*, "the panel chose not to apply" *Jaworski* and other pre-*Lugo* cases, "instead citing *Lugo* for the general proposition that the presence of distractions does not affect the application of the open and obvious doctrine." *Quinto, supra* at *3. The *Quinto* majority disagreed with the *Kennedy* panel's rationale because "in *Lugo*, the distraction, a passing vehicle, was neither continuous nor created, let alone intentionally created, by the defendant." *Quinto, supra* at *3. "By contrast, … in the instant case, the distractions from the floor were continuous, i.e., displays along all the aisleways, and were intentionally created by the defendant to command the customer's attention for a commercial purpose." *Id.* Therefore, when defining the duty of a store owner, the intentional and continuous actions of the store owners that lessen the ability of the customer-invitee to protect himself must be taken into account." *Id.*

Judge Cavanagh dissented, stating: "I agree with this Court's analysis and holding in *Kennedy* … [and] therefore, I respectfully dissent and conclude that a special conflict panel should not be convened…." In Judge Cavanagh's view, "the mere possibility that customers might be distracted by the merchandise displays and advertisements commonly found in all self-service retail stores, alone, neither relieves customers of their duty to exercise reasonable care for their own safety nor imposes a unique duty on self-service retail store owners to protect customers from even open and obvious conditions that do not pose an unreasonable risk of harm."

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