

# boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

01.31.06

## The “Distracted Customer” Exception to the Open and Obvious Defense: The Debate Continues

By James P. Molloy

In *Miller v Bass Pro Shop Outdoor World*, an unpublished decision of the Michigan Court of Appeals, Plaintiff was injured while visiting the Bass Pro Shop Outdoor World in the Great Lakes Crossing Mall. She tripped and fell over the base of a display sign as she was “distracted” by another display of taxidermy mounts. The Michigan Court of Appeals affirmed the trial court’s dismissal based on the open and obvious defense.

Plaintiff and her husband had been shopping at Bass Pro Shop for approximately an hour and a half on the day of the accident. After making their selections, they proceeded along the main aisle toward the front check-out area. On this particular day, there were display tables and signs erected along the main aisle. As she walked toward the check-out area, Plaintiff tripped and fell over the base of a display sign consisting of a large advertising placard secured to a heavy rectangular base. Plaintiff conceded that the sign was open and obvious, but she alleged she did not see the sign as she was “distracted” by another display of taxidermy mounts.

On appeal, Plaintiff argued the distracting sign was a special aspect that rendered the aisle unreasonably dangerous. Specifically, she argued that there was a “distracted customer” exception to the open and obvious doctrine. The Michigan Court of Appeals disagreed in this case.

In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. However, a premises possessor is not required to protect an invitee from open and obvious dangers, unless the premises possessor should anticipate the harm despite the obvious nature of the condition. If there are “special aspects” that make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk. Special aspects exist when a danger, although open and obvious, is unavoidable or imposes a

### SECRET WARDLE NOTES:

Although *Miller* is an unpublished decision and not binding on lower courts or future panels of the Court of Appeals, it presents another example of the application of the open and obvious doctrine to every day occurrences. Courts are placing more responsibility on people for their own safety. In fact, the *Miller* Court noted that when one considers the long debate over what constitutes open and obvious conditions and the subtleties that the Supreme Court defines as fitting within that rule, this case falls well within that spectrum. The store display at issue was an every day occurrence and the *Miller* Court made it clear that it was not going to reward Plaintiff for failing to take appropriate care for her own safety.

The *Miller* decision helps the defense of future claims relying on the so-called “distracted customer” exception by confirming that the sole exception to the open and obvious doctrine is Lugo’s special aspects analysis. Nevertheless, we expect further challenges by the plaintiff’s bar in this regard since this decision is not precedential.

## CONTINUED...

uniquely high likelihood of harm or severity of harm.

In this case, Plaintiff admitted that the sign was an open and obvious condition. The Court also inspected the sign at the appellate hearing (which is very unusual) and found that it was similar to many signs found in retail stores. Furthermore, Plaintiff conceded that she would have been able to see the sign and walk around it if she had been looking forward as she walked.

The Court of Appeals rejected Plaintiff's contention that the "distraction" was a "special aspect" making the store's aisle unreasonably dangerous. Relying on *Lugo v Ameritech Corp.*, 464 Mich 512 (2001), the Court indicated that store display signs were every day occurrences which should ordinarily be observed by a reasonably prudent person. Plaintiff presented no evidence that the sign or aisle were objectively dangerous. The Court concluded that the trial court properly determined that Plaintiff failed to establish a question of fact that the condition in Defendant's store was unreasonably dangerous despite its open and obvious condition (i.e., that there were no "special aspects").

The Court rejected Plaintiff's position that a "distracted customer" exception to the open and obvious doctrine currently exists. As the Michigan Supreme Court held in *Lugo*, the sole exception to the open and obvious doctrine is the special aspects analysis.

## CONTACT US

### Farmington Hills

30903 Northwestern Highway, P.O. Box 3040  
Farmington Hills, MI 48333-3040  
Tel: 248-851-9500 Fax: 248-851-2158

### Mt. Clemens

94 Macomb Place, Mt. Clemens, MI 48043-5651  
Tel: 586-465-7180 Fax: 586-465-0673

### Lansing

6639 Centurion Drive, Ste. 130, Lansing, MI 48917  
Tel: 517-886-1224 Fax: 517-886-9284

### Grand Rapids

2025 East Beltline, S.E., Ste. 209, Grand Rapids, MI 49546  
Tel: 616-285-0143 Fax: 616-285-0145

### Champaign, IL

2919 Crossing Court, Ste. 11, Champaign, IL 61822-6183  
Tel: 217-378-8002 Fax: 217-378-8003

[www.secrestwardle.com](http://www.secrestwardle.com)

SECRET  
**SW**  
WARDLE

Copyright 2006 Secrest, Wardle, Lynch, Hampton,  
Truex and Morley, P.C.

This newsletter is published for the purpose of providing information and does not constitute legal advice and should not be considered as such. This newsletter or any portion of this newsletter is not to be distributed or copied without the express written consent of Secrest Wardle.

## CONTRIBUTORS

### Premises Liability Practice Group Chair

Mark F. Masters

### Editor

Carina Nelson

We welcome your questions and comments.

## OTHER MATERIALS

If you would like to be on the distribution list for Boundaries, or for newsletters pertaining to any of our other practice groups, please contact Secrest Wardle Marketing at [cnelson@secrestwardle.com](mailto:cnelson@secrestwardle.com), or 248-539-2850.

### Other newsletters include:

**Benchmarks** – Navigating the hazards of legal malpractice  
**Blueprints** – Mapping legal solutions for the construction industry  
**Community Watch** – Breaking developments in governmental litigation  
**Contingencies** – A guide for dealing with catastrophic property loss  
**Fair Use** – Protecting ideas in a competitive world  
**In the Margin** – Charting legal trends affecting businesses  
**Industry Line** – Managing the hazards of environmental toxic tort litigation  
**Landowners' Alert** – Defense strategies for property owners and managers  
**No-Fault Newsline** – A road map for motor vehicle insurers and owners  
**On the Beat** – Responding to litigation affecting law enforcement  
**On the Job** – Tracking developments in employment law  
**Safeguards** – Helping insurers protect their clients  
**State of the Art** – Exploring the changing face of product liability  
**Structures** – A framework for defending architects and engineers  
**Vital Signs** – Diagnosing the changing state of medical malpractice and nursing home liability  
**Update Illinois** - Current trends in Illinois law