

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

06.22.09

Jury To Decide If One-Inch-Long Wire Was “Open And Obvious”

By Mark F. Masters

In *Price v. Kroger*, _ Mich App _ (2009), the Court of Appeals held that whether a one-inch-long wire protruding from the bottom of a wire candy bin was “open and obvious” was a question of fact for a jury to decide.

Several hours before Plaintiff arrived at Kroger, a Kroger employee placed a large wire bin in front of a checkout aisle and filled it with bags of candy. Plaintiff testified that she noticed the square, waist-high metal basket, approximately four feet wide, containing sale candy. Plaintiff approached the bin, reached in, retrieved several bags of candy, and turned to walk away. While taking the first step toward the checkout aisle, the wire caught Plaintiff’s pant leg, and she fell to the floor. From Plaintiff’s new vantage point on the floor, she observed a one-inch-long broken wire or “barb” protruding from the bin at ankle level. Plaintiff testified that the candy-filled bin had blocked her view of the protruding wire before she fell.

The trial court dismissed the case on Kroger’s motion, finding “that the condition complained of by Plaintiff was open and obvious.” The trial court emphasized that Plaintiff had conceded “that there was nothing blocking her view of the metal prong,” and that “it is reasonable to conclude that Plaintiff would have not been caught on the metal prong had she been watching where she was going.” The trial court further rejected Plaintiff’s argument “that the metal prong was unavoidable or posed an unreasonably high risk of severe injury.”

The Court of Appeals first restated the duties imposed on possessors of land, and the open and obvious defense:

As the property owner in control of the premises, Defendant owed Plaintiff, a business invitee, a duty to inspect the premises for hazards that might cause injury. Plaintiff was entitled to “the highest level of protection” imposed under premises

SECRET WARDLE NOTES:

Michigan Courts are getting closer to a precedential “distracted customer” exception to the open and obvious defense every day. For years, various panels of the Michigan Court of Appeals have zigzagged on this issue. Namely, whether there is a special exception to the open and obvious defense for customers in a store. Generally, the theory of claimants in these cases is “I would have seen it if the store hadn’t distracted me with its displays and items for sale on the shelves.”

By relying on “the premises in which Plaintiff shopped” and “the bulk of the candy-filled bin” as a partial explanation why the protruding wire may not have been open and obvious, the *Price* case strengthens this argument for future claimants.

The “distracted customer” issue was never ruled upon by Michigan’s previously conservative Supreme Court. However, it is anticipated that Michigan’s new liberal Supreme Court will rule upon such a case in favor of claimants.

CONTINUED...

liability law. The landowner's duty encompasses not only warning an invitee of any known dangers, "but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards."

"However, where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." When a potentially dangerous condition "is wholly revealed by casual observation," the premises owner owes its invitees no duty to warn of the danger's existence. This is so because "an obvious danger is no danger to a reasonably careful person." The test for an open and obvious danger focuses on the inquiry: Would an average person of ordinary intelligence discover the danger and the risk it presented on casual inspection?

In *Price*, the Court of Appeals found that the trial court relied on the wrong test in dismissing the case. The trial court improperly analyzed whether *this Plaintiff* could or should have known about the protruding wire. The correct analysis was whether the wire was observable to the average, casual observer.

The Court of Appeals held that "a jury could reasonably infer that a casual inspection of the premises in which Plaintiff shopped would not have revealed the barb, in light of its small size, its location close to the floor level, the impediment to visibility posed by the bulk of the candy-filled bin, and [Kroger's employee's] failure to detect the anomaly." Therefore, the Court of Appeals reinstated the case, finding that whether the wire was observable to the average, casual observer was a question of fact for a jury to decide.

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

www.secrestwardle.com

SECRET
SW
WARDLE

Copyright 2009 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

Premises Liability Practice Group Co-Chair

Caroline Grech-Clapper

Editors

Bonny Craft/Julie Gorney

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 swsubscriptions.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

No-Fault Newslines – 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