

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Court Denies Requested “Distracted Customer” Exception To The Open and Obvious Defense

By James P. Molloy

The Court of Appeals has ruled against a requested “distracted customer” exception to the open and obvious defense. In *Kennedy v Great Atlantic and Pacific Tea Co. d/b/a Farmer Jack and Borman’s, Inc. d/b/a Farmer Jack*, __ Mich App __ (2007), a published decision of the Michigan Court of Appeals, Plaintiff slipped and fell on crushed green grapes or green grape residue on the floor of Defendant’s grocery store. Plaintiff unsuccessfully argued that the slipping hazard posed by the crushed grapes or grape residue was not open and obvious, and that Defendant should not be allowed to assert the open and obvious defense based on the so-called “distracted customer” exception.

In a premises liability action, a plaintiff must prove (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant’s breach of the duty caused the plaintiff’s injuries, and (4) that the plaintiff suffered damages. Generally, a premises possessor owes a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. However, the possessor of land is not an absolute insurer of an invitee’s safety. A premises possessor is generally not required to protect an invitee from open and obvious dangers. The test to determine if a danger is open and obvious is whether “an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection.”

In *Kennedy*, Plaintiff asserted the crushed grape residue was green and brown in color and the slipping hazard was therefore inconspicuous against the backdrop of the beige supermarket floor. However, Plaintiff testified the crushed grapes were readily observable after he slipped and that he and several other people all noticed the existence of the crushed grapes and grape residue once they actually looked at the floor. He further testified that nothing blocked his view of the supermarket floor immediately preceding his accident.

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Kennedy is a published decision and, therefore, binding on lower courts. It presents another example of the application of the open and obvious doctrine to everyday occurrences and places responsibility on claimants for their own safety.

Importantly, the *Kennedy* Court refused to endorse an overly broad rule concluding all shoppers are distracted by supermarket displays and merchandise. Public policy requires individuals to take some degree of responsibility for their own safety and the Court found no valid reason to create a special standard of care for supermarket patrons. The *Kennedy* decision helps the defense of future claims which rely on the so-called “distracted customer” exception to the open and obvious defense by confirming that the only exceptions to the open and obvious doctrine are (1) an unreasonably dangerous condition with a high likelihood of harm or severity of harm, or (2) an unavoidable condition.

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The *Kennedy* Court disagreed that the slipping hazard posed by the crushed grapes or grape residue was not open and obvious. Plaintiff's own deposition testimony established that he would have noticed the potentially hazardous condition had he been paying attention. The Court also disagreed with Plaintiff's contention that a reasonable prudent shopper in a grocery store is neither required nor expected to observe all potentially dangerous conditions on the supermarket floor or in a supermarket aisle. In support of this argument, Plaintiff relied on *Jaworski v Great Scott Supermarkets, Inc.*, 403 Mich 689 (1978). However, *Jaworski* was a contributory negligence case and decisions since that time have suggested that the reasoning of *Jaworski* is no longer relevant under the doctrine of comparative negligence. *Charleston v Meijer, Inc.*, 124 Mich App 416, 419 (1983).

In *Kennedy*, the issue was whether Defendants owed Plaintiff a duty, not whether Plaintiff was comparatively negligent in failing to observe and avoid the crushed grapes or grape residue on Defendant's floor. There was nothing unusual about spilled grapes or grape residue on the supermarket's floor. Moreover, Plaintiff simply failed to raise a genuine issue of fact with respect to whether Defendants knew or should have known that his attention would be distracted by displays and merchandise in the store. The Court rejected Plaintiff's proposed distracted customer exception to the open and obvious doctrine. Rather, the Court ruled Plaintiff failed to create a genuine factual dispute with respect to whether Defendants knew or should have known that his attention would be distracted away from the open and obvious danger.

Plaintiff next argued that the open and obvious danger doctrine could not bar recovery because Defendants breached a separate and independent duty created by the International Property Maintenance Code. This argument also failed. Although the *Kennedy* Court recognized code violations may provide some evidence of negligence, the relevant inquiry remained whether any special aspects rendered the otherwise open and obvious condition unreasonably dangerous. *O'Donnell v Garasic*, 259 Mich App 569, 578-579 (2003). As already discussed, there was nothing unusual about crushed grapes on a supermarket floor that would create an unreasonably high risk of harm.

Lastly, Plaintiff argued that even if the crushed grapes and grape residue were open and obvious, Defendants breached a separate and distinct duty imposed by the Michigan Occupational Safety and Health Act (MIOSHA), MCL 408.1001 *et seq.* Again, the *Kennedy* Court disagreed. Plaintiff argued that Defendants breached the duty to provide a safe workplace as required by Section 9 of the MIOSHA. However, the MIOSHA and regulations enacted under the MIOSHA apply only to the relationship between employers and employees and, therefore, do not create duties that run in favor of third parties such as Plaintiff.

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