



Ready for the Defense

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Trip & Fall Case: The “Distraction Exception” to the “Open & Obvious Danger” Rule

THIS MONTH WE DISCUSS the so-called “distraction or momentary distraction” exception to the rule that a landowner or possessor is not liable for injuries sustained by a person coming onto his property and being injured by an “open and obvious danger” on the property—for example, a fire burning on the premises. But, as we have often commented that there are two exceptions to the “open and obvious danger”/no liability rule: (1) the “distraction” exception (for example, if there is an “open and obvious danger,” but the person coming onto the premises and being injured was momentarily distracted and looked away, not seeing the open and obvious danger); or (2) the “deliberate encounter” exception where the person coming onto the premises observes the open and obvious danger, but goes ahead and encounters it anyway risking injury because there is no reason not to (for example, if the person does walk on the icy floor to save a child from falling).

This month’s column is the case of *Figas v. Aldi, Inc.*, 2015 IL App (1st) 151117-U (1st Dist. 2015) (an unpublished case which cannot be cited as precedent).

While the case cannot be cited as authority and precedent, it has some value by showing a typical situation where the Appellate Court will apply the “Distraction” Exception.

In *Figas v. Aldi*, Plaintiff Susan Figas tripped and fell over a wooden pallet on a grocery store floor left in the aisle when the store employee was called away and the pallet was seen by Plaintiff Figas who walked around it, appreciating it was an open and obvious danger. But, after she walked by the pallet, another customer coming down the aisle caused Figas to step backwards without looking and trip and fall over the pallet.

The trial court granted summary judgment for Aldi based on the “open and obvious danger/no liability” rule. But, the Appellate Court reversed, finding that Plaintiff Figas may have been “distracted” and whether she was or was not was a question for the jury to decide. So, the case was sent back for a jury trial.

The Facts In The Figas Case

The Appellate Court set out the facts of the accident,

as revealed in the trial court during discovery (depositions, etc.)

On November 11, 2011, the plaintiff was grocery shopping at the Aldi store located at 10532 South Indianapolis Avenue in Chicago. On her way to the checkout counter and while pushing her cart down aisle number four, the plaintiff noticed, and walked around, two empty wooden pallets that were stacked on the floor next to the shelves on the right side of the aisle.

According to the deposition testimony of Angie Villa, the store manager, the pallets were left in the aisle by one of Aldi’s employees who was called away from her work in the aisle to go to the front of the store to assist with customer checkout. The plaintiff testified that, after she had taken several steps past the pallets, a female customer appeared in her path pushing a shopping cart in the opposite direction. According to the plaintiff, she took one or two steps back to allow the other customer to pass when she tripped on the pallets and fell. The plaintiff admitted that she did not look behind her before stepping backwards.

The Court noted there was a video showing the accident:

The video also shows empty pallets laying on the aisle floor next to a shelf on the plaintiff’s right. ... The plaintiff can be seen pushing her cart around the pallets and toward the two customers standing in the intersecting aisle. Villa, who is also pushing a cart, appears from aisle five and walks in front of the two customers near aisle four. As Villa walks in front of the customers, the plaintiff stops, steps backwards without looking, trips on the pallets, and falls.

The Court explained the “Distraction” Exception as a situation where plaintiff observes and appreciates the “open and obvious danger,” but is distracted by something the defendant did or someone else did and hence

looks away and falls on the open and obvious danger obstruction.

However, the distraction exception cannot apply if the plaintiff fails to observe the obvious or is self-distracted.

Explaining the distraction exception, the Appellate Court stated:

There are two exceptions to the open and obvious rule which serve to impose a duty on a landowner despite the existence of an open and obvious condition. *Bruns*, 2014 IL 116998, ¶ 20. Under the ‘distraction exception,’ although a condition is open and obvious, a landowner

that required the plaintiff to divert his or her attention from the open and obvious danger, or otherwise prevented him or her from avoiding the risk’ and where the distractions were reasonably foreseeable by the defendant.

Concluding that Aldi could expect someone to be distracted and trip and fall over a pallet in the aisle, the Court stated:

In sum, we find that it is reasonably foreseeable that a customer pushing a shopping cart down a grocery store aisle might momentarily forget the presence of an otherwise obvious obstruc-

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can be liable if it should have foreseen that its ‘ ‘invitee’s attention may be distracted, so that [s]he will not discover what is obvious, or will forget what [s]he has discovered, or fail to protect h[er]self against it.’ ’ A plaintiff is distracted when ‘circumstances required * * * her to focus on some other condition or hazard.’ The distraction exception will apply only where ‘evidence exists from which a court can infer that [the] plaintiff was actually distracted.’ *Bruns*, 2014 IL 116998, ¶ 22. It has been applied where ‘some circumstance was present

tion in the aisle when maneuvering her cart to allow another customer to pass. We also find that the evidence of record could support the conclusion that the plaintiff in this case was distracted from the danger posed by the pallets upon which she tripped.

The Open & Obvious Danger Rule & Two Exceptions

The *Park v. Metra* case is an excellent case on the open and obvious danger rule and its two exceptions:

(1) distraction; and (2) deliberate encounter. It is a case our firm won for Metra and it is entitled:

Park v. Northeast Illinois Regional Commuter Railroad Corp. (Metra), 2011 IL App (1st) 101283, 960 N.E.2d 764 (1st Dist. 2011), Petition Leave to Appeal to Supreme Court denied January 30, 2013 (Moving train on railroad tracks an open and obvious danger of which Metra had no duty to warn decedent not to cross tracks in front of).

Stepping In Front Of A Moving Train Is An Open & Obvious Danger

Finding stepping in front of a moving train is an open and obvious danger, the Appellate Court in *Park* stated:

We believe that, much like diving into a lake of unknown depth, the danger of stepping in front of a moving train is open and obvious regardless of the kind of train it is. ... The record shows Hiroyuki was aware of the approaching Amtrak train but, believing it to be the Metra train he intended to board, attempted to cross the tracks.

No Momentary Distraction Or Forgetfulness Exception For Walking In Front Of An Oncoming Train

Finding no “distraction exception to the open and obvious danger/no duty rule” applied, the *Park* Court stated:

The issue here is whether, as a matter of law, it was foreseeable that Hiroyuki would be distracted from the open and obvious danger of an approaching train due to foliage located near the east passenger platform and inclement weather. We find that it was not. The allegations in plaintiff’s fifth amended complaint show that, despite the foliage and weather, Hiroyuki was aware of the approaching train before the accident. There is no evidence that the rain and foliage distracted Hiroyuki such that he forgot about the approaching train. Rather, as argued by plaintiff, it was Hiroyuki’s mistaken belief that the approaching train was a Metra train that led Hiroyuki to attempt to cross the tracks.

No Deliberate Encounter/Economic Compulsion Exception For Walking In Front Of An Oncoming Train

And, finally, holding the “deliberate encounter” exception to the open and obvious danger/no duty to warn of rule did not apply, the Appellate Court explained:

We likewise find that the deliberate encounter exception does not apply. Under the deliberate encounter exception to the open and obvious rule, a duty is imposed when a defendant has reason to expect that a plaintiff will proceed to encounter the known or obvious condition, despite the danger, because to a reasonable person in his position the advantages of doing so would outweigh the apparent risk. ... Plaintiff has alleged ‘no indication of any compulsion or impetus under which a reasonable person’ in Hiroyuki’s position would have disregarded the obvious risk of crossing railroad tracks while a train is approaching.



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