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Parking Lot Crosswalk Considered a Potential Special Aspect of the Parking Lot - Open and Obvious Doctrine Rejected

By: James P. Molloy **November 24, 2015**

SECREST WARDLE NOTES

The two oft-cited examples of conditions that would satisfy a special aspects exception to the open and obvious doctrine are: (1) an unguarded, 30-foot deep pit, which creates "a substantial risk of death or severe injury," and (2) a standing pool of water in front of the only exit to a premises, which is "effectively unavoidable" by a person trying to leave the premises. *Lugo v Ameritech Corp, Inc.*, 464 Mich 512, 518 (2001).

In *Fowler v Menard, Inc., unpublished decision of the Michigan Court of Appeals* 2015, a customer died from injuries after being hit by a car as she used a pedestrian crosswalk in Defendant's parking lot. Plaintiff claimed that the negligently designed crosswalk created a "feigned zone of safety."

As held in *Richardson v Rockwood Center, LLC*, 275 Mich App 244 (2007), "it is typical for parking lots outside businesses to lack signs or other traffic controls[,]" and "[a] common condition is not uniquely dangerous, and, therefore, does not give rise to an unreasonable risk of harm." *Richardson* at 249.

In *Fowler*, however, the Court of Appeals affirmed the trial court's finding of a question of fact as to the existence of an unreasonably dangerous hazard as Plaintiff's expert opined that the crosswalk was installed in a manner that increased the risk to the pedestrian, effectively creating an artificial safety zone in which the decedent would have a reasonable presumption of safety.

It is important to note that it appeared the Court was persuaded by Plaintiff's expert report which was critical of the design of the parking lot and the crosswalk in particular. Defendant offered no expert opinion, or other documentary or testamentary evidence of its own to question whether it knew or should have known that the crosswalk it created would give the pedestrian a sense of safety or distraction. It may have inured to their benefit if they did.

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"A negligence action may only be maintained if a legal duty exists which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Burnett v Bruner*, 247 Mich App 365, 368 (2001). In general, a landowner has a duty to "exercise reasonable care to protect [an] invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech, Inc.*, 464 Mich 512, 516 (2001). The *Fowler* Court also gave some credence to the oft-criticized so-called "shopkeeper's duty." Namely, that shopkeepers owe some sort of higher duty because they should expect that their customers will be distracted by the goods on their shelves and will not watch where they are walking. Specifically, "an individual shopping in a self-service store is entitled to *presume* that passageways provided for his use are reasonably safe, and is not under an obligation to see every defect or danger in his pathway."

The Court of Appeals recently applied these principles and took them one step further in *Fowler v Menard, Inc., unpublished decision of the Michigan Court of Appeals* 2015. In *Fowler*, Virginia Jan Rawluszki (the decedent) was struck by a motor vehicle as she walked in the crosswalk from the Defendant's parking lot. Denise Fowler (Plaintiff and Next Friend) filed a Complaint against the storeowner, Menard, Inc., as well as against the driver of the motor vehicle that struck the decedent. As it relates to the claim against Menard, Inc., Plaintiff asserted that the crosswalk created a feigned zone of safety and that Defendant had a duty to take extra measures to install signage or traffic signals to warn oncoming vehicles of the pedestrian crossing. Menard filed a motion for summary disposition, arguing that the crosswalk, as part of the parking lot, was an open and obvious condition, relying on *Richardson v Rockwood Center, LLC*, 275 Mich App 244. The court in *Richardson* held that a landowner has no duty to warn or protect pedestrians from the dangers of vehicular and pedestrian traffic because those dangers are open and obvious. *Id.* At 249. The trial court denied Defendant's motion, reasoning that while the parking lot dangers were open and obvious there was a question of fact as to whether the crosswalk as designed created a special aspect that gave rise to a duty on the part of Defendant as premises owner.

The Court of Appeals agreed with the trial court, finding that there is a duty on the part of the landowner to install crosswalks in a reasonable and prudent manner. The Court cited the rule in *Fultz v Union-Commerce Associates*, 477 Mich 460 (2004) that, "[i]f one voluntarily undertakes to perform an act, having no prior obligation to do so, a duty may arise to perform the act in a non-negligent manner." *Id.* At 465. The Court agreed with the lower court when it found that the intentionally created crosswalk created a safety zone, and a special aspect, warranting the imposition of a duty of care.

Plaintiff submitted the report of an accident reconstruction expert which was critical of the design of the parking lot. Specifically, the report indicated, "I also am of the opinion that the design of the crosswalks at this Menards are substandard for safety….There are no warning signs, no pedestrian crosswalk warning signs or any type of signage. The combination of these design problems creates an unreasonable risk to pedestrians." As Defendant did not submit anything to the trial court to question whether it knew or should have known that the crosswalk it created would give the pedestrian a sense of safety or distraction, the Court of Appeals concluded that the trial court reached the correct result.

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