

STATE OF MICHIGAN
COURT OF APPEALS

ELENA QUINTO,

Plaintiff-Appellant,

v

WOODWARD DETROIT CVS, L.L.C., d/b/a
CVS PHARMACY #8016,

Defendant-Appellee.

FOR PUBLICATION
April 29, 2014

No. 311213
Macomb Circuit Court
LC No. 2011-001772-NI

Advance Sheets Version

Before: M. J. KELLY, P.J., and CAVANAGH and SHAPIRO, JJ.

CAVANAGH, J. (*concurring in the result only*).

I agree with this Court’s analysis and holding in *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 714-719; 737 NW2d 179 (2007); therefore, I concur in the result only and conclude that a special conflict panel should not be convened under MCR 7.215(J)(2).

“[A] premises owner is not an insurer of the safety of invitees.” See *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 94; 485 NW2d 676 (1992). Although, generally, a premises owner 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, an invitee also has a duty to exercise reasonable care for his or her own safety. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001); *Bertrand v Alan Ford, Inc*, 449 Mich 606, 616-617; 537 NW2d 185 (1995); *Charleston v Meijer, Inc*, 124 Mich App 416, 418-419; 335 NW2d 55 (1983).

Here, the majority imposes a heightened duty of care on self-service retail store owners after concluding that merchandise displays and advertisements cause customers to be so distracted that they cannot reasonably be expected to observe even an open and obvious danger that exists in an aisle while shopping, i.e., a condition that “an average person with ordinary intelligence would have discovered [] upon casual inspection.” *Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012). Therefore, the majority concludes, the open and obvious danger doctrine should not apply to floor-level hazards located in aisles containing displays of

merchandise and advertising.¹ I disagree and would hold that self-service retail store owners owe the same duty of care as other premises owners and that duty is to exercise reasonable care to protect customer-invitees from an unreasonable risk of harm caused by a dangerous condition in the store, including in the aisles. And if “special aspects” of an open and obvious condition create an unreasonable risk of harm, the retail store owner is not relieved of its duty to protect its customer-invitees from that risk. See *Lugo*, 464 Mich at 517. But the mere possibility that customers might be distracted by the merchandise displays and advertisements commonly found in all self-service retail stores, alone, neither relieves customers of their duty to exercise reasonable care for their own safety nor imposes a unique duty on self-service retail store owners to protect customers from even open and obvious dangers that do not pose an unreasonable risk of harm.

In this case, plaintiff tripped over an open and obvious display platform located in an aisle of defendant’s store. That is, the danger was discoverable by an average person upon casual inspection. See *Hoffner*, 492 Mich at 461. And plaintiff did not argue that “special aspects” of this open and obvious danger created an unreasonable risk of harm. Therefore, defendant did not have a duty to protect plaintiff from tripping over the display platform. Accordingly, consistent with the analysis and holding in *Kennedy*, I would affirm the trial court’s order granting summary disposition in favor of defendant.

/s/ Mark J. Cavanagh

¹ This argument was also rejected by this Court in *Charleston*, 124 Mich App at 418. In that case, the plaintiff slipped in a puddle of water while shopping in a supermarket. She argued that the holding in *Jaworski v Great Scott Supermarkets, Inc*, 403 Mich 689, 699; 272 NW2d 518 (1978), created a heightened standard of care for supermarkets, or lowered her standard of care, because of the distractions attracting a shopper’s attention away from the floor. *Charleston*, 124 Mich App at 418. Noting that the *Jaworski* Court had held that a customer is not “under an obligation to see every defect or danger in his pathway,” this Court nevertheless concluded that the statement did not mean “that the customer may remain blind to visible dangers.” *Id.* (quotation marks and citation omitted).