

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Vivian Miller

Court of Appeals No. L-08-1187

Appellee/Cross-Appellant

Trial Court No. CI 02-6313

v.

First International Fidelity &
Trust Building, LTD, et al.

DECISION AND JUDGMENT

Appellants/Cross-Appellees

Decided: December 18, 2009

* * * * *

Teresa Dewey Bacho, for appellee/cross-appellant.

Stephen C. Roach, Brian A. Newberg, Marc J. Meister and Teckla H. Meister,
for appellants/cross-appellees.

* * * * *

HANDWORK, P.J.

{¶ 1} This case is before the court on appeal from the judgment of the Lucas County Court of Common Pleas which, following a jury trial, awarded judgment in favor of appellee/cross-appellant, Vivian Miller, against appellant/cross-appellee, First International Fidelity Guarantee Building Partnership, PLL ("First International"), in the

amount of \$360,000, on October 25, 2004. Miller's injuries resulted from a fall, occurring on January 2, 2001, while she was employed by Advance Cleaning and performing janitorial duties in the basement of First International's building ("the building"), which housed the law offices of Cooper and Walinski. The trial court denied First International's motions for summary judgment, directed verdict, judgment notwithstanding the verdict, and for new trial.

{¶ 2} On appeal, First International raises the following assignments of error:

{¶ 3} 1. "The trial court erred when it denied First International's motion for summary judgment because there were no genuine issues of material fact and First International did not owe a legal duty to protect Miller from the open and obvious hazard that caused her fall."

{¶ 4} 2. "The trial court erred when it denied First International's motions for directed verdict because there were no genuine issues of material fact and First International did not owe a legal duty to protect Miller from the open and obvious hazard that caused her fall."

{¶ 5} 3. "The trial court erred when it failed to grant First International's motion for judgment n.o.v. pursuant to Civ.R. 50(B) because there were no genuine issues of material fact requiring the submission of the case to a jury and First International did not owe a legal duty to protect Miller from the open and obvious hazard which caused her fall."

{¶ 6} 4. "The trial court erred when it denied First International's motion for a new trial pursuant to Civ.R. 59, especially since the trial court committed plain error during the trial by failing to instruct the jury on propositions of law that were correct and applicable to the facts of this case and, furthermore, because it refused to submit requested interrogatories to the jury when such interrogatories might have cured the error caused by the failure of the trial court to give the requested instructions."

{¶ 7} Miller filed a motion for prejudgment interest, which was denied by the trial court, and filed the following cross-assignment of error:

{¶ 8} "The trial court abused its discretion in denying appellee/cross-appellant's motion for prejudgment interest."

{¶ 9} We will address First International's first two assignments of error together, regarding the trial court's denial of the motions for summary judgment and directed verdict. First International argues that the trial court erred in denying its motions because First International had no duty to protect Miller from the hazard which caused her fall as the danger was known to her or was so obvious and apparent that she should have reasonably been expected to discover it and protect herself against it.

{¶ 10} At the time of her fall, Miller had been cleaning the building for at least two years, five nights a week. Her normal procedure was to collect the garbage throughout the building, in the areas she was responsible for cleaning, and take the garbage bags down the elevator to the basement. Once in the basement, she would unload the garbage bags and then carry them, between one and four bags at a time, through the basement into

the area where the garbage bins were located. The hallway/passageway that led to the garbage repository was narrow and often cluttered with empty boxes, waiting to be put into recycling bins. It was not Advance Cleaning's responsibility to place the boxes into the recycling bins.

{¶ 11} At the location of Miller's fall, there was an opening, which was approximately 36 inches wide, that led into the area of the garbage bins. The opening was located between fixed objects in the basement, one of which was a furnace. In front of the opening was a cement slab, approximately 36 inches square and two to four inches higher than the floor. On the slab, against a fixed object was a cabinet with shelves. Off of the slab, and on the floor opposite from the location of the cabinet, were recycling bins. A short distance from the concrete slab was a PVC drainage pipe and a short brick wall. The concrete slab was far enough away from the pipe that a person could step down on the floor between the cement slab and the pipe.

{¶ 12} The pipe was six inches in diameter and was attached to the side of the short brick wall, which was approximately four inches wide and slightly higher than the pipe. The pipe was secured to the brick wall with a metal assembly, which consisted of two metal straps, roughly one inch wide, that encased the pipe, a nut and bolt that secured the two ends of the metal straps together on the side of the pipe, and a metal bracket that attached the straps to the brick wall. The metal bracket, which was rectangular in shape, protruded slightly above the brick wall. Throughout her testimony, Miller referred to the metal bracket as being a "hook" or "hooks". The metal assembly was darker in color than

the pipe it surrounded. At times, but not always, the fluorescent light above the pipe would be burned out and the area would be poorly illuminated.

{¶ 13} In order to get into the garbage bin area, Miller had to step up onto the concrete slab, step off back onto the floor, and then immediately step over the pipe and brick wall. Miller would deposit the trash and then return by the same route. Miller estimated that each night she carried a minimum of ten bags, one to four bags at a time, through the passageway and into the garbage repository. She estimated that she made that trip hundreds of times during her employment. The passageway and opening where the pipe was located was the only available route to the garbage bins. During her deposition, Miller marked on a photograph the path she took when she stepped over the pipe and wall. The line of her drawing went directly over the metal assembly, which was visible in the photograph.

{¶ 14} On January 2, 2001, during her second or third trip from the elevator to the garbage repository, while carrying several bags of garbage, Miller's leg of her blue jeans caught on something as she was crossing over the top of the pipe. Miller attempted to pull her leg loose, which caused her to lose her balance and fall, thereby injuring her knee. Miller was unable to identify what portion of the metal assembly actually caught on to her jeans.

{¶ 15} During her deposition testimony, Miller described the pipe as having hooks and testified that, prior to her injury, she knew there were hooks, or something, on the pipe because sometimes the garbage bags would get caught on something and rip,

although she testified that she never actually looked to see what was causing the bags to tear:

{¶ 16} "Q. What do you remember about the pipe?

{¶ 17} "A. Well, the pipe was fat and it was hooked to the wall and they was [sic] hooks.

{¶ 18} "Q. Where were the hooks?

{¶ 19} "A. I don't remember. I mean –

{¶ 20} "Q. Do you remember there being hooks within the area where you would have to put trash in the trash cans?

{¶ 21} "A. Well, I know they was hooks on there.

{¶ 22} "Q. When you say 'hooks,' describe –

{¶ 23} "A. I don't know, a hook that holds the pipe to the wall or something. * * *

{¶ 24} "Q. Before the injury what do you remember as far as hooks being on the pipe? Do you remember or –

{¶ 25} "A. No, I know there was some hooks. Like I tried to tell you, sometimes we had practically no room to squeeze through. Like, a little brick thing that was here, they'd have stuff sitting there in the way, and then these trash bins sometimes were way over where we'd have maybe that much room to try to squeeze through (indicating).

{¶ 26} "Q. To put your trash into the trash cans?

{¶ 27} "A. To cross the wall to go over the other one to put the trash in the thing.

{¶ 28} "Q. But as far as the trash – I'm sorry, as far as the pipe, before this accident happened, did you know that there was actually something on these pipes, you know, hooks or whatever you label them as?

{¶ 29} "A. Well, I know sometimes we'd take our trash and the bags would get caught on something and rip, but –

{¶ 30} "Q. But as far as your job –

{¶ 31} "A. But, see, we didn't sit and look down at the floor, we'd just cross with our bags and take our trash."

{¶ 32} During trial, Miller testified that she was not aware of the "hook" prior to her fall. When cross-examined with her deposition testimony, she testified that she never "paid any attention" to what was ripping the garbage bags, just that the bags would sometimes "hit that cement wall when we would cross it."

{¶ 33} Christopher Snyder, office services supervisor, employed by Cooper and Walinski, the occupier of the building, had been responsible for the building's maintenance for 19 years. Snyder testified that the pipe and metal assembly had not been changed in the years he was responsible for the building's maintenance. During his deposition, he testified that he was unaware prior to Miller's injury that there was a "hook" connecting the strap around the pipe to the wall. Based on his examination of a black and white copy of a photograph of the pipe, he stated that he could not see the "hook" very well. At trial, Snyder testified that there was no "hook" connecting the strap to the brick wall:

{¶ 34} "Q. * * * prior to Vivian's injury in January of 2001 you, personally, were not even aware of that hook or connection on the pipe, correct?

{¶ 35} "A. I was aware that it – I mean, there was a strap on the pipe itself.

{¶ 36} "Q. You weren't aware of the hook connecting the strap around the pipe to the brick wall, correct?

{¶ 37} "A. I knew it was there because I crossed over it myself. I don't understand the question.

{¶ 38} "Q. My question is, prior to Vivian's injury, were you aware of the fact that there was a hook connecting the strap around the pipe to the wall?

{¶ 39} "A. There is no hook on the pipe.

{¶ 40} "Q. So is your answer you weren't aware or – you're saying now there was no hook?

{¶ 41} "A. Correct."

{¶ 42} Snyder testified that Miller never complained to him about the garbage or recycling bin areas, but that she did complain about clutter, such as empty boxes, in the passageway. Snyder attested that Miller never informed him or complained about unsafe conditions in the basement. He testified that there were sometimes empty boxes and other items in transit in the passageways, but that it was usually clear. Following Miller's injury, upon a request from Larry Meyers, Operations Manager at Advance Cleaning, a wooden platform was built over the brick wall and adjoining pipe.

{¶ 43} Meyers testified that Miller and another employee had complained to him about having to step over a pipe to carry the trash bags to the garbage bins. Meyers testified during his deposition that he spoke to Snyder about the location of the trash bins on two occasions and that Snyder said he would look into it, but that no steps to correct the problem ever occurred. At trial, Meyers testified that he was aware, prior to Miller's injury, that Miller's garbage bags had been ripping. He did not indicate where in the building the bags were being ripped, but stated that they had gotten "a bad batch of bags." During his deposition testimony, however, he testified that he was not aware of any bags ripping in the basement.

{¶ 44} Joseph Roberts, Miller's immediate supervisor while she worked in the building, testified that the walkway to the garbage bins was narrow and often lined with boxes and other miscellaneous items, making it difficult to get through while carrying heavy bags of trash. Prior to Miller's injuries, Miller complained to Roberts about the clutter and difficulty in getting through the area with the trash, but Roberts testified that it was his understanding that Miller relayed these concerns to Chris Snyder. During direct examination, Roberts also testified that Miller specifically complained to him about the pipe that crossed the floor and that she expressed a concern to him that her pants' leg would get caught:

{¶ 45} "A. * * * Vivian reported to me that she had a problem with something in the basement and I went down and looked at it.

{¶ 46} "Q. What specific problem was that?

{¶ 47} "A. There was some kind of pipe that went across the floor that was bracketed to the floor. * * *

{¶ 48} "Q. And is that the area of concern that Vivian brought to you, the pipe – I'm sorry, this pipe structure?

{¶ 49} "A. That's the pipe structure, yes.

{¶ 50} "Q. What, specifically, was your understanding of the concern?

{¶ 51} "A. She was concerned that when she would step over it her pants leg would get caught and she would trip.

{¶ 52} "Q. Okay, and did you investigate the situation yourself?

{¶ 53} "A. Yes, I did.

{¶ 54} "Q. And what conclusions,, if any, did you reach from your investigation?

{¶ 55} "A. After I – I checked it out to see what it looked like and I came to the conclusion that, to me, that was a hazardous condition because it was not exposed like that. Nine times out of ten there would be something, pretty much, almost blocking that area when you got there.

{¶ 56} "Q. And this was prior to Vivian's injuries in January of 2001 that you had these concerns, correct?

{¶ 57} "A. Yes.

{¶ 58} "Q. Did you do anything with that information?

{¶ 59} "A. Well, my responsibility – it was not an immediate danger that – I had to report only immediate, like, right now, dangers. So I reported to my supervisor, which was Larry Meyers, verbally, and I put it in writing."

{¶ 60} On cross-examination, Roberts testified that he was aware, prior to Miller's injuries, that there was a strap located on the sewage pipe; however, he noted that "With a pipe in an open area like that you probably wouldn't have any problem because you could see it. The main problem was not being able to see that area when you approached it." Even knowing the pipe was there, when carrying trash, Roberts misjudged the distance to the pipe and tripped over it on two occasions, but was able to catch his balance before falling. When carrying trash bags himself, Roberts testified that he would locate the pipe when he got to that area so that he would not trip over it.

{¶ 61} The trial court denied summary judgment on the basis that there was a genuine issue of material fact regarding whether the danger posed by the hazard was one that an invitee reasonably should have been expected to discover. Specifically, the trial court noted that although Miller was aware that trash bags would sometimes get caught on something and tear, as she was lifting them over the brick wall, she never examined the area to determine the specific cause. The trial court found that "[w]hile some photos show the bracketing to which the pipe was attached, these photo[s] do not clearly depict a prominent hazard posed for people traversing the pipe[,] especially in the direction traveled by Ms. Miller at the time of her fall." Moreover, the trial court noted that the area near the pipe was often cluttered and that even the building manager was unaware of

the "hook" prior to the time of the accident and testified that it could not be seen very well in the photographs. The trial judge, who had not ruled on the motion for summary judgment, denied First International's motion for directed verdict. The trial judge, however, did not articulate which facts he found created a genuine issue of material fact.

{¶ 62} We recognize that "[a]ny error by a trial court in denying a motion for summary judgment is rendered moot or harmless if a subsequent trial on the same issues raised in the motion demonstrates that there were genuine issues of material fact supporting a judgment in favor of the party against whom the motion was made."

Continental Ins. Co. v. Whittington (1994), 71 Ohio St.3d 150, syllabus. However, when it is discovered upon appellate review that no genuine issues of material fact existed at the time the motion for summary judgment was decided, and no additional facts were presented at trial to establish the existence of a genuine issue of material fact, then the appellate court is permitted to review the trial court's denial of summary judgment. See *Nageotte v. Cafaro Co.*, 6th Dist. No. E-04-015, 2005-Ohio-2098 (trial verdict in favor of plaintiff/invitee reversed on appeal, and judgment entered on behalf of defendant/owner, when court determined, as a matter of law, that owner/occupier owed no duty to the invitee to protect her from an open and obvious hazard which she could have protected herself against).

{¶ 63} An appellate court's review of a trial court's grant of summary judgment is de novo. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. Civ.R. 56(C) provides that summary judgment can be granted only if (1) no genuine issue of

material fact remains to be litigated, (2) viewing the evidence in a light most favorable to the nonmoving party, reasonable minds can reach but one conclusion and that conclusion is adverse to the nonmoving party, and (3) the moving party is entitled to summary judgment as a matter of law. See, also, *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶ 64} Civ.R. 50(A)(4) states that "[w]hen a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue." A motion for a directed verdict tests the sufficiency of the evidence, not the weight of the evidence or the credibility of witnesses. *Wagner v. Roche Laboratories* (1996), 77 Ohio St.3d 116, 119-120. When the party opposing the motion fails to produce any evidence on one or more of the essential elements of a claim, a directed verdict is appropriate. *Hargrove v. Tanner* (1990), 66 Ohio App.3d 693, 695. Although the appellate court must review all facts presented by the plaintiff in determining a motion for directed verdict, trial court's grant or denial of a motion for directed verdict presents a question of law, which an appellate court reviews de novo. *Schafer v. RMS Realty* (2000), 138 Ohio App.3d 244, 257.

{¶ 65} In order to establish her claim of negligence, Miller needed to establish that First International owed her a duty of care, breached that duty, and proximately caused

her injuries. See *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, ¶ 10. In this case, the parties agree that Miller was an invitee.

{¶ 66} The owner of a premises owes an invitee a duty of ordinary care in maintaining the premises in a reasonably safe condition, such that its invitees will not unreasonably or unnecessarily be exposed to danger, should warn an invitee of any latent dangers which the owner knows about or, with the exercise of reasonable care, should know about, and should take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 203; *Jackson v. Kings Island* (1979), 58 Ohio St.2d 357, 359; and *Perry v. Eastgreen Realty Co.* (1978), 53 Ohio St.2d 51, 52. "However, this duty does not require landowners to insure the safety of invitees on their property." *Lang*, ¶ 11. Rather, where a danger is open and obvious, "a landowner owes no duty of care to individuals lawfully on the premises" *Id.*, citing *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, syllabus, and *Sidel v. Humphrey* (1968), 13 Ohio St.2d 45. As such, the open and obvious doctrine "acts as a complete bar to any negligence claims." *Armstrong*, ¶ 5.

{¶ 67} The open and obvious doctrine states that "[a]n occupier of premises is under no duty to protect a business invitee against dangers which are known to such invitee or are so obvious and apparent to such invitee that he may reasonably be expected to discover them and protect himself against them." *Sidel v. Humphrey* (1968), 13 Ohio St.2d 45, paragraph one of the syllabus, and *Armstrong*, ¶ 5. "The rationale underlying

this doctrine is 'that the open and obvious nature of the hazard itself serves as a warning. Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves.'"

Armstrong, ¶ 5, citing, *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 644.

Whether the invitee was unreasonable in choosing to encounter the danger is not what relieves the property owner of liability; rather, "it is the fact that the condition itself is so obvious that it absolves the property owner from taking any further action to protect the [invitee]." *Armstrong*, ¶ 13.

{¶ 68} Whether a hazard is open and obvious must be determined on the facts in each case. *Navarette v. Pertoria, Inc.*, 6th Dist. No. WD-02-070, 2003-Ohio-4222, ¶ 19.

A hazard is considered to be open and obvious when it is in plain view and readily discoverable upon ordinary inspection. See *Parsons v. Lawson Co.* (1989), 57 Ohio App.3d 49, 51.

{¶ 69} Upon our thorough review of the record, we find that Miller knew that there was a danger in the location where she crossed over the pipe and/or that the danger was so obvious and apparent that Miller was reasonably expected to discover it. See *Sidel*, supra, paragraph one of the syllabus. Specifically, Miller knew that while she was carrying garbage bags, they would sometimes catch on something and rip when she stepped over the pipe.¹ Moreover, Roberts testified that Miller had expressed a concern to him about the pipe because she was worried that "when she would step over it her

¹Meyers' testimony that they had gotten "a bad batch of bags" does not contradict Miller's testimony that bags would sometimes rip when she lifted them over the pipe.

pants leg would get caught and she would trip." Thus, even if Miller could not see the danger every time she walked through the narrow opening, because she was carrying garbage bags or the area was poorly lit or cluttered, she nevertheless knew that the danger existed and, therefore, had warning of the hazard. Furthermore, we find that, even if Snyder was unaware of the presence of the "hook" prior to Miller's fall, Snyder's knowledge of the hazard was irrelevant because Miller knew of its existence. Accordingly, it was reasonable to expect that Miller would take appropriate measures to protect herself, particularly, when she had bags in her hands and could not see the ground well. See *Armstrong*, supra, ¶ 5.

{¶ 70} Miller, however, claims that she never inspected what caused the trash bags to tear in that area and, therefore, was unaware of the hazardous "hook." When ruling on First International's motion for summary judgment, the trial court considered this factor in determining that a genuine issue of material fact existed with respect to whether the danger was open and obvious and appreciated by Miller. We, however, disagree with this rationale because, even if Miller did not know the danger existed based upon the torn garbage bags, the open and obvious doctrine states that the owner/occupier has no duty to protect an invitee from dangers which are so obvious and apparent that the invitee should reasonably be expected to discover them. *Sidel*, supra, paragraph one of the syllabus. Had Miller looked down, at any point during the hundreds of times she crossed over the hazard during her two or more years on the job, she readily would have seen the metal assembly, as it was darker than the pipe and in plain sight. Even if we presume she could

not have seen the metal assembly while she was carrying garbage bags, she had an equal number of opportunities, when she was returning back through the opening without bags in her hands, to look down and see the metal assembly, or the "hook."

{¶ 71} We recognize that there can be exceptions to the application of the open and obvious doctrine. For instance, the presence of attendant circumstances can create a genuine issue of material fact as to whether a danger is open and obvious. See *Ray v. Wal-Mart Stores, Inc.*, 4th Dist. No. 08CA41, 2009-Ohio-4542, ¶ 23. In this case, Miller was carrying garbage bags down the narrow hallway when her pants caught on the hazard.

{¶ 72} It is reasonable to presume that the garbage bags in Miller's hands could have prevented her from readily viewing the hazard on the day of the incident. We find, however, that this was not Miller's first time encountering the hazard. Rather, as discussed above, Miller knew the hazard existed in that location because bags had been torn at that spot and she told Roberts, her supervisor, that she was concerned she would catch her pants on the hazard. In fact, hundreds of times Miller was able to navigate successfully through the area and avoid the hazard while carrying garbage bags. Because she knew the hazard was there and appreciated the risk involved, we find that the presence of attendant circumstances does not create an exception to the application of the open and obvious doctrine in this case. As such, First International owed Miller no duty to protect her from a hazard that was known to her and was reasonable in presuming that Miller would take appropriate measures to protect herself. See *Armstrong*, ¶ 5.

{¶ 73} Based on the foregoing, we find that First International owed Miller no duty to protect her against the danger posed by the metal assembly, or "hook," that surrounded the pipe in the basement passageway, because Miller had knowledge of the danger existing in that area, or reasonably should have known it was there, and should have taken measures to protect herself against it. Having viewed the evidence in a light most favorable to Miller, we find that there are no genuine issues of material fact regarding First International's duty to Miller, and that reasonable minds can only conclude that First International is entitled to judgment as a matter of law. Accordingly, we find that the trial court erred and that judgment should have been entered on behalf of First International upon its motion for summary judgment and/or directed verdict. First International's first and second assignments of error are therefore found well-taken.

{¶ 74} Having found that First International was entitled to judgment as a matter of law, we find that its third and fourth assignments of error, and Miller's cross-assignment of error regarding the trial court's denial of prejudgment interest, are denied as moot.

{¶ 75} On consideration whereof, the court finds substantial justice has not been done the party complaining and the judgment of the Lucas County Court of Common Pleas is reversed. This matter is remanded to the trial court for further proceedings in accordance with this decision and judgment entry. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J.

JUDGE

Arlene Singer, J.

JUDGE

Richard W. Knepper, J.
CONCUR.

JUDGE

Judge Richard W. Knepper, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.