

[Cite as *Carter v. Miles Supermarket*, 2010-Ohio-6365.]

Court of Appeals of Ohio
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95024

ETTA B. CARTER

PLAINTIFF-APPELLANT

vs.

MILES SUPERMARKET, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-701771

BEFORE: Boyle, J., Kilbane, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: December 23, 2010

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MARY J. BOYLE, J.:

{¶ 1} Plaintiff-appellant, Etta Carter, appeals the trial court's decision granting summary judgment in favor of defendant-appellee, Miles Supermarket Corporation ("Miles"), on her negligence claim. Finding no merit to the appeal, we affirm.

Procedural History and Factual Background

{¶ 2} According to Carter's deposition, she went to Miles to do some grocery shopping for the 2009 July 4th holiday. She was injured after she

fell on a closed box that was 18-inches high and sitting on the floor in an aisle at the store. The box had store goods in it waiting to be stocked.

{¶ 3} Carter stated that she left her cart at one end of the aisle because there were “five or six” people in the aisle. She walked down the aisle to get some cans of baked beans. While in the aisle in front of the beans, she briefly talked to another shopper. She picked her cans of beans, and “turned around” to the other side of the aisle to look at “some boxes of other stuff” on the shelf. She then turned to walk back to her cart, and that is when she fell over the box. She said that the cans she was carrying were large, and they were out in front of her, so she could not see the box.

{¶ 4} Carter further explained that she frequently shops at this Miles grocery store. She did not remember ever seeing a single box sitting in an aisle, although “[t]here might have been a stack of things” previously. Carter stated that she wears glasses with bifocals “all the time, day and night”; she cannot see to drive without them.

{¶ 5} Carter further testified that there was nothing else in the aisle obstructing her view of the box. She agreed that she would have seen the box if she had just looked down at it. The box was a regular brown cardboard box. She had never complained to the store before about boxes in

the aisles, nor was she aware of anyone else doing so. She did not remember seeing a Miles employee in the aisle before she fell.

{¶ 6} When asked again if there was anything else obstructing her view of the box, she replied, “[p]eople, you know, people in the aisle and I wasn’t paying attention. I just had my mind set on the beans and getting out of there. That’s all I was thinking about.” But she stated that the people, at least the ones in front of her, had left the aisle before she fell.

{¶ 7} Carter commenced the underlying action against Miles, alleging that it negligently caused her fall. Miles moved for summary judgment, asserting that the cardboard box was an “open and obvious condition,” and there were no “attendant circumstances” preventing her from discovering or observing the box.

{¶ 8} The trial court granted Miles’ motion. It is from this judgment that Carter appeals, raising two assignments of error for review:

{¶ 9} “[1.] The trial court erred in granting defendants’ motion for summary judgment.

{¶ 10} “[2.] Whether a motion for summary judgment is properly granted when the motion is based on the open-and-obvious doctrine and there exist genuine issues of material fact as to whether the condition was obvious.”

{¶ 11} We will address these assignments of error together, because in answering the first question, we must necessarily address the second.

Summary Judgment

{¶ 12} An appellate court reviews a decision granting summary judgment on a de novo basis. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. Summary judgment is properly granted when: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made. *Harless v. Willis Day Warehousing Co.* (1976), 54 Ohio St.2d 64, 66, 75 N.E.2d 46.

Open-and-Obvious Doctrine

{¶ 13} To establish a negligence claim, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and injury or damages proximately caused by the breach. See *Menifee v. Ohio Welding Prod., Inc.* (1984), 15 Ohio St.3d 75, 77, 472 N.E.2d 707. In this case, it is undisputed that Carter was a business invitee; therefore, Miles owed a duty of ordinary care to maintain the premises in a reasonably safe condition and to warn of “latent and hidden dangers.” See *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶5.

{¶ 14} But property owners are not the insurers of their invitees' safety. *Jackson v. Kings Island* (1979), 58 Ohio St.2d 357, 358, 390 N.E.2d 810. The open-and-obvious doctrine provides that owners do not owe a duty to persons entering their premises regarding dangers that are open and obvious. *Armstrong* at ¶14, citing *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, 233 N.E.2d 589, paragraph one of the syllabus. 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." *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644, 1992-Ohio-42, 597 N.E.2d 504.

{¶ 15} Even when an invitee does not actually see the object or danger until after he or she falls, no duty exists when the invitee could have seen the object or danger if he or she had looked. *Haymond v. BP Am.*, 8th Dist. No. 86733, 2006-Ohio-2732, ¶16. Courts must consider whether the object or danger itself was observable. *Id.*

{¶ 16} When the record supports a determination that the open-and-obvious doctrine applies, thereby obviating a property owner's duty to warn of the hazard and acting as a complete bar to any negligence claim,

then a defendant is entitled to summary judgment. *Armstrong*, 99 Ohio St.3d at ¶5.

Attendant Circumstances

{¶ 17} Carter argues that the trial court erred in granting summary judgment to Miles because she presented compelling evidence that the hazardous condition, the small cardboard box of unstocked product, was not open and obvious. She asserts that the hazardous condition was not obvious to a shopper looking up at shelved merchandise. She further asserts that it was not observable to her because she was wearing bifocals, making it difficult for her to see objects on the floor, something she contends Miles should have foreseen.

{¶ 18} Attendant circumstances may create a genuine issue of material fact as to whether a danger was open and obvious. *Id.* Although there is no precise definition of “attendant circumstances,” they generally include any distraction that would come to the attention of an invitee in the same circumstances and reduce the degree of care an ordinary person would exercise at the time. *McGuire v. Sears, Roebuck & Co.* (1996), 118 Ohio App.3d 494, 498, 693 N.E.2d 807.

{¶ 19} In *Armentrout v. Associated Dry Goods Corp.* (Jan. 9, 1991), 1st Dist. No. C-890784, the plaintiff walked into a department store and

immediately saw an Elizabeth Arden display to her left in the cosmetics section. She entered the display “booth” to view a computer monitor showing images of an Elizabeth Arden product on the screen, and when she exited the booth, she fell over a “horizontal bar at the bottom of the right side of the booth.”

{¶ 20} The First District reversed the trial court’s decision granting summary judgment to the store owner based upon a “distraction” exception to the open-and-obvious doctrine. *Id.* The court explained, quoting “Prosser and Keeton, Law of Torts (5 Ed.1984) 427, Section 61,” that:

{¶ 21} “In any case where the occupier as a reasonable person should anticipate an unreasonable risk of harm to the invitee notwithstanding his knowledge, warning, or the obvious nature of the condition, something more in the way of precautions may be required. This is true, for example, where there is reason to expect that the invitee’s attention will be distracted, as by goods on display, or that after a lapse of time he may forget the existence of the condition, even though he has discovered it or been warned; or where the condition is one which would not reasonably be expected, and for some reason, such as an arm full of bundles, it may be anticipated that the visitor will not be looking for it.”

{¶ 22} In *Armentrout*, the First District was not persuaded by the defendant's assertion that no duty was owed to the plaintiff because she was looking at her husband rather than at the monitor when she tripped. It reasoned: "If the purpose of the display was to divert her attention upward and away from the floor level, the question of whether her focus would have reasonably returned to activities outside the display, and not toward the floor as she exited, constitutes a question of fact related to defendant's care in maintaining a safe display booth." *Id.*

{¶ 23} Five years later, however, the First District explained that *Armentrout* "should not be read so broadly to apply to any and all displays that are customarily encountered in retail settings." *McGuire v. Sears, Roebuck & Co.*, 118 Ohio App.3d at 498. The court noted that "[i]f this were true, a jury question would always exist in such cases because the store owner displayed goods for sale and subject to the customer's view." *Id.* Here, Carter contends that she did not see the box because she was distracted, looking at a product that was displayed on the store shelf. But goods are customarily located on store shelves. See *Colvin v. Kroger Co., Inc.*, 12th Dist. No. CA2005-07-026, 2006-Ohio-1151 ("The fact that [the plaintiff's] attention was focused on the lunch meats ahead of her is a common circumstance in a store and was clearly within [the plaintiff's]

control.”). If we were to adopt Carter’s interpretation of the law, then a store owner would owe a duty to every person who comes into its store for open and obvious hazards. And although Carter is expressly asking this court to abrogate the open-and-obvious doctrine, we must follow the law set forth by the Ohio Supreme Court in *Armstrong*, namely, that “[t]he open-and-obvious doctrine remains viable in Ohio.” 99 Ohio St.3d at the syllabus.

{¶ 24} Miles, however, contends, and the trial court agreed, that the facts of this case are analogous to *Isaacs v. Meijer, Inc.*, 12th Dist. No. CA2005-10-098, 2006-Ohio-1439.

{¶ 25} In *Isaacs*, the plaintiff was doing her weekly grocery shopping when she fell on a box in the frozen food aisle that was 18-inches high. She had left her cart at the end of the aisle because there was a “large restocking cart” in the middle of the aisle. *Id.* at ¶3. She picked out six Stouffer’s frozen dinners and “engaged in a light conversation with the employee who was restocking the frozen dinner case.” *Id.* After she selected her frozen dinners, she began to walk back to her cart. She walked around the restocking cart and tripped over the box. The box was about two feet from the restocking cart. She testified that she did not see the box because of the frozen dinners in her hand, and she did not expect a box to be there.

{¶ 26} The court in *Isaacs* affirmed the trial court's granting of summary judgment because it determined that "no genuine issues of material fact exist regarding the open and obvious nature of the box." *Id.* at ¶12. It explained that "[t]he record shows that the box was in plain view, clearly observable to the naked eye by any person who chose to look, and was therefore observable to appellant had she looked." *Id.* at ¶14.

{¶ 27} The *Isaacs* court further determined that there were no attendant circumstances preventing the plaintiff from seeing the box. *Id.* at ¶18. It reasoned that although the plaintiff had been engaged in light conversation before she fell, "she was no longer engaged in that conversation when she walked back to her shopping cart." *Id.* Also, the court explained that the fact that the plaintiff had to park her cart at the end of the aisle, walked to the product she wanted, and carried the product back to her cart "is a common circumstance in a grocery store," and thus cannot be an "attendant circumstance." *Id.* at ¶19 (citing *Gamby v. Fallen Timbers Ents.*, Lucas App. No. L-03-1050, 2003-Ohio-5184, in ¶16: "Attendant circumstances do not, however, encompass the common or ordinary.")).

{¶ 28} We agree with the trial court that the present case is exactly on point with *Isaacs*. We disagree with Carter that *Isaacs* does not apply because it "primarily relied [on] stacking activity and an adjacent pallet cart

at the time of the accident to warn the plaintiff.” This was one circumstance the court discussed, but we do not agree that it was the primary reason.

{¶ 29} And as far as Carter’s bifocals are concerned, she did not testify that her glasses prevented her from seeing the box. Indeed, she stated that she has to wear her glasses all of the time, and she agreed that she would have seen the box had she just looked at it.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., and
MELODY J. STEWART, J., CONCUR