[Cite as *Briel v. Dollar Gen. Store*, 2007-Ohio-6164.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

DELORES M. BRIEL,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2007-A-0016**
- vs -	:	
DOLLAR GENERAL STORE,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 06 CV 241.

Judgment: Reversed and remanded.

Nicholas A. Iarocci, The Iarocci Law Firm, LTD., 213 Washington Street, Conneaut, OH 44030 (For Plaintiff-Appellant).

Gregory G. Guice, Reminger & Reminger Co., L.P.A., 1400 Midland Building, 101 Prospect Avenue, West, Cleveland, OH 44115-1093 (For Defendant-Appellee).

MARY JANE TRAPP, J.

{¶1} Appellant, Ms. Delores M. Briel, appeals from the February 6, 2007 judgment entry of the Ashtabula County Court of Common Pleas awarding summary judgment in favor of appellee, Dollar General Store. For the following reasons, we reverse.

{¶2} **Substantive and Procedural History**

{¶3} At approximately 10:00 a.m. on May 19, 2005, appellant, Ms. Delores M. Briel ("Ms. Briel"), visited appellee, the Dollar General Store ("Dollar General") in order

to purchase a baby shower card. Upon her entrance to the store, Ms. Lynn Hamilton ("Ms. Hamilton"), the store manager, warned her that the weekly product shipment had just been delivered the previous night, and to be careful since there were boxes lined up along the aisles. Since Ms. Briel could not locate the type of card she was seeking, she inquired to Ms. Hamilton where the cards were located. Ms. Hamilton led her to the card aisle, which was partially obstructed by a stack of boxes. To enter or exit from that entrance of the aisle required Ms. Hamilton to "scoot" between a stack of boxes and a pole.

{¶4} A subsequent search revealed that the cards were not located in that particular aisle. Ms. Hamilton then proceeded to another area of the store in search of the cards, located them, and indicated to Ms. Briel that she found them. Ms. Briel proceeded towards Ms. Hamilton, and as she was "scooting" between the pole and the waist high stack of boxes, she caught her foot on a box that was slightly protruding from the bottom of the stack, tripped, and fell.

{¶5} Ms. Briel shouted out for help and began to cry, clutching her shoulder. Ms. Hamilton called Ms. Briel's daughter and EMS, both of whom arrived to the scene shortly thereafter. Ms. Briel suffered a broken shoulder, torn rotator cuff, and broken ribs. Ms. Hamilton inspected the area for the protruding box, however, she was unable to find it.

{¶6} On May 1, 2006, Ms. Briel filed a complaint, alleging that Dollar General was negligent as a business invitee in failing to provide safe premises; and that as a direct and proximate result of Dollar General's negligence, she sustained temporary and permanent injuries, pain, and suffering, as well as emotional distress, restriction of

activities, and incurred medical expenses, to her legal detriment, in excess of $25,000. Dollar General answered on March 20, 2006, denying the allegations, and then subsequently filed a motion for summary judgment on June 9, 2006.

{¶7} In the brief attached to their motion for summary judgment, Dollar General argued that summary judgment was warranted since they owed no duty as a business licensee to Ms. Briel for failing to observe an open and obvious danger of which she was very much aware.

{¶8} Ms. Briel filed her motion in opposition on August 21, 2006, in which she argued that the box that caused her fall was not open and obvious because it was stacked underneath the other boxes. While Ms. Briel averred that the stack of boxes may have been an open and obvious condition, she argued that she did not observe the protruding box since she failed to look down, and that even if the stack of boxes was an open and obvious condition, sufficient attendant circumstances existed to overcome such a defense. Specifically, Ms. Briel contended that it was unreasonable for Ms. Hamilton to tell Ms. Briel to stay where she was and that she would locate the cards and that it was unreasonable that the only method of passing through the aisle was to "scoot" between the pole and stack of boxes. Furthermore, in order to do so, she was unable to look down and watch her feet since she was carefully trying to maneuver between them. Thus, even if the alleged defect was an open and obvious condition, Dollar General was still under a duty of care since the attendant circumstances surrounding the fall were an excusable distraction that increased the risk of walking by the stack of boxes.

{¶9} In addition, Ms. Briel argued that her deposition should not be considered because she misunderstood Dollar General's counsel's question when he asked her several times as to how far the box was protruding from the stack of boxes. At her deposition on May 9, 2006, Ms. Briel estimated the protrusion to be about eighteen inches long. However, in her brief in opposition, she argued that she misunderstood the question and that her affidavit attached to her motion in opposition should be considered in order to clarify her confusion.

{¶10} In the affidavit, she attested that upon review of her deposition, she realized that Dollar General's counsel was inquiring as to how far the box was protruding from the stack, and not, as she believed, how large the protruding box was compared to the rest of the stack. She concluded that she was unable to indicate how far it was sticking out, but that it could not have been more than a few inches. She also alleged that Ms. Hamilton did not warn her or indicate that she should stay put until Ms. Hamilton located the cards.

{¶11} Dollar General filed a leave to reply. However, the court denied the motion in a judgment entry on February 6, 2007, and in the same entry awarded summary judgment to Dollar General. In reaching its conclusion, the court found there were no disputed issues of material fact since the protruding box was "visible and not hidden or obstructed in any way," and by Ms. Briel's own admission, she simply failed to observe the condition because she did not look down.

{¶12} Ms. Briel timely appeals and raises the following two assignments of error:

{¶13} "[1.] The trial court improperly determined that the box or piece of box at the bottom of the stack of boxes was an open and obvious condition.

{¶14} "[2.] Even assuming that the stack of boxes or protruding box at the bottom of the stack causing Appellant's fall was an open and obvious condition, the trial court failed to recognize and determine that sufficient attendant circumstances existed to overcome such defense."

{¶15} **Summary Judgment**

{¶16} In her both of her assignments of error, Ms. Briel raises the overarching issue of whether the court erred in awarding summary judgment in favor of Dollar General. Specifically, Ms. Briel contends that the trial court erred in finding that the stack of boxes was an open and obvious danger and that even if it was, in light of the attendant circumstances surrounding the incident, the open and obvious defense can not apply.

{¶17} "This court reviews de novo a trial court's order granting summary judgment." *Hudspath v. Cafaro Co.*, 11th Dist. No. 2004-A-0073, 2005-Ohio-6911, ¶8, citing *Hapgood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, ¶13. "A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law." Id.

{¶18} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt*, the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that

demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Misteff v. Wheeler* (1988), 38 Ohio St.3d 112." *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, ¶40.

{¶19} "The court in *Dresher* went on to say that paragraph three of the syllabus in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, is too broad and fails to account for the burden Civ.R. 56 places upon a *moving* party. The court, therefore, limited paragraph three of the syllabus in *Wing* to bring it into conformity with *Misteff.* (Emphasis added.)" Id. at ¶41.

{¶20} The Supreme Court in *Dresher* went on to hold that when *neither* the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled to a judgment as a matter of law as the moving party bears the initial responsibility of informing the trial court of the

basis for the motion, "and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. Id. at 276. (Emphasis added.)" Id. at ¶42.

{¶21} Furthermore, "[t]o establish a negligence claim, a plaintiff must demonstrate "the existence of a duty on the part of the one sued not to subject the former to the injury complained of, a failure to observe such duty, and an injury resulting proximately therefore." *Fink v. Gully Brook, Inc.*, 11th Dist. No. 2004-L-109, 2005-Ohio-6567, ¶11, citing *Thrash v. U-Drive-It Co.* (1953), 158 Ohio St. 465, paragraph one of the syllabus.

{¶22} **The Open and Obvious Doctrine**

{¶23} In her first assignment of error, Ms. Briel contends that the protruding box that caused her fall was not an open and obvious condition because the box was located at the bottom of the stack of boxes. Since she had to "scoot" between the stack of boxes and the pole, the protruding box was further concealed, thus she noticed the protruding box only after she caught her foot, tripped, and fell. We find this argument to have merit insofar as there is a genuine material issue of fact as to whether the protruding box was indeed so "open and obvious" as to negate Dollar General's duty owed to its business invitees to keep its premises safe.

{¶24} "A shopkeeper ordinarily owes its business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition and has a duty to warn its invites of latent or hidden dangers." *Fink* at ¶12, citing *Armstrong v. Best Buy Co., Inc.,* 99 Ohio St.3d 79, 80, 2003-Ohio-2573. "However, under the open and obvious doctrine, a business owner has no duty to warn or protect a business invitee against

dangers which are known to the invitee or those which are so obvious that he or she may reasonably be expected to discover them." Id., citing *Abbott v. Sears, Roebuck & Co.*, 11th Dist. No. 2003-T-0085, 2004-Ohio-5106, ¶19. "Rather, business invitees are expected to discover open and obvious dangers and take appropriate steps to protect themselves. Id., citing *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 644. "Where a hazard is open and obvious, a business owner owes no duty to an invitee and it is unnecessary to consider the issues of breach and causation." Id., citing *Ward v. Wal-Mart Stores, Inc.* (Dec. 28, 2001), 11th Dist. No. 2000-L-171, 2001-Ohio-4041, p.5.

{¶25} As the Supreme Court of Ohio emphasized in the *Armstrong,* the emphasis in analyzing open and obvious danger cases relates to the threshold issue of duty. "[T]he rule properly considers the nature of the dangerous condition itself, as opposed to the nature of the plaintiff's conduct in encountering it. The fact that a plaintiff 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 absolve the plaintiff." Id. at 82.

{¶26} We note at the outset that the fact that Ms. Briel did not look down as she "scooted" between the stack of boxes and the pole is not the determinative issue since "*** the danger does not actually have to be observed by the plaintiff in order for it to be an open and obvious condition under the law." *Konet v. Glassman, Inc.*, 11th Dist. No. 2004-L-151, 2005-Ohio-5280, ¶33, citing *Lydic v. Lowe's Companies, Inc.,* 10th Dist. No. 01AP-1432, 2002-Ohio-5001, ¶10. "Rather the determinative issue is whether the condition was observable." Id.

{¶27} Moreover, a review of the depositions of Ms. Briel and Ms. Hamilton reveals that the protruding box was not clearly so open and obvious of a condition. Ms. Briel testified at her May 9, 2005 deposition that she did not notice the protruding box when she first passed between the boxes and the pole to enter the aisle, or the second time on her exit until she was in the process of falling. When asked whether there was an obstacle in her way to obscure her view of the box, she stated in the negative and further replied "there was nothing block – it wasn't sticking out that far, you know. It was only sticking out a little bit and I didn't notice it going in and I didn't notice it going out but I did notice it for a moment, as I was falling." Furthermore, it appears Ms. Briel was forced to exit between the pole and the stack of boxes since she testified that although one could use the other end of the aisle as a walkway, it was not possible that day because it was a smaller aisle and had boxes stacked against it, which made it impassable. Thus, as to Ms. Briel, the protruding box was clearly not an open and obvious condition.

{¶28} Dollar General's employee, Ms. Hamilton, did not rebut this issue, but rather, corroborated Ms. Briel's testimony that the protruding box was not so observable as to constitute an open and obvious condition. Specifically, in her August 3, 2006 deposition, Ms. Hamilton testified that she did not know what caused Ms. Briel's fall, nor did she observe the protruding box upon inspection after Ms. Briel fell. Ms. Hamilton and Ms. Briel's counsel engaged in the following colloquy at her deposition:

{¶29} "Mr. Guice [counsel for Dollar General]: No, you didn't observe her, or no, you don't know what caused her to fall?"

{¶30} "Ms. Hamilton: No, I don't know what caused her to fall."

{¶31} "Mr. Iarocci [Ms. Briel's counsel]: But you attempted to learn, you investigated, you inspected, you looked to see what might have caused her fall?"

{¶32} "Ms. Hamilton: I looked to see what tried to cause it, yeah, but…"

{¶33} "Mr. Iarocci: And you were not able to find it?"

{¶34} "Ms. Hamilton: No."

{¶35} "Mr. Iarocci: Did you happen to find any boxes that were displaced, different from the other boxes after she fell?"

{¶36} "Ms. Hamilton: No."

{¶37} Dollar General has not presented evidentiary materials demonstrating an absence of a genuine issue of material fact. That is, the evidence Dollar General attached to its motion by way of Ms. Hamilton's deposition, clearly demonstrates that there is a genuine issue of material fact to be determined by a jury as Ms. Hamilton did not see the protruding box even upon an inspection that she conducted following Ms. Briel's fall. On summary judgment, it is axiomatic that "[t]he moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Welch* at ¶37, citing *Brunstetter v. Keating,* 11th Dist. No. 2002-T-0057, 2003-Ohio-3270, ¶12, citing *Dresher* at 292. In this case, Dollar General failed to introduce evidence that the protruding box was an open and obvious condition. Ms. Briel's testimony demonstrates that there is a genuine issue of material fact, which Dollar General failed to rebut. In essence, reasonable minds could conclude that the protruding box was not sufficiently observable as to

constitute an “open and obvious” danger, and consequently, there is question as to whether Ms. Briel had a duty to self-protect.

{¶38} In addition, we find there is merit in Ms. Briel’s second assignment of error insofar as there is a genuine issue of material fact as to whether the attendant circumstances of trying to circumvent between a pole and a stack of boxes, and the fact that the other entrance of the aisle was blocked by more boxes did indeed create a situation that would suffice under the totality of the circumstances as to whether a reasonable person would notice the protruding box if it was indeed, found by the trier of fact to be open and obvious. “[T]he question of whether something is open an obvious cannot always be decided as a matter of law simply because it may have been visible.” *Hudspath* at ¶19, citing *Collins v. McDonald’s Corp.*, 8th Dist. No. 83282, 2004-Ohio-4074, ¶12, citing *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.,* 81 Ohio St.3d 677. “Attendant circumstances include any distraction that would divert the attention of a pedestrian in the same circumstances and thereby reduce the amount of care an ordinary person would exercise.” Id. citing *McGuire v. Sears Roebuck and Co.* (1996), 118 Ohio App. 3d 494, 499. “In short, attendant circumstances are all facts relating to a situation such as time, place, surroundings, and other conditions that would unreasonably increase the typical risk of a harmful result of an event.” Id. See, *Menke v. Beerman* (Mar. 9, 1998), 12th Dist. No. CA97-09-182, 1992 Ohio App. LEXIS 868, 2-3, citing *Cash v. Cincinnati* (1981), 66 Ohio St. 2d 319.

{¶39} Accordingly, we reverse, finding the trial court erred in awarding summary judgment in favor of Dollar General.

{¶40} The judgment of the Ashtabula County Court of Common Pleas is reversed, and this case is remanded for proceedings consistent with this opinion.

COLLEEN MARY O'TOOLE, J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

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{¶41} The trial court's grant of summary judgment in favor of appellee, Dollar General Store, was correct. Accordingly, I respectfully dissent.

{¶42} The three essential elements of any negligence action are a duty, the breach of that duty, and an injury proximately caused by the breach. *Wellman v. East Ohio Gas. Co.* (1953), 160 Ohio St. 103, paragraph three of the syllabus. In the present case, reasonable minds can only conclude that there was neither a duty nor the breach of a duty on the part of Dollar General.

{¶43} "A shopkeeper ordinarily owes its business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition and has the duty to warn its invitees of latent or hidden dangers." *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 80, 2003-Ohio-2573, at ¶5 (citations omitted). "Where a danger is open and obvious," however, "a landowner owes no duty of care to individuals lawfully on the premises." Id. at syllabus.

{¶44} In the present case, the stacks of boxes in the card aisles constituted an open and obvious hazard. Therefore, Dollar General owed appellant "no duty"

regarding the dangers posed by the stacked boxes since appellant could reasonably have been expected to discover the danger and take appropriate measures to protect herself. Id. at ¶5 (citations omitted).

{¶45} The majority obscures the obvious by identifying the hazard, not as the stacks of boxes, but as the slight protrusion of one of the boxes on the bottom of the stack, claiming that "the protruding box was clearly not an open and obvious condition." Supra, at ¶27. Such an analysis artificially separates cause (the stacks of boxes) from their effect (limited sight). Stacks of boxes in a narrow aisle are hazardous precisely because they obscure one's line of sight. Appellant's inability to see the protrusion is not an attendant circumstance, it is an inherent circumstance of the open and obvious condition.

{¶46} The Second District has recently and cogently observed that "[h]azards are open and obvious when they are inherent in the condition from which they arise and the condition itself is known to the invitee or by reason of its particular size or configuration the condition is readily discoverable." *Trimble v. Frisch's Ohio, Inc.*, 2nd Dist. No. 07CA0018, 2007-Ohio-4616, at ¶27 (Grady, Wolf, and Fain, JJ.).

{¶47} The protrusion of one box in a stack is inherent when boxes are stacked on top of each other, just as limited sight is inherent in a narrow passage between a pole and a stack of boxes. Appellant was fully aware of the stacks of boxes and the narrow passage between the pole and the boxes. In fact, appellant had already negotiated the passage between pole and boxes upon entering the aisle.

{¶48} For this reason, courts hold that the nature of an open and obvious or any recognized hazard serves as a warning of aggravating circumstances caused by the

hazard. *Armstrong*, 2003-Ohio-2573, at ¶5, quoting *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 644 ("the open and obvious nature of the hazard itself serves as a warning").

{¶49} The issue can be considered from another angle. Accepting, arguendo, the hazard at issue is the slight protrusion of one of the boxes in the stack, Dollar General is still entitled to summary judgment because such a defect is insubstantial and does not create an unreasonably dangerous condition in the premises. *Raflo v. Losantiville Country Club* (1973), 34 Ohio St.2d 1, 4 ("[i]njuries occasioned by insubstantial defects should not be actionable unless circumstances render them 'unreasonably dangerous'") (citation omitted).

{¶50} Such circumstances are generally defined as "any distraction that would come to the attention of a pedestrian in the same circumstances and reduced the degree of care an ordinary person would exercise at the time." *McGuire v. Sears, Roebuck & Co.* (1996), 118 Ohio App.3d 494, 499 (citation omitted). Stated otherwise, "[t]he attendant circumstances must, taken together, divert the attention of the pedestrian, significantly enhance the danger of the defect, and contribute to the fall." *Stockhauser v. Archdiocese of Cincinnati* (1994), 97 Ohio App.3d 29, 33 (citation omitted).

{¶51} The majority finds such circumstances in the fact that appellant was "trying to circumvent between a pole and stack of boxes, and the fact that the other entrance of the aisle was blocked by more boxes." Supra, at ¶38. Neither of these purported circumstances renders the slight protrusion of one of the boxes unreasonably dangerous. Rather than diverting plaintiff's attention from the insubstantial hazard, they

should have served to focus appellant's attention and heightened her own sense of care. To say that appellant was distracted by a stack of boxes from noticing that one of the boxes was protruding slightly is to argue in a circle.

{¶52} The situation is analogous to the effect darkness has on an insubstantial hazard. Rather than constituting an attendant circumstance augmenting the premises owner's duty of care, "'darkness' is always a warning of danger, and for one's own protection it may not be disregarded." *Jeswald v. Hutt* (1968), 15 Ohio St.2d 224, paragraph three of the syllabus. Thus, in *Jeswald*, where the plaintiff fell on a "minor imperfection" in a dark and slippery parking lot, the court held that plaintiff was chargeable "with full knowledge of those conditions" and "assumed the risk of a fall." Id. at 228; cf. *Swonger v. Middlefield Village Apts.*, 11th Dist. No. 2003-G-2547, 2005-Ohio-941, at ¶13 ("[s]ince darkness itself constitutes a sign of danger, the person who disregards a dark condition does so at his or her own peril"); *McCoy v. Kroger Co.*, 10th Dist. No. 05AP-7, 2005-Ohio-6965, at ¶16 ("darkness increases rather than reduces the degree of care an ordinary person would exercise").

{¶53} In *Wainscott v. Americare Communities Anderson Dev., LLC*, 12th Dist. No. CA2006-12-308, 2007-Ohio-4735, as in the present case, plaintiff tripped on a stack of boxes lining a hallway which he was required to traverse. Id. at ¶5. The trial court granted summary judgment in defendant's favor on the grounds that "the stacked boxes were an open and obvious hazard which appellant could reasonably have been expected to discover." Id. at ¶7.

{¶54} On appeal, the plaintiff argued "attendant circumstances" existed which created a genuine issue of material fact as to whether the boxes that caused his fall

were open and obvious, including inadequate lighting and the slight protrusion of the boxes. Id. at ¶¶13-22. The court of appeals rejected the argument, noting "the mere designation of any condition as an 'attendant circumstance' does not create a genuine issue of material fact precluding summary judgment." Id. at ¶23. Considering the circumstances set forth by the plaintiff, the court concluded that "[n]one of these circumstances constitute an abnormal condition which would unreasonably increase the normal risk of harmful result or reduce the degree of care that an ordinary person would exercise in a similar situation. *** Most are factors that should be considered when determining whether the stacked boxes were open and obvious." Id.

{¶55} Likewise, there is no evidence in the present case that the stack of boxes on which appellant fell was any more or less hazardous than any other stack of boxes one would normally encounter. There is no basis for Dollar General's liability. Cf. *Schaeffer v. Dollar General/Dollar General Corp.*, 2nd Dist. No. 2006 CA 4, 2006-Ohio-5766, at ¶11 ("The size, color, and location of the boxes at Dollar General lead us to conclude, as a matter of law, that they created an open and obvious hazard akin to the one discussed in *Armstrong*. Accordingly, Dollar General owed no duty to warn Schaeffer about the boxes, and summary judgment was properly granted in its favor.").

{¶56} In sum, the boxes on which appellant fell were an open and obvious condition of which she was fully aware. It has often been said that the owners and lessees of premises are not "insurers" against all accidents occurring on the premises. *S.S. Kresge Co. v.* Fader (1927), 116 Ohio St. 718, 723. The majority's conception of attendant circumstances, however, would render owners and lessees, in effect, insurers of their patrons' safety. The judgment of the trial court should be affirmed.