

IN THE SUPREME COURT OF OHIO

CASE NO. 08-0009

On Appeal from the Eleventh Appellate District
Ashtabula County, Ohio

Court of Appeals Case No. 2007-A-0016

DELORES BRIEL
Plaintiff-Appellee

vs.

DOLLAR GENERAL STORE
Defendant-Appellant.

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT,
DOLLAR GENERAL STORE

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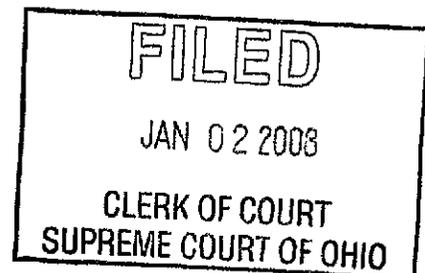


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PROPOSITION OF LAW I: 4

In Ohio, when a condition can reasonably be expected to be on a premises, can reasonably be expected to be seen and is equally observable to both an invitee and the owner/occupier of the premises, it is an open and obvious condition for which the owner/occupier owes neither a duty to warn nor a duty to protect the invitee from that condition

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Decision from the Ashtabula County Eleventh Appellate District of Ohio (November 19, 2007)

I. THIS IS A CASE OF GREAT AND GENERAL INTEREST

The Eleventh District Court of Appeals' ruling in this case permits an invitee who tripped over a stack of boxes that could be seen, and in fact was seen, to attempt recovery for injuries allegedly stemming from tripping over those boxes. The decision distorts the concept of what constitutes an open and obvious condition as described in *Armstrong v. Best Buy*, 99 Ohio St. 3d 79, 2003-Ohio-2573. The decision is an example of the need for this Court to articulate a clear proposition of law that citizens, lawyers and Judges can use in deciding whether to file trip and fall cases of this type and how to rule on motions in trip and fall cases of this type. This appeal presents an issue of great and general interest because appellate and trial courts, as well as plaintiff and defense attorneys, are in need of a succinct, practical statement of law as to what constitutes an open and obvious condition for which an invitee must bear responsibility for exercising care for his or her own safety.

On November 19, 2007, the Eleventh District Court of Appeals reversed the entry of summary judgment in favor of Dollar General Store ("Dollar General"). In doing so, the appellate court failed to properly apply the concept of an open and obvious condition as articulated in *Armstrong*. Further, the appellate court disregarded the established principle that whether or not a condition is open and obvious is a question of law for the court to decide. There is a need to issue a statement of law that incorporates not only the law applicable to premises liability claims, but also the rationale for the rule to avoid the further misapplication of prior pronouncements of this Court on this issue including *Armstrong*, *supra*, *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St. 3d 203, and *Sidle v. Humprey* (1968), 13 Ohio St.2d 45.

The Eleventh District Court of Appeals is not the only court misconstruing the open and obvious doctrine. In *Cole v. McCarthy Management, Inc.* 6th Dist. No. L-03-1020, 2003-Ohio-5181, the trial court granted summary judgment based on the open and obvious doctrine when the patron voluntarily moved toward rushing water from a collapsed ceiling. *Id.* The Sixth District Court of Appeals reversed the decision and held that there were questions of fact surrounding the alleged condition. *Id.* This runs completely contrary to the established principles of the open and obvious doctrine, whose only real inquiry is whether or not the condition is observable. See *Armstrong*, supra.; *Sidle*, supra.; and *Paschal*, supra.

In *Henry v. Dollar General Store*, 2nd Dist. No. 2002-CA-47, 2003 -Ohio- 206, the trial court granted summary judgment holding that a cement block propping open a door was an open and obvious condition. The Second District Court of Appeals overturned the trial court's decision and held that whether or not the cement block was open and obvious was a fact question for the jury. *Id.* The appellate court further indicated that only after the jury had decided whether the cement block was open and obvious could the court decide to apply the open and obvious doctrine. *Id.* It was undisputed that the block was equally observable to both the property owner and the patron, that both could reasonably be expected to have seen the static condition. Without a clear pronouncement of the law in this area, the Second District Court of Appeals simply lost its way and abdicated the responsibility of the court by deferring to a jury.

Clarity and consistency in the legal process is a key component necessary to keep the wheels of justice turning. Confusion and misconception in the application of a

particular and important standard, such as the open and obvious doctrine, is detrimental to the uniformity of our judicial process. It is vital that the Court clarify the proper application and parameters of the open and obvious doctrine.

II. STATEMENT OF THE CASE AND FACTS

A. Statement of the Case

On March 1, 2006, Plaintiff-Appellee filed her premises liability Complaint against Defendant-Appellant Dollar General. On March 20, 2006, Dollar General timely filed its Answer to the Complaint. Plaintiff-Appellee was deposed on May 9, 2006. On June 9, 2006, Dollar General filed a Motion for Summary Judgment based upon Plaintiff-Appellee's version of the facts. On February 6, 2007, the trial court granted Dollar General's Motion for Summary Judgment and held that the alleged condition was open and obvious and there were no attendant circumstances to excuse Plaintiff-Appellee from failing to notice the alleged condition. Plaintiff-Appellee appealed to the Eleventh District Court of Appeals. The parties filed their respective briefs and the appellate court rendered its decision reversing summary judgment on November 19, 2007. Defendant-Appellant now seeks discretionary review by this court.

B. Statement of the Facts

On May 19, 2005, Plaintiff-Appellee Delores Briel went to the Dollar General store located in Conneaut, Ohio looking for baby shower invitations. She had been to the store an average of once every three weeks for many years, since the time the store had opened. She was "pretty familiar" with the layout of the store. While walking through the store Plaintiff-Appellee saw boxes stacked throughout the card aisle that contained store merchandise. The store manager, Lynn Hamilton assisted Plaintiff-Appellee in her

search for baby shower invitation cards and helped her look through the card aisle. Once Ms. Hamilton left the aisle, Plaintiff-Appellee moved past the boxes and began looking through the very same area that Ms. Hamilton had just vacated to ensure that the cards were not there. As Plaintiff-Appellee was looking through that section of the card area, Ms. Hamilton told her that the baby shower invitations were actually in a different aisle.

Plaintiff-Appellee then began walking back down the aisle, past the stacked boxes that she had previously passed. She apparently caught her foot on one of the stacked boxes and she fell. When looking down, Plaintiff-Appellee was able to see the box upon which she tripped.

III. ARGUMENTS IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW I:

In Ohio, when a condition can reasonably be expected to be on a premises, can reasonably be expected to be seen and is equally observable to both an invitee and the owner/occupier of the premises, it is an open and obvious condition for which the owner/occupier owes neither a duty to warn nor a duty to protect the invitee from that condition

This Court has issued pronouncements applicable to situations of this type when defining the duty of an owner/occupier of a premises. An owner/occupier of a premises is not an insurer of an invitee's safety. *Paschal*, supra. at 204. "The duty owed by a defendant to a business invitee is the duty to maintain the defendant's premises in a reasonably safe condition." *Paschal*, supra. "... [U]nder the open and obvious doctrine, an occupier of premises is under no duty to protect a business invitee from dangers that are known to such invitee or are so obvious and apparent that such invitee may reasonably be expected to discover them and protect himself against them." *Sidle*, supra. "Ohio law establishes a duty upon the pedestrian to discover and protect himself from an

open and obvious hazard.” See *Raffo v. Losantville Country Club* (1973), 34 Ohio St.2d 1.

Ohio appellate courts have been told by these statements of law that both customers and store owners each have a duty to exercise reasonable care. The premises owner is not held to a higher standard of care than the invitee. Thus, when they are in the same position in regard to a “condition,” i.e. confronted with a reasonably expected condition that is equally observable to both invitee and premises owner, it is the person in the best position to protect the invitee, the customer, who bears responsibility for the invitee’s safety. Unfortunately, these general statements of law have not been sufficient to guide the lower courts. In fact, the general statements have resulted in a piecemeal and case specific analysis which should not be required for this area of the law.

When an invitee encounters a reasonably expected condition that is equally observable to all, that invitee should be barred from seeking to recover from any injury resulting from contact with that condition. Under the facts of this case, Plaintiff-Appellee encountered a stack of boxes in an aisle in a store. Stacks of boxes are often encountered in the present day of retail trade. Further, she admitted that she observed the boxes prior to attempting to squeeze past them. Her defense, which the Eleventh District Court of Appeals seized upon because of a lack of a definitive statement of law, was that one of the boxes was sticking out farther than the others.

As Judge Grendell noted in her dissent in this case, you cannot change the obvious nature of the condition, i.e. the visible stack of boxes, by focusing on just one box, or the edge of one box. See Decision from the Ashtabula County Eleventh Appellate District of Ohio (November 19, 2007) at ¶45. Whether or not one of the boxes

“protruded” should be immaterial, and is immaterial, when the concept of premises liability law is applied properly. Unfortunately the Eleventh District Court of Appeals and others have not properly applied the general prior pronouncements of the law.

Plaintiff-Appellee saw the boxes prior to her first foray past them. There was no evidence that the condition had changed, or that the store owner had any greater ability to see what was there to be seen. This is the very essence of an open and obvious condition. Not only was the condition observable, it was observed prior to the accident, and Plaintiff-Appellee should be precluded from recovery. See *Kirksy v. Summit County Parking Deck*, 9th Dist. No. Civ.A.22755, 2005-Ohio-6742 and *Raflo*, *supra*. The problem was that two of the Justices from the 11th Appellate District in this case, and at least two other Appellate District Courts (the 2nd District in *Henry*, *supra* and the 6th District in *Cole*, *supra*.) have also struggled with what should be, and with a more clear pronouncement will be, an easily understood concept.

Another result of the confusion surrounding the open and obvious doctrine is the emergence and application of the concept of “attendant circumstances”. This concept is rooted in the comparative negligence analysis and is concerned with whether an invitee becomes distracted from the alleged condition. This “exception” is at odds with the open and obvious doctrine. As articulated in *Armstrong*, the open and obvious doctrine explicitly rejects the inclusion of the reasonableness of the invitee’s actions into the analysis. *Armstrong* at ¶13. Attendant circumstances are merely another way of taking into account the reasonableness of the invitee’s actions under the circumstances, and therefore should have no part in the consideration of an open and obvious defense. Instead, the concept of attendant circumstances should only be a factor in the comparative

negligence analysis, after the trial court has determined whether a duty exists. A new pronouncement of the open and obvious doctrine in this case would make it easier for Ohio courts to properly apply the open and obvious doctrine. Proper application of the doctrine would eliminate the need to even discuss “attendant circumstances,” which are really just another method of determining comparative fault.

The Eleventh Appellate District Court’s decision in this case will only serve to further confuse the application of the open and obvious doctrine in Ohio. Essentially, it stands for the proposition that an invitee can observe a condition, i.e. a stack of boxes, but that the duty of care of the premises owner will not abate even though the condition was observable. Further, the decision stands for the proposition that whether a duty exists is a question for the jury, not one for the court, despite the clear prior rulings of this Court. The within appeal presents an opportunity to clarify Ohio law. It will allow this Court to confirm that the open and obvious doctrine acts as a complete bar to a patron injured by a static and observable condition. It will define what constitutes “open and obvious,” i.e. something that is equally observable to all. It will also allow this Court instruct the lower courts that the existence or lack of a duty in premise liability cases in Ohio is a question of law for the court, not a question of fact for a jury. This Court should accept this case for review to clarify the state of the open and obvious doctrine in Ohio.

IV. CONCLUSION

For the foregoing reasons, this case involves matters of public and great interest. Dollar General, therefore, respectfully requests that this Court accept jurisdiction and allow this case to proceed so that the issues presented will be reviewed on the merits.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing *Appellant's Memorandum In Support Of Jurisdiction* has been sent by regular U.S. mail, postage prepaid, on this 2 day of Jan, 2008 to:

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APPENDIX

COURT OF APPEALS

STATE OF OHIO

FILED
JSS.

IN THE COURT OF APPEALS

COUNTY OF ASHTABULA

2007 NOV 19 P 3:48

ELEVENTH DISTRICT

DELORES M. BRIEL,

CAROL A. HEAD
CLERK OF COURTS
COMMON PLEAS COURT
ASHTABULA CO. OH

Plaintiff-Appellant,

JUDGMENT ENTRY

- vs -

CASE NO. 2007-A-0016

DOLLAR GENERAL STORE,

Defendant-Appellee.

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Ashtabula County Court of Common Pleas is reversed, and this case is remanded for further proceedings.


JUDGE MARY JANE TRAPP

COLLEEN MARY O'TOOLE, J., concurs,

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

COURT OF APPEALS
FILED

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO

2007 NOV 19 P 3:48

CAROL A. HEAD
CLERK OF COURTS
COMMON PLEAS COURT
ASHTABULA CO. OH

DELORES M. BRIEL, : OPINION
Plaintiff-Appellant, :
- vs - : CASE NO. 2007-A-0016
DOLLAR GENERAL STORE, :
Defendant-Appellee. :

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

Judgment: Reversed and remanded.

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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, ¶18, 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. Zicarelli*, 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 and 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.

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

{¶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. *Raffo 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.