

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 M. BRIEL
Plaintiff-Appellee

vs.

DOLLAR GENERAL STORE
Defendant-Appellant

**MEMORANDUM IN RESPONSE OF
APPELLEE DELORES M. BRIEL**

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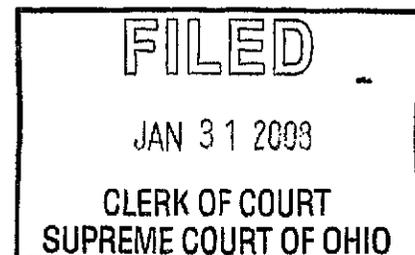


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I. **NO PUBLIC OR GREAT GENERAL INTEREST EXISTS TO SUPPORT THIS HONORABLE COURT'S GRANT OF A DISCRETIONARY APPEAL IN THIS CASE**

No public or great general interest has resulted from the decision of the Eleventh District Court of Appeals in this case to justify this Honorable Court accepting jurisdiction of the appeal herein.

Based on the facts of this case, the Eleventh District Court of Appeals properly determined that a genuine issue of material fact existed so as to support a reversal of the trial court's grant of the motion for summary judgment filed by Appellant Dollar General Store ("Appellant"). In rendering its decision, the Eleventh District Court of Appeals relied on this Court's pronouncement in *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St. 3d 79, 2003-Ohio-2573 on "open and obvious" conditions in premises liability cases. The appellate court simply applied the facts of the case at hand to such pronouncement and found that a question of fact existed on whether a protruding box at the bottom of a stack of boxes was sufficiently "observable" so as to constitute an "open and obvious" condition. The appellate court further found that sufficient attendant circumstances existed to overcome any open and obvious condition since (1) Appellee Delores M. Briel ("Appellee") followed a store employee to "scoot" herself between a pole and a stack of boxes in the aisle to locate a baby shower card, and (2) the other entrance of that aisle where the baby shower cards purportedly were located was blocked by more boxes preventing Appellee from entering or exiting another way. The appellate court held that questions of fact were created under the "totality of the circumstances" as to whether a reasonable person would notice the protruding box that caused Appellee's fall.

Appellant states in its Memorandum in Support of Jurisdiction that the decision of the Eleventh District Court of Appeals is an example of the need of this Court to articulate a clear proposition on trip and fall cases since courts and attorneys are in need of a “succinct, practical statement of law” as to what constitutes an open and obvious condition. Indeed, this Court in *Armstrong* provided such a “succinct, practical statement of law” in 2003. The trial and appellate courts have cited and applied, and are continuing to cite and apply *Armstrong* to the relative facts of each case. The pronouncement in *Armstrong* is clear, and the trial and appellate courts have not wavered from that pronouncement.

Besides the present case, Appellant is only able to cite *two* other appellate court decisions that Appellant claims has created confusion and misconception in the application of the open and obvious doctrine in support of jurisdiction in this case. Indeed, the Second District Court of Appeals’ decision in *Henry v. Dollar General Store*, 2nd Dist. No. 2002-CA-47, 2003-Ohio-206, was decided on January 17, 2003, **approximately five months before** *Armstrong* was decided on June 4, 2003. Further, the Sixth District Court of Appeals’ decision in *Cole v. McCarthy Management, Inc.*, 6th Dist. No. L-03-1020, 2003-Ohio-5181 was decided on September 30, 2003, **only three months after** *Armstrong* was decided. Hundreds of cases have followed this Court’s decision in *Armstrong* and cited and applied this Court’s pronouncement on the “open and obvious” doctrine, yet Appellant is only able to cite two cases (one issued before *Armstrong* and the other within weeks after *Armstrong*) in support of its claim for a “great general interest” in this case. Contrary to Appellant’s claims, there is no need for this Honorable Court to clarify at this time its

June 4, 2003 decision in *Armstrong* with respect to the application and parameters of the open and obvious doctrine.

II. ARGUMENT IN SUPPORT OF APPELLEE’S POSITION ON APPELLANT’S PROPOSITION OF LAW

Appellant has asserted the following Proposition of Law I in its Memorandum:

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

A. Brief Statement of Facts

A brief review of the facts of the case is in order since Appellant failed to articulate all necessary facts for this Court’s consideration.

After entering Appellant’s store on May 19, 2005, Appellee encountered Appellant’s employee and store manager Lynn Hamilton and requested assistance in locating the area of the store for baby shower cards. Ms. Hamilton went to search a particular aisle for the cards. Appellee intuitively followed Ms. Hamilton as it was Appellee that needed to choose the correct baby shower card, not Ms. Hamilton. Appellee had only requested Ms. Hamilton for the location of the baby shower cards, not to locate the specific card Appellee wished to purchase.

In the aisle, two stacks of boxes were placed in certain areas of the aisle where Appellee fell that day. One stack of boxes was near an area where the cards were located. The stack of boxes were located on one side of the small aisle and a large pole was located directly across on the other side of the aisle, requiring Ms. Hamilton and Appellee to maneuver their bodies in such a

way to go beyond the boxes and pole to the area of the cards. The stack of boxes was at least “waist high”.

Appellee watched Ms. Hamilton look for the cards in the small area of the aisle beyond the cards and pole. When Ms. Hamilton determined that the baby shower cards were not in that area, Appellee moved to allow Ms. Hamilton to proceed between the stack of boxes and pole so Ms. Hamilton could look for cards in another area. Appellee for a few seconds looked for a card in the same area Ms. Hamilton had looked, and then Ms. Hamilton yelled for Appellee to let Appellee know she had found the baby shower cards in another area. Appellee then “scooted” her body between the stack of boxes and the pole in the aisle to find Ms. Hamilton, and in so doing caught her foot on an unobservable piece of a box sticking out slightly from the bottom of the stack of boxes, tripped and fell.

Appellee suffered a broken shoulder, torn rotator cup, and broken ribs, among other injuries, as a result of the fall and has undergone surgery and substantial medical treatment.

B. Proposition of Law

Appellant contends that when an invitee like Appellee 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. Appellant seemingly posits that the “condition” in this case was the stack of boxes and not the protruding box from the stack that caused Appellee’s fall. Such a proposition has already been established by this Court in *Armstrong*, and it is not necessary to this Court to enter another similar proposition.

As addressed earlier, the Eleventh District Court of Appeals considered and in fact relied on the pronouncement in *Armstrong* which stated:

“[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.”

See Decision of Eleventh Appellate District of Ohio (November 19, 2007) at ¶ 25, citing Armstrong, supra, at 82 (emphasis added).

Contrary to Appellant’s claim, the Eleventh District Court of Appeals properly applied the pronouncement in *Armstrong*. In holding that a genuine issue of material fact existed so that reasonable minds could come to but one conclusion, the appellate court found that the “condition” in this case was not the stack of boxes as posited by Appellant but the protruding box located near the bottom of the stack of boxes encountered by Appellee. The appellate court effectively disagreed with Appellant on the type of the “condition”. The fact that a disagreement exists on the type of “condition” to evaluate does not require further pronouncement by this Court. Following *Armstrong*, the appellate court found that the protruding box near the bottom of the stack of boxes was not observable by both store manager Lynn Hamilton and Appellee due in part to the confined space of that area of aisle. Appellant is unable to dispute that fact, and instead seeks this Honorable Court through this appeal to involve itself in pronouncing the type of condition to be evaluated. Determination of the “condition” to be evaluated for purposes of further deciding whether such condition is “observable” is a specific fact-based inquiry to be reviewed on a case-by-case basis, and

Appellee contends this Court would be unable to issue any general pronouncement adding clarity to the issue.

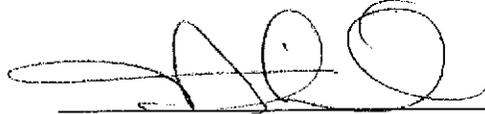
In reaching its decision, the appellate court properly considered the totality of the circumstances in deciding that the protruding box was the “condition” in which to evaluate, including but not limited to the fact that (1) Appellee followed store manager Lynn Hamilton squeezing herself between a pole and the stack of boxes to locate a baby shower card as that was the only way to enter and exit that part of the aisle, and (2) Appellee was required to exit the same way after being called by Ms. Hamilton to meet her in another aisle. The appellate court decided that Appellee was “forced to exit between the pole and 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”. *See Decision of Eleventh Appellate District of Ohio (November 19, 2007) at ¶ 27.*

Contrary to Appellant’s claims, the Eleventh District Court of Appeals’ decision does not serve to confuse application of the open and obvious doctrine but instead adds clarity to such evaluation. Indeed, the appellate court did not decide in favor of Appellee on the issue of liability. Instead, the appellate court found that genuine issues of material fact exist and reasonable minds can come to more than one conclusion as to the issues of whether the condition was observable and the existence of attendant circumstances.

III. CONCLUSION

For the foregoing reasons, this case does not involve matters of public and great general interest. Therefore, Appellee Delores M. Briel respectfully requests this Court to deny accepting jurisdiction of this appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Response of Appellee Delores M. Briel has been sent by U.S. Regular Mail, postage prepaid, this 30th day of January, 2008, to Gregory G. Guice, Esq., Attorney for Defendant-Appellant, at his office address of Reminger & Reminger Co. LPA, 1400 Midland Building, 101 Prospect Avenue West, Cleveland, Ohio 44115.



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