[Cite as *Wild v. Midwest Gift Assn., Inc.*, 2016-Ohio-8351.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Marcia Wild,	:	
Plaintiff-Appellant,	:	
		No. 16AP-367
v.	:	(C.P.C. No. 15CV-1796)
Midwest Gift Association, Inc. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 22, 2016

On brief: *Scott Elliot Smith, L.P.A.*, *Scott E. Smith; Paul W. Flowers Co., L.P.A.*, and *Paul W. Flowers*, for appellant. **Argued:** *Scott E. Smith.*

On brief: *Curry, Roby & Mulvey Co., L.L.C.*, and *Bruce A. Curry*, for appellees Midwest Gift Association and The Columbus Marketplace. **Argued:** *Lisa C. Haase.*

On brief: *Lane Alton, Michael J. Kelley*, and *Eric S. Bravo*, for appellees Gennari & Co., Joseph Gennari, and Kathy Gennari. **Argued:** *Eric S. Bravo.*

APPEAL from the Franklin County Court of Common Pleas

HORTON, J.

{¶ 1} Marcia Wild is appealing from the granting of summary judgment in her premises liability case. For the reasons set forth below, we reverse the judgment of the trial court and remand the case for appropriate further proceedings.

{¶ 2} The assignment of error presented for our review is:

> THE TRIAL JUDGE ERRED, AS A MATTER OF LAW, BY GRANTING SUMMARY JUDGMENT UPON PLAINTIFF-APPELLANTS' PREMISES LIABILITY CLAIM.

{¶ 3} Marcia Wild was seriously injured on April 5, 2013, when she fell over boxes in the building where she conducted her business. The boxes were in an enclosed area Wild needed to traverse in order to turn on the lights in the basement area which housed a so-called "utility room." The lights were turned on by throwing a set of circuit breakers in the "utility room." The common area of the building, including the "utility room," was supposed to be kept free from obstacles, but someone affiliated with one of the other tenants left several boxes in the area. The boxes were not readily visible because no other lighting fixtures were lit and most of the natural lighting was blocked off by cardboard attached to the sides of the "utility room."

{¶ 4} As a result of her injuries, Wild filed suit against Midwest Gift Association, Inc., Gennari & Co., Joseph Gennari, Kathy Gennari, Roto Group, LLC, and The Columbus Marketplace dba Tri State Gift Association, Inc.

{¶ 5} After discovery was pursued, including depositions of a number of the principals, the Gennari defendants (Gennari & Co., Joseph Gennari, and Kathy Gennari), who were tenants in the building, filed a motion for summary judgment. The Midwest Gift Association and The Columbus Marketplace defendants, the managers of the building who were jointly represented, also filed for summary judgment.

{¶ 6} The trial court judge assigned to the case granted the summary judgments based upon his finding that the boxes obstructing the access to the circuit breaker were an open and obvious obstruction. An open and obvious hazard could not be the basis for a finding of negligence in the claims against the named defendants since Ohio case law indicates that a hazard being open and obvious obviates any negligence. *Sidle v. Humphrey*, 13 Ohio St.2d 45 (1968).

{¶ 7} The open and obvious doctrine has traditionally been applied to block liability in situations when a person falls into a hole which is plain for all to see or falls over an object which is plainly visible. For summary judgment purposes at least, this is not one of those cases.

{¶ 8} Marcia Wild was walking in a dimly lit area which was supposed to be kept open and free from obstruction. Someone apparently affiliated with the Gennari group of defendants had left a large number of boxes obstructing the route which had to be traversed to get to the power source for the lighting. The boxes were not obvious because

the room was dimly lit at best. Whatever the available lighting was, i.e., natural lighting, most of which was blocked out by cardboard which had been placed over a wire mesh fencing which constitutes the walls for the so-called "utility room."

{¶ 9} The trial court, in its decision, initially noted that Joseph Gennari had been dismissed from the case before the judge ruled on the summary judgment motions. As a result, Joseph Gennari is not a party to this appeal.

{¶ 10} The judge viewed the case as "essentially a slip and fall action." The judge indicated that Marcia Wild fell over boxes which were stacked inside the enclosure called the "utility room." The trial court judge apparently did not seriously consider that the attendant circumstances made the boxes dimly visible, at best, not open and obvious. The attendant circumstances here included the fact the area was dimly lit, which made the hazard far less than obvious. The attendant circumstances also included the fact that tenants in the building, including Marcia Wild, were on notice that items such as the boxes of merchandise involved here were not supposed to be placed or stored in the area where Gennari employees had placed and left their boxes. Therefore, the tenants were actually on notice the area was supposed to be clear of obstructions, thus lowering the need for care in the area which was, at best, dimly lit.

{¶ 11} Further, for summary judgment purposes, there is a genuine issue of material fact as to whether Wild could have discerned the boxes when using normal care. These questions make the application of the open and obvious doctrine inapplicable at this stage in the proceedings.

{¶ 12} The trial court granted summary judgment for all the named defendants based upon an application of the open and obvious doctrine. The trial court did not address other potential issues regarding liability. We do not choose to address these issues at this stage of the proceedings. Instead, we vacate the granting of summary judgment and remand the case for further appropriate proceedings, including review of any issues, as to liability, as to the remaining issues.

{¶ 13} We sustain the sole assignment of error and remand the case to the Franklin County Court of Common Pleas.

Judgment vacated; case remanded for further appropriate proceedings.

TYACK, J., concurs.
KLATT, J., dissents.

KLATT, J., dissenting.

{¶ 14} Because I would affirm the trial court's grant of summary judgment in favor of the appellees based on the application of the open and obvious doctrine, I respectfully dissent.

{¶ 15} I agree with the trial court's conclusion that the boxes in the utility room were an open and obvious hazard. This conclusion is supported by the deposition testimony of appellant and other witnesses. The appellant testified that she was not looking down when she tripped over the boxes. Appellant stated that she simply did not expect the boxes to be there. Another witness testified that she saw the boxes as she approached the entrance to the utility room immediately after appellant's fall. Appellant had a duty to watch where she was going and there is no evidence that appellant or any other person entering the utility room at the time of this accident would not have seen the boxes on the floor had they looked.

{¶ 16} Nor are there any attendant circumstances here to negate the application of the open and obvious doctrine. There is no evidence of any distractions that might have diverted appellant's attention from where she was walking. Although appellant emphasizes the low light conditions in the utility room, these conditions should only have increased appellant's level of caution, because darkness, in and of itself, is an open and obvious condition. Darkness is not an attendant circumstance that negates the open and obvious doctrine. *McCoy v. Kroger*, 10th Dist. No. 05AP-7, 2005-Ohio-6965, ¶ 16.

{¶ 17} For these reasons, I would affirm the trial court's judgment. Because the majority reaches a different conclusion, I respectfully dissent.

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