[Cite as *Rengel v. Meijer Stores Ltd. Partnership*, 2013-Ohio-1088.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Barbara E. Rengel, et al.	Court of Appeals No. E-12-050
Appellants	Trial Court No. 2010-CV-0658
v.	
Meijer Stores Limited Partnership, et al.	**DECISION AND JUDGMENT**
Appellee	Decided: March 22, 2013

* * * * *

Linda R. Van Tine and Joseph A. Zannieri, for appellants.

John M. Conway and Michael A. Ross, for appellee.

* * * * *

JENSEN, J.

{¶1} Plaintiffs-appellants, Barbara Rengel and David Rengel, timely appeal the July 16, 2012, judgment of the Erie County Court of Common Pleas which granted summary judgment in favor of defendant-appellee, Meijer Stores Limited Partnership.

The primary issue before the court in this premises liability case is whether the trial court erred when it held that as a matter of law, the hazard leading to Mrs. Rengel's injuries was open and obvious, thus negating any duty owed to her as a business invitee of appellee. For the reasons that follow, we find appellants' assignments of error well-taken and we reverse the trial court's decision.

1. Factual Background

{¶2} On April 7, 2009, Mr. and Mrs. Rengel were shopping in the produce department at the Meijer store on Milan Road in Sandusky, Ohio. The Rengels approached a display of cantaloupes which were stacked on a slanted table. The melons were in cardboard boxes placed on the slanted table. There was a plastic lip at the bottom of the table which was intended to prevent the merchandise from sliding off the table. In front of the table there were additional cantaloupes in boxes. Meijer employees testified that their practice was to stack rows of two empty boxes in front of the table and then to place a third full box on top of the empty boxes. This gave the appearance that Meijer had a large inventory to choose from.

{¶3} Mr. Rengel was seated in a motorized cart and Mrs. Rengel, who was seventy-eight years old at the time of the incident, selected a cantaloupe from the top of the pile of cantaloupes that were on the slanted table. She showed the cantaloupe to her husband but he said it was too green. Mrs. Rengel put the first cantaloupe back and selected another cantaloupe, also from the top of the table. She turned to show her

husband her second selection. While her back was to the table, the cantaloupes began rolling off the table, knocking her to the ground. Mrs. Rengel sustained a hip fracture from the fall and required surgery. She suffered serious complications from the surgery, incurring medical bills in excess of $200,000.

{¶4} Mrs. Rengel brought this negligence claim against Meijer and her husband brought a claim for loss of consortium. After a number of depositions, including the depositions of Mr. and Mrs. Rengel and several Meijer employees, Meijer moved for summary judgment claiming that the hazard posed by the cantaloupe display was open and obvious. This motion was based primarily on Mrs. Rengel's deposition testimony that she was concerned about the stability of the display so she took a melon from the top thinking that if she took one from the bottom or the middle, the cantaloupes might roll off the table. Meijer claims that this testimony establishes that as a matter of law, the hazard was open and obvious. Meijer also disputes the cause of the accident. One of its employees testified that Mrs. Rengel was leaning against and possibly lying across the display—a claim that Mrs. Rengel denies. Meijer insists that it was incumbent upon Mrs. Rengel to seek help from an employee in selecting and removing a cantaloupe from the display table.

{¶5} Appellants, on the other hand, point to the testimony of store employees Missy Schoewe and Steve Krout, as well as Mrs. Rengel's testimony, to establish that there is a question of fact as to whether the display presented an open and obvious

hazard. Ms. Schoewe is the produce team leader for Meijer who constructed the cantaloupe display. She testified that the display looked solid to her, that she was well-trained on building solid displays, and that she never expected that someone would get hurt by this display.

{¶6} Mr. Krout was Meijer's grocery team leader. Although he did not construct the display and was not present at the time of the incident, he testified that Meijer trained its employees to build displays in this way, that this method of displaying cantaloupes was safe, that it was not likely to collapse, and that the set-up was suitable for displaying the cantaloupes without the risk of injury.

{¶7} Mrs. Rengel testified that she was concerned about the stability of the display and that it did not look safe. But later in her deposition she testified that she was not *that* concerned.

{¶8} The trial court agreed with Meijer that the hazard posed by the slanted display table was open and obvious, thus negating Meijer's duty to Mrs. Rengel. In this appeal of the trial court's decision granting summary judgment to Meijer and dismissing the Rengels' claims, appellants identify four assignments of error:

(1) There was a factual issue as to whether it was open and obvious that the display would fall on Mrs. Rengel;

(2) Because there was conflicting evidence about whether the hazard posed by the display was open and obvious, the issue could not be

decided as a matter of law;

(3) Meijer's naked assertion that assistance was available to Mrs. Rengel was an issue for the jury and should not have been determined on summary judgment; and

(4) The court was not permitted to pick between two competing and conflicting accident scenarios.

2. Standard of Review

{¶9} Appellate review of a summary judgment is de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), employing the same standard as trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that 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, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶10} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526

N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826, 675 N.E.2d 514 (8th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

3. Analysis

{¶11} In this negligence claim, appellant is required to show "the existence of a duty, a breach of that duty and injury resulting proximately therefrom." *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989). Absent a duty to the injured party, there can be no actionable negligence. *Id.*

{¶12} As recognized by the trial court, Mrs. Rengel was a business invitee. A business invitee is a business visitor who is "on the premises of another for purposes in which the possessor of the premises has a beneficial interest." *Patete v. Benko*, 29 Ohio App.3d 325, 328, 505 N.E.2d 647 (8th Dist. 1986). A property owner typically 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 invitees of latent or hidden dangers. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 80, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 5. However, if a hazard is determined to be "open and obvious," this doctrine obviates the duty to warn and operates as a complete bar to liability for negligence. *Id.* "The underlying theory of the doctrine is that persons entering the premises may reasonably be expected to 'discover those dangers and take appropriate measures to protect themselves.'" *Id.*, quoting *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644, 597 N.E.2d 504 (1992). *See also Armstrong v. Meade*, 6th Dist. No. L-06-1322, 2007-Ohio-2820, ¶ 7.

{¶13} A hazard is considered to be open and obvious when it is in plain view and readily discoverable upon ordinary inspection. *See Miller v. First Internatl. Fid. & Trust Bldg*., Ltd., 6th Dist. L-08-1187, 2009-Ohio-6677, ¶ 68, citing *Parsons v. Lawson Co.*, 57 Ohio App.3d 49, 51, 566 N.E.2d 698 (5th Dist.1989). Whether a hazard is open and obvious must be determined based on the facts in each case. *Navarette v. Pertoria, Inc.*, 6th Dist. No. WD-02-070, 2003-Ohio-4222, ¶ 19. If the facts are undisputed, the question of whether a danger is open and obvious can be determined as a matter of law. *Madison v. Raceway Park, Inc*., 6th Dist. L-08-1279, 2009-Ohio-1279, ¶ 22. In the present case, however, the facts are disputed.

{¶14} Mrs. Rengel's testimony was somewhat inconsistent as to the extent to which she believed the display to be unstable. At one point she says that she was concerned because the display looked unstable and unsafe, but she then clarifies that she was not *that* concerned. "It is the province of the jury to determine where truth probably lies from conflicting statements, not only of different witnesses, but by the same witness. *State v. Lakes*, 120 Ohio App. 213, 217, 201 N.E.2d 809 (4th Dist.1964). *See also Bowen v. Kil-Kare, Inc*., 63 Ohio St.3d 84, 585 N.E.2d 384 (1992) (concluding that court of appeals had erred in failing to consider appellant's affidavit solely because of perceived discrepancy between appellant's affidavit and his earlier deposition testimony). However, more important to our decision today is the testimony of appellee's own witnesses.

{¶15} Meijer's employees testified unequivocally that the cantaloupe display was safe and solid and that they were not aware of or concerned about the display collapsing and causing injury. Nevertheless, Meijer argues that Mrs. Rengel's testimony that she questioned the stability of the display and purposely picked a cantaloupe from the top of the table establishes that the hazard was open and obvious to her. Meijer also insists that recognizing the potential instability of the display, Mrs. Rengel should have sought assistance from a Meijer employee in picking cantaloupes from the display.

{¶16} Meijer's employees testified that they are trained to build displays that are sturdy but attractive. Their deposition testimony establishes that they expect customers

to select items from the display themselves and they know that customers often pick up a piece of fruit, look at it, and put it back if it does not meet their quality expectations. It is common knowledge that fruit is not a uniform product like a box of cereal or a jar of spaghetti sauce. Customers check fruit for color, shape, smell, and feel. In other words, they touch the merchandise, shift it around, and search for the item that looks most appealing. Meijer builds these displays knowing that this is how consumers shop for produce. In fact, appellee's employees testified that they rotate the display so that the freshest fruit is placed underneath the older fruit.

{¶17} The trial court cited a number of decisions where Ohio courts have found that items cascading from a display shelf presented an open and obvious hazard to the plaintiff. Unlike the present case, those cases make no mention of the defendants' own employees insisting at their depositions that the display was safe and solid and did not appear to them capable of causing injury to shoppers. If the hazard was not open and obvious to the employees who built the display—in accordance with Meijer training—we see no reason why it should have been open and obvious to appellant, a shopper who relied on appellee to safely display the merchandise that she visited the store to buy.

{¶18} Numerous courts around the state have held, as we now hold, that a question of fact existed as to whether a store display created an open and obvious hazard. In *Dillon-Garcia v. Marc Glassman, Inc.*, 8th Dist. No. 86318, 2006-Ohio-562, the Eighth District found that there was a question of fact as to whether removing a can of

spaghetti sauce from a case-stacked display presented an open and obvious danger that another can of spaghetti sauce would fall, striking appellant in the face. We held similarly in *Lopez v. Home Depot, USA, Inc.*, 6th Dist. L-02-1248, 2003-Ohio-2132, where appellant was struck by a piece of wood that fell from the third shelf when her husband removed a piece of wood from the second shelf. *See also Mills v. Drug Mart, Inc.*, 8th Dist. No. 64358, 1993 WL 526801 (Dec. 16, 1993) (finding a genuine issue of material fact as to whether wire mesh beach ball display protruding into aisle presented an open and obvious hazard); *Bumgardner v. Wal-Mart Stores, Inc.*, 2d Dist. No. 2002-CA-11, 2002-Ohio-6856, ¶ 26 (holding that reasonable minds could differ as to whether protruding pallet of soft drinks was open and obvious hazard).

{¶19} Significant to our holding in this case is that although Mrs. Rengel may have perceived potential instability of the display, she deliberately selected cantaloupes from the top of the display to avoid disrupting the configuration. She realized that if she pulled a melon from the bottom or the middle of the display, cantaloupes might roll off the table. Had she approached the table, observed the possibility of causing an avalanche of cantaloupes by removing a bottom or middle melon, then proceeded to do just that, our opinion may be different. We see the issue as analogous to a situation involving cans, jars, or some other product stacked in a pyramid formation. Clearly, it would present an open and obvious danger to pull one of the items from the middle of the pyramid; pulling the item from the top of the pyramid, however, would not pose the same danger. This

was the reasoning Mrs. Rengel employed in taking a cantaloupe from the top of the display.

{¶20} We also do not agree that, as a matter of law, appellant was required to request assistance with reaching the cantaloupe. Meijer is, as its employees described, a "self-service" store. Customers generally select merchandise, place it in their grocery cart, and proceed to the check-out counter to pay. Certainly, if a customer cannot reach an item on the top of a six-foot shelf, is shopping in a non-grocery department and wishes to purchase an item that is heavy or cumbersome, or wishes to purchase an item from the middle of a ceiling-high display, it may be reasonable under those circumstances for Meijer to expect appellants to seek assistance. *See, e.g., Sexton v. Wal-Mart Stores, Inc.*, 4th Dist. No. 98 CA 2603, 1999 WL 22632 *5 (Jan. 14, 1999) (noting that appellant could have asked for assistance in reaching laundry detergent from top shelf); *Lazzara v. Marc Glassman, Inc.*, 107 Ohio App.3d 163, 667 N.E.2d 1275 (8th Dist.1995) (involving appellant's removal of package of toilet paper from the middle of a display stacked almost to the ceiling). But these were cantaloupes placed on a relatively low display and were items that Meijer understood would be touched, handled, and sorted through by customers seeking to find the item of highest quality. There is at least a genuine issue of material fact as to whether it was reasonable for appellants to select cantaloupes from the table on their own without seeking employee assistance.

{¶21} Finally, the court understands that Meijer believes that this accident could only have happened if Mrs. Rengel was leaning against, and perhaps lying across, the display. Mrs. Rengel insists that she reached the cantaloupes without touching the display or without even standing on her tiptoes. It is not for the court to determine which version of events is most credible-it is a question of fact to be determined by the jury. In any event, that question is not relevant to the issue of whether the display presented an open and obvious hazard. And it does not negate Meijer's duty to its business invitee.

4. Conclusion

{¶22} It was error for the trial court to conclude that as a matter of law, the cantaloupe display at appellee's store was an open and obvious hazard, negating Meijer's duty of care to appellant, a business invitee. Summary judgment should not have been granted and the court, therefore, reverses the July 16, 2012, judgment of the Erie County Court of Common Pleas. The costs of this appeal are assessed to appellee pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.

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JUDGE