UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0936

September Term, 2015

BLANCHE SMITH

v.

RITE AID OF MARYLAND, INC.

Wright,
Berger,
Reed,

JJ.

Opinion by Wright, J.

Filed: May 19, 2016

This appeal arises from the granting of summary judgment by the Circuit Court for Baltimore City in favor of appellee, Rite Aid Corporation ("Rite Aid"), for alleged negligence. Appellant, Blanche Smith, filed a Complaint and Prayer for Jury Trial against Rite Aid[1] on February 3, 2014, after she tripped and fell over a tote box on the store's floor. After Ms. Smith filed two more Amended Complaints on March 28, 2014,[2] and November 11, 2014, Rite Aid filed its Answer to the last Amended Complaint on December 30, 2014.

Rite Aid filed a motion for summary judgment on March 24, 2015. On April 13, 2015, Ms. Smith filed a motion for extension of time to respond to the motion for summary judgment to April 15, 2015. Ms. Smith then filed her response on April 15, 2015, and on April 20, 2015, the circuit court granted her motion for extension of time to April 15, 2015.

A hearing on the motion for summary judgment was held on April 22, 2015. At the hearing, the circuit court judge stated that she had not read Ms. Smith's opposition to Rite Aid's motion for summary judgment that was filed April 15, 2015.[3] At the conclusion of the hearing, the court granted Rite Aid's motion for summary judgment.

On May 4, 2015, Ms. Smith filed an Omnibus Motion to Alter or Amend Judgment, Motion for New Trial, and Motion to Revise Judgment of the Court's Grant of

[1] Other defendants initially named were later dismissed.

[2] Rite Aid issued an Answer to the first Amended Complaint on June 1, 2014.

[3] The circuit court judge conducting the hearing was not the judge who granted the motion for extension.

Defendant's Motion for Summary Judgment. Rite Aid filed an opposition to the motion on May 12, 2015, and the circuit court denied the Omnibus motion on June 5, 2015.

Ms. Smith subsequently filed this timely appeal asking whether the circuit court erred in granting Rite Aid's motion for summary judgment.[4] We answer in the affirmative, reverse the judgment of the circuit court, and remand for further proceedings not inconsistent with this opinion.

FACTS

On October 24, 2012, Ms. Smith went into the Rite Aid store at 423 North Avenue in Baltimore City ("the Store"), a location that she had visited about twice a month for several years. After picking up items for purchase, Ms. Smith approached the cashier counter. As Ms. Smith turned to leave, after paying for her items, she tripped over a tote box that was placed by the cashier counter "flushed against" the candy and magazine rack. The tote box was there because a Store employee was unloading magazines from the box and placing them on the magazine rack. Ms. Smith testified that she was looking

[4] In her brief, Ms. Smith posed three questions for our review:

I. Whether the Court Erred in Granting Appellee's Motion for Summary Judgment.

II. Whether the Court Erred in Denying Appellant's Motion to Alter and Amend Judgment

III. Whether the Court Erred in Granting the Summary Judgment without Considering Appellant's Opposition filed in the case on the basis that the opposition was untimely.

We consolidated the questions as the first issue encompasses the thrust of Ms. Smith's challenge of the circuit court's decision.

straight ahead at the entryway, "focusing [on] going out the door," and tripped as she was leaving. An ambulance arrived at the scene and took Ms. Smith to Maryland General Hospital.

After a series of filings, Rite Aid moved for summary judgment contending that it owed no duty to Ms. Smith to warn her of an open and obvious condition. The circuit court granted the summary judgment, concluding:

> [T]he Plaintiff in this matter testified through deposition that she's seen the totes . . . throughout the store on many occasions. She was in the store on that particular day at least 15 minutes before this incident occurred. That she's familiar with the store, she goes into the store several times a week.
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> This box was placed, or the tote was placed flush against the racks protruding from the cash register. The Plaintiff has indicated and testified that she was not looking where she was going. The beige floor was there with the red box or black box or blue box . . . . There was ample room for the Plaintiff to walk around that box.
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> But the Plaintiff indicated very clearly that she was not looking where she was going. She was not watching the floor. That she was looking out the door I believe at her husband. Condition was open and obvious. The motion for summary judgment is granted.

The circuit court heard from both sides at the hearing, but reached its decision without reviewing Ms. Smith's opposition to Rite Aid's Motion for Summary Judgment.

Additional facts may be included below as they become relevant to the discussion.

STANDARD OF REVIEW

A circuit court may grant a motion for summary judgment if the moving party can show that "there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f).

"To defeat a motion for summary judgment, the party opposing the motion must present admissible evidence to show the existence of a dispute of material fact." *Tennant v. Shoppers Food Warehouse Md. Corp.*, 115 Md. App. 381, 386 (1997) (citations omitted). "[F]ormal denials and general allegations" do not establish the existence of a factual dispute. *Id.* (citations omitted).

Rulings on summary judgment require the circuit court to make determinations on issues of law "resolving no disputed issues of fact." *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 737 (1993) (citation omitted). Accordingly, we review the circuit court's ruling on a motion for summary judgment for whether it "was legally correct," *id.* (citations omitted), and we afford it no deference. *Tyler v. City of Coll. Park*, 415 Md. 475, 498 (2010).

To determine whether a genuine dispute of material facts exists among the parties, we review the record independently. *Id.* (citing *Charles Cnty Comm'rs v. Johnson*, 393 Md. 248, 263 (2006)). We review the record in the light most favorable to the non-moving party and construe any reasonable inferences against the moving party. *Id.* (citing *Conaway v. Deane*, 401 Md. 219, 243 (2007)). In doing so, we must determine "whether a fair minded jury could find for the plaintiff in light of the pleadings and the evidence presented, and there must be more than a scintilla of evidence in order to proceed to trial . . . ." *Laing v. Volkswagen of Am., Inc.*, 180 Md. App. 136, 153 (2008) (citations omitted).

DISCUSSION

There are several reasons that the granting of the motion for summary judgment in this case was in error. We will explain.

A store, while not always necessarily liable for all harm suffered by a customer within its premises, owes a certain level of responsibility to the customer based on its relationship to the customer:

> In Maryland, it is well-established premises liability law that the duty of care that is owed by the owner of property to one who enters on the property depends upon the entrant's legal status. Ordinarily, one entering onto the property of another will occupy the status of invitee, licensee by invitation, bare licensee, or trespasser. "An invitee is a person 'on the property for a purpose related to the possessor's business.'" He is owed a duty of ordinary care to keep the property safe.

Rivas v. Oxon Hill Joint Venture, 130 Md. App. 101, 109 (2000) (internal citations omitted). The duty of the property owner is to exercise reasonable care only to the extent that he may "'protect the invitee from injury caused by an unreasonable risk' that the invitee would be unlikely to perceive in the exercise of ordinary care for his or her own safety, and about which the owner knows or could have discovered in the exercise of reasonable care." *Tennant*, 115 Md. App. at 388 (citing *Casper v. Charles F. Smith & Son, Inc.*, 316 Md. 573, 582 (1989)) (other citations omitted).

This duty includes not only inspecting the premises and warning invitees of any known hidden dangers, but also includes taking "reasonable precautions against foreseeable dangers." *Id.* (citing W. Page Keeton, et. al., *Prosser and Keeton on the Law of Torts*, § 61, at 425-26 (5th ed.1984)).

However, "[s]torekeepers are not insurers of their customers' safety, and no presumption of negligence arises merely because an injury was sustained on a storekeeper's premises," *Giant Food, Inc. v. Mitchell,* 334 Md. 633, 636 (1994) (citation omitted). The invitee himself has a duty to exercise due care for his own safety, including the duty to look at his surroundings. *Tennant*, 115 Md. App. at 389. "Accordingly, the owner or occupier of land ordinarily has no duty to warn an invitee of an open, obvious, and present danger." *Id.* (citing *Casper,* 316 Md. at 582).

First, we are tasked to review whether the circuit court correctly determined that the tote box was such an "open, obvious, and present danger" that Rite Aid owed no duty to Ms. Smith to warn her of its presence. Rite Aid asks us to affirm this decision because it posits that the tote box was "an open and obvious condition." While the question of whether duty exists is a legal question for the courts, *Valentine v. On Target, Inc.*, 353 Md. 544, 549 (1999), the question of whether the tote box was an open and obvious condition excusing such duty is a question of fact. *See Blackwell v. CSX Transp., Inc.*, 220 Md. App. 113, 120 (2014) ("A material fact is one that will alter the outcome of the case, depending upon how the fact-finder resolves the dispute." (Citations omitted)), *cert. denied*, 442 Md. 194 (2015).

We have previously explained customers' expectations that store aisles and floors be relatively free of hazards:

> [I]t would seem that, even in a grocery and provision store, where the articles offered for sale are irregularly placed about the floor, since it is intended that purchasers will inspect and select such articles as they desire to purchase from those offered for sale, the owner is under a duty to

> provide reasonably safe passageways to afford access to different parts of the store, where customers are expected to go.
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> The storekeeper expects and intends that his customers shall look not at the floor but at the goods which he displays to attract their attention and which he hopes they will buy. He at least ought not to complain, if they look at the goods displayed instead of at the floor to discover possible pitfalls, obstructions, or other dangers, or if their purchases so encumber them as to prevent them from seeing dangers which might otherwise be apparent. *Patrons are entitled therefore to rely to some extent at least upon the presumption that the proprietor will see that the passage ways provided for their use are unobstructed and reasonably safe.*

Tennant, 115 Md. App. at 391-92 (citing *Chalmers v. Great Atl. & Pac. Tea Co.,* 172 Md. 552, 556, 559 (1937)) (emphasis added). In *Chalmers*, a case where a customer fell over a carton of canned goods in an aisle in a store operated by the defendant, the Court of Appeals reversed a directed verdict in favor of the defendant, explaining, "Whether under the circumstances its conduct in placing the box in the aisle, or permitting it to remain there, was consistent with due care, was peculiarly a jury question." 172 Md. at 558; *see also Van Gordon v. Herzog*, 410 N.W.2d 405, 406 (Minn. Ct. App. 1987) ("[D]istracting circumstances are factors for a jury to consider and may excuse a plaintiff's failure to see that which is in plain sight."); *Hawsey v. United States Fid. and Guar. Co.*, 211 So.2d 417, 419 (La. Ct. App. 1968) (determining that while a customer in a store has a duty to see obvious dangers and cannot recover if he fails to see something that a reasonably prudent person would have observed, it was a finding of fact by the court that plaintiff had no opportunity to observe a mop before tripping over it); *Sears, Roebuck & Co. v. Chandler*, 263 S.E.2d 171, 173 (Ga. Ct. App. 1979) (explaining that

while a customer must exercise ordinary care in a store, "[l]ooking continuously, without interruption, for defects in the premises is not required").

In the instant case, the record reflects that the tote box was flushed under the racks by the cashier counter in an area where customers would be focused on the cashier and the various merchandise displayed on the racks by the counter. The cashier counter is an area "where customers are expected to go," *Chalmers*, 172 Md. at 556, and where the store may expect customers to be distracted. Because the checkout counter is a high traffic area where customers regularly walk to and from, individuals walking to and leaving the cashier counter are not necessarily expected to be looking at the floor for any objects obstructing the area. Like the distraction of the eye catching displays, *id.*, the attention customers give to the cashiers as they are prepare for and complete their transactions is not unexpected. Additionally, due to the height and location of the tote box, it was not necessarily in Ms. Smith's line of vision as she was walking away. It cannot, therefore, be said unequivocally that the tote box was open and obvious.

In addition, Ms. Smith provides testimony from Rite Aid employees who acknowledged that the tote box's placement at the time Ms. Smith fell was against the company's policy. The Store's manager explained that the Store required that the workplace be kept safe for customers by being kept "clutter free and hazard free." Another of Rite Aid's employees, Ms. Rosaline Ahaghotu, testified as to why she believed placing the tote box by the register was dangerous:

Q. You never take the tote [to the front of the store]?

A. You don't take the totes there.

Q. Why?

A. Why you don't take the totes there is you don't want them to, somebody to know his or her feet there . . . .

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Q. Is it ever allowed for the tote to be in the front of the store where the customer stands to pay for their merchandise?

A. Because sometime when the vendors come, you don't see them, they can drop whatever, I don't know. Then we ask them not to put anything in front of our, in front of our counter, so they have to put it – some of them are so hurry, they just put something and you don't know, but in this place, we are not allow.

Q. Okay. So based on your training, you're not allowed to keep the totes in the front where the customer stands?

A. We don't put them there, except behind the machine.

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Q. But when you are working your shift, you make sure nobody leaves anything in that front area where the customer has to stand?

A. Yes, ma'am.

Q. And why do you do that?

A. Why I do that? I don't want them to be hurt. I don't want somebody to be hurt, because I've gone to other stores to buy something, and you see caution, like the mop, it puts caution, and you went to step and they say watch your step, so some of them like Giant, some of them with the stocking, they said please, see the signs, don't go on this side, and then you have to obey.

Q. I see. So they make sure they get it out of the way, is that what you're saying?

A. Yes, ma'am, because the idea when you are not there stocking.

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Q. Okay. So based on your training, you're not allowed to keep the totes in the front where the customer stands?

A. We don't put them there, except behind the machine.

Rite Aid points out that Ms. Ahaghotu's testimony, as to her personal opinion about duty, does not bind Rite Aid, and that any reference to internal policies or safety regulations are "merely a reference guide for safety, not a statue or ordinance, and, accordingly, the violation of that safety [policy] is not evidence of negligence." In support of this statement, Rite Aid cites *Ramseur v. United States*, 587 F. Supp. 2d 672, 675-77 (D. Md. 2007), *aff'd*, 283 F. Appx. 998 (4th Cir. 2008), a case where summary judgment was initially granted in favor of the plaintiff who alleged that the United States Post Office failed to follow its own safety policies and she sustained injuries as a result. The Federal District Court for the District of Maryland explained that summary judgment was improper in that case because going against existing safety policies is not necessarily evidence of negligence, and thus not dispositive. *Id.* at 682.

Ramseur is in no way inconsistent with our holding here, to reverse. The Store's employees' opinions as to the Store's general precautions to ensure the safety of their customers, while in and of itself does not establish liability, is contrary to Rite Aid's argument that the placement of the tote box was "open and obvious," as a matter of law, and that evidence would prohibit the granting of a motion for summary judgment for Rite Aid.

Finally, Rite Aid contends that Ms. Smith's claims are barred by the doctrines of contributory negligence and assumption of the risk. Fundamentally, Rite Aid argues that Ms. Smith was not acting as a reasonable person would have acted under the circumstances in ensuring her own safety. However, we have previously stated that such a determination is a question for the jury:

> The standard of care applicable to a customer in a store is not as high as that imposed upon a pedestrian on a sidewalk. In determining whether a business visitor's failure to observe a dangerous condition on the premises constitutes negligent inattention, the fact that the possessor of the premises has eyecatching objects on display which divert the visitor's attention is an important factor for consideration. In view of the fact that there were displays all around the area in which [the plaintiff] fell . . . we cannot say as a matter of law that [she] failed to exercise due care for her own protection. *Whether or not she was using the caution expected of a reasonably prudent person under the circumstances was a question of fact for the jury and not of law for the court.*

Diffendal v. Kash & Karry Serv. Corp., 74 Md. App. 170, 175 (1988) (citing *Borsa v. Great Atl. & Pac. Tea Co.,* 215 A.2d 289, 292-93 (Ps. Super. Ct. 1965)) (emphasis in original). It is, therefore, for the factfinder to determine whether Ms. Smith acted with "the caution expected of a reasonably prudent person under the circumstances," *id.*, and an award of summary judgment on that basis is in error.

In conclusion, we cannot say that "a fair minded jury" could not find, *Laing*, 180 Md. App. at 153, based on the record, that Rite Aid breached its duty to Ms. Smith, and that she was not contributorily negligent and did not assume the risk. The circuit court erred in granting summary judgment in favor of Rite Aid.[5]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS REVERSED. CASE REMANDED FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.

[5] Because we reverse the decision of the circuit court as to summary judgment, we need not address the timeliness of Ms. Smith's opposition to Rite Aid's Motion for Summary Judgment, the circuit court's refusal to read it, and Ms. Smith's Motion to Alter or Amend Judgment.