[Cite as *Guthrie v. Giant Eagle, Inc.*, 2021-Ohio-1268.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

DIANE GUTHRIE,

Plaintiff-Appellant,

v.

GIANT EAGLE, INC. et al.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 20 MA 0091

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2019 CV 437

BEFORE:
Carol Ann Robb, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Patricia A. Morris, Law Office of Patricia Morris, 841 Boardman-Canfield Rd., Suite 306, Boardman, Ohio 44512 for Plaintiff-Appellant and

Atty. Gregory H. Collins, Collins, Roche, Utley & Garner, LLC, 520 S. Main Street, Suite 2551, Akron, Ohio 44311 and *Atty. Kurt D. Anderson*, Collins, Roche, Utley & Garner, LLC, 875 Westpoint Parkway, Suite 500, Westlake OH 44145, for Defendants-Appellees.

Dated: March 22, 2021

Robb, J.

{¶1} Plaintiff-Appellant Diane Guthrie appeals the decision of the Mahoning County Common Pleas Court granting summary judgment in favor of Defendants-Appellees Giant Eagle Inc. et al. Appellant contests the court's application of the open and obvious doctrine to preclude her negligence action. She contends reasonable minds could differ on whether an area of cracked asphalt in the parking lot was open and obvious due to the existence of attendant circumstances, including a stop sign and time to perceive the danger before encountering it. However, the hazard was open and obvious, and the alleged attendant circumstances were not unusual, unexpected, or urgent. Appellant also complains the trial court did not determine if Appellees breached the duty of care to keep the premises in a reasonably safe condition. However, the case never reached this stage as the duty was eliminated by the application of the open and obvious doctrine. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} On February 28, 2017, Appellant fell in the parking lot of the Canfield Giant Eagle and broke her elbow. On February 28, 2019, she filed a negligence complaint against Giant Eagle Inc. (the entity leasing the property and operating the grocery store), Apex Century Colonial Plaza LLC (the owner of the property), and Benchmark Management of Ohio Inc. (the entity managing the property). In the complaint, Appellant claimed her fall was caused by a defect in the parking lot surface which was the result of failure to maintain the premises in a reasonably safe condition or warn of the dangerous condition.

{¶3} Appellees filed a motion for summary judgment. They highlighted certain deposition testimony given by Appellant: she lived a half a mile from the store for the five years prior to her injury; she shopped there on a weekly basis; she entered the store on a clear, dry day to visit Western Union within the store; she exited the store carrying nothing except her purse; she exited an automatic door that faced her car, which was parked in the side lot west of the building; the traffic was normal, and no cars were near her position; she did not stop before entering the lane between the store and her car; and she did not notice a visibly cracked area of asphalt until after she fell.

{¶4} Appellees claimed the cracked asphalt was open and obvious, noting Appellant admitted it was plainly visible in the photographs she provided in discovery. They pointed to a portion of Appellant's deposition where she circled the cracked spot in a photograph and she then said: if they were at the parking lot at the time of her injury, they would have been able to see the spot; there was nothing hiding it; and she would have seen it if she had looked down but was focused on her car after ensuring there was no traffic. The exhibits to the deposition were filed along with the deposition and included the photographs Appellant produced in discovery which showed the cracked area from various angles. One photograph portrayed the crack with a tape measure showing part of it was 5 inches wide and 1 inch deep.

{¶5} Anticipating the arguments Appellant would use in her opposition, Appellees argued there were no attendant circumstances that would reduce the degree of attention a business invitee would be expected to exercise with regard to an open and obvious hazard. Appellees said the "normal" traffic described by Appellant was expected and commonplace and a stop sign is not an unexpected or justifiable distraction. Appellees noted the partial side view blocked by the stop sign did not mean Appellant could not look forward where she would be walking as: she testified she did not even have to stop to ascertain whether it was safe to cross; there was no urgency; she had time to evaluate her path; and she was two to three strides past the stop sign when she fell.

{¶6} Lastly, Appellees pointed to Appellant's testimony that she knew the entire parking lot was deteriorated (with potholes and washed-out areas) and in need of repair at the time of her injury and in the months leading up to it. They claimed this put her on notice of the hazard she encountered when she fell.

{¶7} In opposing summary judgment, Appellant first responded to the facts presented by pointing out: she usually parked in the lot to the north of the store (the front); she "hardly ever" parked in the side lot to the west of the store and was thus not familiar with the west side of the store; she parked on the west side on the day of her injury; she was more careful than usual because of her unfamiliarity with that lot; and although she did not stop before entering the lane, she slowed down.

{¶8} Appellant argued the question of whether the spot where she fell was open and obvious was a jury question. She complained Appellees did not describe the crack

or how it contrasted with the surroundings and said they were relying on four unclear photographs. She concluded: "Some jurors might look at the photographs in evidence and determine the crack in the parking lot was not open and obvious, while others could disagree." Appellant explained the attendant circumstances she was relying on were the height of the stop sign and her unfamiliarity with this side of the parking lot, not the traffic. She cited in her testimony that in ascertaining whether traffic was coming from the left, she had to first look around the corner of the building and the stop sign, which she described as being "right in my face." It was argued that the stop sign distracted her attention from clearly observing the crack. She testified she is 5'6" and the bottom of the stop sign was only 5 feet from the ground. Her opposition memorandum claimed this violated Ohio Department of Transportation (ODOT) regulations.

{¶9} Appellant submitted an affidavit wherein she reviewed some facts from her testimony and said she had no time to observe the crack because she had to get past the stop sign which had a height that distracted her. She attached a photograph showing a view of the stop sign and the crack as seen from Giant Eagle's patio. She also attached a summary from ODOT's website which provided sign heights for various public roads. It said when measured from the bottom of the sign, the height should be 5 feet in rural areas but 7 feet in business, commercial, or residential areas where parking or pedestrian movements are likely to occur.

{¶10} Appellees' reply asked the trial court to strike the ODOT information as it was not produced in discovery, was improperly provided as a substitute for an expert opinion, and was not relevant to a private parking lot. They also pointed out Appellant regularly used the same automatic door, which faced the spot in the side lot where her car was parked that day. It was just the parking spot and the path from the patio to the parking lot which differed from her usual path. (She usually exited onto the same patio and turned north, instead of continuing to walk west as she did on the day of the injury).

{¶11} Appellees noted the photographs were provided by Appellant, who confirmed at deposition they accurately depicted the cracked area which would be just as visible if viewed live at the time of the injury. Regardless of the photographs, Appellant admitted at deposition that she would have observed the crack if she had looked. Appellees also pointed to Appellant's testimony that she noticed it was safe to cross before she cleared the sign and she placed her attention on her car instead of on the

parking lot once she saw it was safe to cross. They said the suggestion in Appellant's affidavit that she lacked time contradicted her deposition (where she said she did not even stop before crossing the lane).

{¶12} On July 28, 2020, the trial court granted summary judgment in favor of Appellees. The court noted Appellant was aware of the deteriorating condition of parts of the parking lot in the four to six months prior to her fall and said Appellant's claim of unfamiliarity with the west side lot was not dispositive. The court added a conclusion that her general knowledge of the lot's condition "provides adequate notice to preclude her claims."

{¶13} The court then separately found Appellees' duty was eliminated as the hazard was open and obvious. The court stated: a pedestrian has a duty to watch where they are walking; Appellant admitted she would have seen the hazard if she looked down; her mere need to look past a static stop sign did not qualify as an attendant circumstance; and she could have taken all the time she needed to assess the situation and proceed safely. The court said the ODOT document: applied to public roads, not private parking lots; contained a statement that was not a legal requirement for installation and was not a substitute for engineering judgment; and was not produced in discovery.

BRIEFING ON APPEAL

{¶14} Appellant filed a timely notice of appeal from the trial court's July 28, 2020 decision granting summary judgment for Appellees. Appellees initially complain Appellant's brief fails to set forth assignments of error. Appellant's brief contains a "statement of the issues presented for review" in the table of contents and on a separate page.

{¶15} Pursuant to App.R. 16, the brief of the appellant "shall include, under the headings and in the order indicated * * * A statement of the assignments of error presented for review, with reference to the place in the record where each error is reflected." App.R 16(A)(3). The next subdivision requires a "statement of the issues presented for review, *with references to the assignments of error to which each issue relates*." (Emphasis added). *See also* 7th Dist. Loc.R. 16(A),(B),(E). Thereafter, the brief shall contain an "argument containing the contentions of the appellant with respect to each assignment of error presented for review * * *." App.R. 16(A)(7).

{¶16} The three capitalized sentences set forth in Appellant's "statement of the issues presented" are used in the argument section of the brief as topical headings. The first two issues both concern the court's application of the open and obvious doctrine (which doctrine relates to duty), and the third issue concerns breach of duty. We will address these issues to the extent they are argued.

LAW

{¶17} We review the granting of summary judgment under a de novo standard of review. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. We therefore apply the same standard as the trial court to ascertain if summary judgment was warranted. Pursuant to Civ.R. 56(C), summary judgment shall be granted when the evidence shows there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Summary judgment is appropriate if reasonable minds can only find in favor of movant after considering the evidence in the light most favorable to the non-movant. Civ.R. 56(C).

{¶18} A summary judgment movant has the initial burden of stating why the movant is entitled to judgment as a matter of law and showing there is no genuine issue of material fact. *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 10, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292-294, 662 N.E.2d 264 (1996). The non-movant then has a reciprocal burden. *Id.* The non-movant's response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing there is a genuine issue of material fact for trial and may not rest upon mere allegations or denials in the pleadings. Civ.R. 56(E).

{¶19} The material issues in a given case depend on the applicable substantive law. *Byrd*, 110 Ohio St.3d 24 at ¶ 12. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id. See also Talbott v. Condevco Inc.*, 2020-Ohio-3130, 155 N.E.3d 84, ¶ 18 (7th Dist.) (if issues of fact are allegedly on several minor items that together would not be dispositive, then summary judgment would not be subject to reversal and those items would not need to be addressed on their merits); *Peters v. Tipton*, 7th Dist. Harrison No. 07 HA 3, 2008-Ohio-1524, ¶ 8 (even if issues of fact are demonstrated, if those issues are "not dispositive due to the lack of a genuine issue on a threshold legal matter, summary judgment is still appropriate").

{¶20} "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. * * * When applicable, however, the open-and-obvious doctrine obviates the duty to warn and acts as a complete bar to any negligence claims." *Armstrong v. Best Buy Co.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 5. "[A] premises-owner owes no duty to persons entering those premises regarding dangers that are open and obvious." *Id*. Since the open and obvious doctrine "obviates the duty to warn," it "acts as a complete bar to any negligence claims." *Id.*

{¶21} The rationale is "that the open and obvious nature of the hazard itself serves as a warning." *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644, 597 N.E.2d 504 (1992). "Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves." *Id.* The open and obvious doctrine applies to all negligence claims against the owner or occupier of premises, including negligent maintenance and negligent design. *See Miller v. Cardinal Mooney High School*, 7th Dist. Mahoning No. 20 MA 0037, 2021-Ohio-___, ¶ 79, citing *Brown v. Pet Supplies Plus*, 7th Dist. Mahoning No. 98 CA 9 (Aug. 26, 1999).

{¶22} Although the existence of a duty presents a question of law for the court, there may be genuine issues of material fact on the question of whether a danger is open and obvious. *Boston v. A & B Sales Inc.*, 7th Dist. Belmont No. 11 BE 2, 2011-Ohio-6427, ¶ 31-36. Whether a reasonable person would find a hazard open and obvious is usually determined by testimony from actual people who observed the danger, including the plaintiff. *Miller*, 7th Dist. No. 20 MA 0037 at ¶ 85. *See also Trowbridge*, 7th Dist. No. 12 JE 33 at ¶ 14.

{¶23} "Attendant circumstances may create a genuine issue of material fact as to whether a danger was open and obvious." *Miller*, 7th Dist. No. 20 MA 0037 at ¶ 78, quoting *Bounds v. Marc Glassman, Inc.*, 8th Dist. Cuyahoga No. 90610, 2008-Ohio-5989, ¶ 24. An attendant circumstance created by the store must contribute to the fall and be beyond the control of the injured party. *Backus v. Giant Eagle Inc.*, 115 Ohio App.3d 155, 158, 684 N.E.2d 1273 (7th Dist.1996) (finding store advertising was not attendant circumstances as to defect in asphalt after stating, "If he exercises the option to read

advertisements rather than to look at the surface upon which he is traveling, then he abandons the duty to look").

{¶24} Attendant circumstances are those that would distract a person's attention in the same situation and reduce the degree of care an ordinary person would exercise. *Spence v. Baird Bros. Saw Mill Inc.*, 7th Dist. Mahoning No. 16 MA 0117, 2017-Ohio-8161, ¶ 14. These "special" circumstances must be more than regularly-encountered, common, or ordinary circumstances. *Id.* (noise was not an attendant circumstance defeating the open and obvious danger of standing/passing under an overhead door).

{¶25} Here, the trial court concluded the defect was open and obvious as Appellant would have seen it if she had looked and the alleged attendant circumstances did not reduce the degree of attention a reasonable person would exercise.

{¶26} Before addressing the issues presented on this topic, we must point to the prior section of the judgment where the court seemed to first and alternatively find that Appellant's knowledge of the general deteriorating condition of the parking lot precluded her claim, regardless of the open and obvious doctrine. In support, the trial court relied on: *Cika-Heschmeyer v. Young*, 7th Dist. Mahoning No. 18 MA 0048, 2019-Ohio-502, citing *Raflo v. Losantiville Country Club*, 34 Ohio St.2d 1, 295 N.E.2d 202 (1973); *Strevel v. Fresh Encounter Inc.*, 4th Dist. Highland No. 15CA5, 2015-Ohio-5004, ¶ 17; and *Cooper v. Meijer Stores Ltd. Partnership*, 10th Dist. Franklin No. 07AP-201, 2007-Ohio-6086, ¶ 16.

{¶27} Appellant does not discuss the cases cited by the trial court or recognize that this seems to be an alternative holding made prior to the decision on the open and obvious doctrine. Still, Appellant's brief does generally contest the emphasis placed on her knowledge that the parking lot was in need of repair, noting the vast size of the parking lot and the lack of specifics on the number or location of the areas in need of repair.

{¶28} Notably, Appellees do not alternatively ask this court to uphold the trial court's application of these cases in support of any alternative holding, even though they alternatively argued this position below. The parties seem to treat the trial court's alternative holding as merely a factor in entire open and obvious analysis.

{¶29} This may be because what appears to be an alternative holding was merely the trial court's explanation as to why Appellant's "lack of familiarity with the particular washed out area that caused her fall is not dispositive." The court's next sentence (which

concluded the first section of the judgment) reads: "The fact that she was aware of the deteriorating condition of the parking lot in general provides adequate notice to preclude her claims." It is possible the court was using the word "claims" to mean arguments rather than the negligence claims as a whole. We review the cases cited by the trial court before it made this statement.

{¶30} The statement in *Strevel* on awareness of other holes in a parking lot, which was quoted by the trial court here, was merely a recitation of an observation made by the trial court in that case. *Strevel*, 4th Dist. No. 15CA5 at ¶ 17. The Fourth District then analyzed whether attendant circumstances created a genuine issue as to whether the hazard was open and obvious and the prior general knowledge of the lot was merely a consideration. *Id.* at ¶ 28.

{¶31} In the *Cooper* case, it appeared the plaintiff previously noticed the potholes at issue on her way into the store that day (as the court said she "discovered the potholes in the parking lot aisle as she made her way into the building"). *Cooper*, 10th Dist. No. 07AP-201 at ¶ 20. The Tenth District applied the premise that the defect is open and obvious when the plaintiff previously noticed it, and the court then reviewed her allegations of attendant circumstances. *Id.* The analysis of the plaintiff's attendant circumstances argument appeared to be presented as a required holding (not an alternative holding). And, the case is distinguishable from a case where a plaintiff has mere prior awareness of cracked areas randomly located around a large parking lot containing multiple stores where that plaintiff testified she did not notice cracks in the aisle as she walked from her car to the store.

{¶32} In *Cika-Heschmeyer*, this court concluded the width of a staircase, the new glossy paint on the stairs, and the lack of a handrail were open and obvious hazards (to people wearing wet shoes in a house). *See Cika-Heschmeyer*, 7th Dist. No. 18 MA 0048 at ¶ 16-18. We also pointed to the plaintiff's prior use of the stairs as an indication the first two conditions were open and obvious. We did not rely on the awareness of the general condition of a property to impute knowledge of specific defects.

{¶33} We explained that courts apply the open and obvious doctrine to situations "where the person had actual knowledge of the particular hazard or condition" as well as to situations where a person would be reasonably expected to discover the hazard. *Id.* at ¶ 14. *See also Sidle v. Humphrey*, 13 Ohio St.2d 45, 48, 233 N.E.2d 589 (1968) ("no

obligation to protect the invitee against dangers which are known to him, or which are so obvious and apparent to him that he may reasonably be expected to discover them"). Stated differently, a person with actual knowledge of a hazard would be reasonably expected to discover the hazard at the time.

{¶34} We also cited *Raflo* for the proposition that "the failure to avoid a known peril is not excused by the fact that one forgot about it or ignored it." *Cika-Heschmeyer*, 7th Dist. No. 18 MA 0048 at ¶ 14, citing *Raflo*, 34 Ohio St.2d at 3. *Raflo* discussed the "known peril" doctrine, and the Supreme Court concluded the invitee, who encountered a known defect when entering, could not say the defect became dangerous upon exiting as she traversed the defect at her own peril. *Raflo*, 34 Ohio St.2d at 4. *Raflo* was a contributory negligence case predating Ohio's adoption of comparative negligence. *See Mayhew v. Massey*, 7th Dist. No. 16 MA 0049, 2017-Ohio-1016, 86 N.E.3d 758, ¶ 56-60. *Raflo* did not involve knowledge of a general condition.

{¶35} The case law cited by the trial court would not support an alternative, independent holding that Appellant's claim was precluded merely because she was aware the parking lot was generally in need of repair or noticed deteriorated spots on the other side of the parking lot on prior visits. Whether or not she knew of the parking lot's general condition, Appellant's argument on attendant circumstances would still need to be addressed, which the trial court did in the next section of the judgment.

{¶36} Considering this law, we proceed to review the issues presented by Appellant. We set forth the arguments under the first two issues presented for review and then set forth our analysis on the application of the open and obvious doctrine to this case.

ISSUE 1: ATTENDANT CIRCUMSTANCES

{¶37} Appellant's first "issue presented" provides:

"THE COURT ERRED IN NOT FINDING THAT REASONABLE MINDS COULD DIFFER REGARDING WHETHER THE DANGER IS OPEN AND OBVIOUS BECAUSE OF THE ATTENDANT CIRCUMSTANCES, THEREFORE THE ISSUE MUST BE SUBMITTED TO A JURY DETERMINATION."

{¶38} Appellant states the attendant circumstances existing in this case allow reasonable minds to differ on whether the danger was open and obvious. Appellant specifies: "the stop sign is an attendant circumstance [which] creates a risk that is beyond

the control of the customer." Her brief says the stop sign was an obstruction placed "right in her face" which she had to lean beyond to look for oncoming traffic after looking past the pillar on the right and the pillar (or corner of the building) on her left. She claims the "ill-placed stop sign" created an urgent or imminent risk. She asks this court to consider "[t]he totality of the facts constituting the obstruction of viewing any open and obvious danger" and notes she was at an unfamiliar side of the building with "traffic coming from all directions" which was "evidenced by the need to post 4 separate stop signs."

{¶39} On the issue of traffic, Appellees point to Appellant's testimony admitting there was no traffic near her position and to her summary judgment opposition stating the attendant circumstances involved "negligently placed stop signs, not traffic itself." Appellees believe Appellant's brief untruthfully says traffic was coming from all directions. However, it appears the brief is referring to the potential for parking lot traffic to come from all directions, rather than to existing vehicles traveling at the moment of her crossing.

{¶40} As to Appellant's claim of unfamiliarity with the west side parking lot, Appellees point out she knew the entire parking lot was in need of repair and had deteriorating asphalt and potholes. Regarding the stop signs, they note: Appellant knew the stop signs were there to protect pedestrians; she admitted the stop sign in question did not block her view of the cracked area where she fell; and the sign's partial obstruction of her view of traffic from the left did not even cause Appellant to stop walking before stepping out. Before proceeding with the analysis, we review Appellant's next contention.

ISSUE 2: TIME TO PERCEIVE DANGER

{¶41} The second "issue presented" by Appellant contends:

"THE COURT ERRED IN NOT CONSIDERING IF THE PLAINTIFF HAD A SUFFICIENT AMOUNT OF TIME TO PERCEIVE THE DANGER BEFORE IT WAS ENCOUNTERED IN ORDER TO BE ABLE TO AVOID IT."

{¶42} Appellant reiterates her statements about looking for traffic and looking past the stop sign to the left. She suggests she immediately fell upon clearing the stop sign. However, she testified to taking two or three strides after noticing it was safe to cross before she fell, and she specifically pointed out that she did not take small steps. (Tr. 122). And, the photographs show the cracked asphalt was not immediately after the stop sign.

{¶43} Appellant also relies on a sentence in her deposition where she opined the cracked asphalt, although visible from the store exit, would not have looked dangerous "until you're on top of it." (Tr. 128). She believes this shows she did not have time to avoid the danger. However, she did not rely on this statement below.

{¶44} When Appellees' summary judgment motion quoted from Appellant's deposition at page 127 and 129 to show she admitted she would have seen the cracked asphalt if she had looked down at the parking lot, Appellant's memorandum in opposition did not respond by citing the trial court to page 128 or mentioning the words contained thereon. A trial court need not scour the depositions submitted by the movant (whose motion quotes from specific pages) in order to help a non-movant avoid summary judgment. *See, e.g., Krlich v. Clemente*, 2017-Ohio-7945, 98 N.E.3d 752, ¶ 17 (11th Dist.) ("A trial court is not required to act as an advocate and scour the record for evidence to defeat a pending motion."). *See also* Civ.R. 56(E) (adverse party's response to summary judgment motion must set forth specific facts showing that there is a genuine issue for trial). Rather, the trial court can rely on the pages cited by the movant and those cited in the non-movant's response as pages containing the information pertinent to a particular issue.

{¶45} Moreover, the photographs showed the hazard was visible from the patio (and from the parking lot), and Appellant said the photographs accurately depicted the area with the visible cracked asphalt in the same manner as if they were live at the scene. Appellees cited the trial court to her testimony that she would have seen the cracked area visible in the photographs if she had looked down.

{¶46} Appellant claims the portion of the deposition testimony relied upon by Appellees to show the cracked asphalt was open and obvious was prompted by unclear questions from defense counsel. At pages 8 and 18 of her brief, she claims she answered, "it would be different," when asked, "the photographs wouldn't really be any different than what we would expect to see if we were there in person, correct?" (Tr. 127-128). However, as quoted by Appellees, the transcript shows she answered, "No, it would *not* be different." (Emphasis added.) (Tr. 128). This question and this answer were not unclear.

{¶47} Notably, this question was posed after defense counsel asked her about the photographs she submitted in discovery. He had her circle the area which caused her

fall and asked, “Fair to say that if we were live at the time of the accident we would also be able to see it in person?” to which she responded, “You would be able to see it live in person, yes, if you were there live.” She also agreed that nothing was hiding the cracked area of asphalt. (Tr. 127). She was thereafter asked, “And had you looked down as you were walking out, you also would have been able to see it yourself personally?” She answered, “If I had looked down, yes.” (Tr. 129).

{¶48} Appellant concludes the trial court failed to recognize that a person need not look down at all times and failed to consider whether she had sufficient time to perceive the danger before encountering it. Appellant’s affidavit attached to the summary judgment opposition said: “Because I had to get past the stop sign, I had no time to observe what later appeared to be a crack in the parking lot.”

{¶49} In addition to the lack of explanation for the alleged urgency, Appellees suggest the argument conflicted with Appellant’s deposition testimony where she said she did not even have to stop to ascertain whether there was approaching traffic. Appellees also complain the memorandum in opposition to summary judgment failed to specifically mention this time theory (just as it did not mention deposition testimony opining the visible crack would not have looked dangerous from afar). Appellees alternatively point out, the contention on time would be part of the analysis as to whether the risk was open and obvious considering the attendant circumstances.

ANALYSIS ON OPEN AND OBVIOUS DOCTRINE

{¶50} Appellant claims she did not see the offending spot of cracked asphalt until after she fell (after exiting). However, knowledge of the danger is merely one aspect of the duty-eliminating doctrine; the fact that the plaintiff claims the specific danger went unnoticed by her does not preclude the application of the open and obvious doctrine. A shopkeeper has no duty to protect a business invitee from dangers which are (1) “known to such invitee” or (2) “are so obvious and apparent to such invitee that he may reasonably be expected to discover them and protect himself against them.” *Paschal v. Rite Aid Pharmacy Inc.*, 18 Ohio St.3d 203, 203-204, 480 N.E.2d 474, 475 (1985), quoting *Sidle v. Humphrey*, 13 Ohio St.2d 45, 233 N.E.2d 589 (1968), paragraph one of the syllabus.

{¶51} The fact that a particular plaintiff did not see the danger does not mean it was not open and obvious as the court can employ an objective standard of observability and ask whether the hazard was open and obvious to a reasonable person. *Cornell v.*

Mississippi Lime Co., 2017-Ohio-7160, 95 N.E.3d 923, ¶ 68 (7th Dist.). Notably, the objective part of the doctrine asks whether it was obvious and apparent "to such invitee" which would involve consideration of the circumstances regarding that particular plaintiff. *Paschal*, 18 Ohio St.3d at 203.

{¶52} Appellant states the law does not require a person to be constantly looking downward for dangers under all circumstances even when she has prior knowledge of a hazard, citing a case where the court found a jury question as to whether the danger on the public sidewalk should have been noticed by a plaintiff who was facing circumstances of weather and road traffic. *Grossnickle v. Village of Germantown*, 3 Ohio St.2d 96, 209 N.E.2d 442 (1965), paragraph two of the syllabus (a contributory negligence case). "A shopkeeper is not, however, an insurer of the customer's safety." *Paschal*, 18 Ohio St.3d at 203. An invitee is expected to be aware of her surroundings and watch where she is planning to walk in order to avoid open and obvious dangers. *See Armstrong*, 99 Ohio St.3d 79 at ¶ 16. *See also Backus v. Giant Eagle Inc.*, 115 Ohio App.3d 155, 158, 684 N.E.2d 1273 (7th Dist.1996) ("There is a paramount duty upon a pedestrian to look where he may be walking.").

{¶53} In *Armstrong*, the Supreme Court found a guardrail presented an open and obvious danger upon reciting: the plaintiff admitted at deposition "that when he entered the store, nothing was obstructing his view prior to his fall and that, had he been looking down, he would have seen the guardrail"; he visited the store two or three times before the injury; he chose to be distracted by the advertising; and the photographs supplied by both parties showed the rail in question was visible to all persons entering and exiting the store. *Armstrong*, 99 Ohio St.3d 79 at ¶ 16.

{¶54} Appellant lived one-half of a mile from the store and shopped at the store on a weekly basis for years. She regularly used the same automatic doorway to enter and exit the store. An invitee exits this doorway onto a corner patio while facing the west side of the parking lot (and the stop sign and cracked area at issue). The covered patio had an "exit" to the north and an "exit" to the west. The precise experiences Appellant claimed were unfamiliar to her were parking in the west side lot and traversing the path between the parking lot and the corner patio outside of the west-facing store entrance.

{¶55} On her way into the store on the day of her fall, she used the same general path to enter the store; although, she said she walked more toward the middle of the

opening into the patio. It was a clear, dry day. Appellant had just walked past the cracked area to enter the store. In addition, she knew for months that the parking lot was in need of repair and previously observed other deteriorated areas. She had no shopping cart, and she was not carrying any purchases; she was there to use Western Union and was only carrying her purse.

{¶56} Appellant admitted the particular hazard of cracked asphalt was not hidden by any object including the stop sign to her left. The cracked asphalt was directly in the line of sight between the store exit and Appellant's vehicle which was parked nearby and within view from the exit. The motion for summary judgment demonstrated to the trial court that Appellant admitted she would have seen the cracked asphalt if she would have looked at the pavement. (Tr. 127, 129). At deposition, she agreed the photographs depicted what one would have seen live that day: the cracked area is clearly visible from the parking lot and from the store exit. The danger was noticeable upon ordinary inspection.

{¶57} In contending the attendant circumstances raised a genuine issue of material fact as to whether the danger was open and obvious, Appellant says she did not look at the pavement between the patio and her vehicle because she was busy looking to the sides for traffic by looking around a pillar to the right and a brick building and stop sign to the left. The risk of encountering traffic in the store parking lot while crossing a lane between the store and the parking lot was anticipated, customary, and usual. Moreover, the traffic at the time was described as normal by Appellant at deposition, and no cars were near her position. She was not even required to stop in order to ascertain whether it was safe to cross.

{¶58} Encountering a stop sign where vehicular traffic would approach a pedestrian egress and crossing is not unusual, unexpected, or surprising. She spoke of similar stop signs in the front of the store where she regularly parked and crossed. Before falling, Appellant walked past the back of the stop sign on her left, which faced the lane in which traffic from the side lot could be approaching from her left. She complains the stop sign was "right in her face." However, the closeness to the stop sign to her body was not beyond her control. There is no indication she was required to exit on the far *left* side of the patio so close to the building and the stop sign. Moreover, the photographs show the existence of viewing space between the stop sign and the side of the building.

{¶59} Additionally, the cracked area was two to three strides past the stop sign, strides described by Appellant as not small. Appellant did not look at the pavement as she exited the store, upon approaching the stop sign, or after clearing the stop sign. After quickly assuring herself there was no traffic, she looked at her nearby, front-row-parked car without scanning the pavement directly in the line of sight to the car. She claims that, because of the stop sign obstructing her view of the traffic lane to her left, she had no time to look down and notice the dangerous quality of the cracked area. However, this allegation of minimized time to scan the pavement was not beyond her control. She testified that she slowed *but was not required to stop* before entering the traffic lane and there was no traffic near her position. Her allegation of insufficient time to view the hazard is unsupported by her testimony.

{¶60} The alleged attendant circumstances relied upon by Appellant were usual and ordinary circumstances which did not decrease the attention a reasonable person would be expected to give to the situation and did not act to defeat the application of the open and obvious doctrine. For the reasons expressed, the first two issues presented for review are overruled.

BREACH OF DUTY

{¶61} Appellant's third and final "issue presented" contends:

"THE COURT ERRED IN NOT DETERMINING WHETHER THE DEFENDANTS BREACHED ITS DUTY OF CARE TO MAINTAIN THE PREMISES IN A REASONABLY SAFE CONDITION."

{¶62} Appellant points out a premises owner or occupier owes a duty of ordinary care to protect a business invitee. *See Light v. Ohio Univ.*, 28 Ohio St.3d 66, 68, 502 N.E.2d 611 (1986). "However, this duty does not require landowners to insure the safety of invitees on their property." *Lang v. Holly Hill Motel Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, 909 N.E.2d 120, ¶ 11. As set forth above, "the open-and-obvious doctrine obviates the duty to warn and acts as a complete bar to any negligence claims." *Armstrong v. Best Buy Co.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 5.

{¶63} "Any issue in the negligence action regarding the duty a premises owner owes to a business invitee is not relevant in this appeal and would only become relevant if we were to rule in Appellant's favor" on the open and obvious doctrine, at which point it would become relevant on remand. *Miller*, 7th Dist. No. 20 MA 0037 at ¶ 23. In other

words, if a reviewing court were to conclude the trial court erred in applying the open and obvious doctrine, then the case would be remanded for further proceedings on whether there was a breach of the duty of ordinary care.

{¶64} But, if the trial court properly applied the open and obvious doctrine, then there was no need to reach the issue of whether there was a breach of duty by a premises owner. *Id.* at ¶ 23, 76 ("questions on whether the school breached the duty of ordinary care and conflicting expert opinions on that topic are irrelevant if the school's duty was eliminated"). In fact, Appellees' motion for summary judgment did not alternatively claim there was no breach of duty. (And, there was no opposing motion for summary judgment arguing, for instance, that there was a breach of duty as a matter of law.)

{¶65} In sum, there was no error in failing to determine whether a duty was breached when ruling on a defense motion for summary judgment on the duty and the open and obvious doctrine, and as we are affirming the trial court's judgment applying the open and obvious doctrine to eliminate the duty, the issue of breach of duty never arises.

{¶66} For the foregoing reasons, the trial court's judgment is affirmed.

Waite, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the issues presented are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.