

[Cite as *Ellington v. JCTH Holdings, Inc.*, 2015-Ohio-840.]
DONOFRIO, J.

{¶1} Plaintiff-appellant Shirley A. Ellington appeals a decision of the Mahoning County Common Pleas Court awarding summary judgment in favor of defendant-appellee JCTH Holdings Inc. on her claim of negligence.

{¶2} JCTH owns and operates a nursing home in North Lima, Ohio called Caprice Health Care Center where Ellington's husband was a resident. Seventy-three-year-old Ellington went to the facility along with her thirteen-year-old granddaughter on July 6, 2010, to visit him. As she was walking and talking with her granddaughter on their way into the facility, she tripped on a hole in the parking lot, injuring her foot.

{¶3} Ellington filed a complaint for negligence against JCTH on July 3, 2012. The matter proceeded to discovery, including Ellington's deposition.

{¶4} JCTH filed a motion for summary judgment arguing that the hole was an open and obvious danger. Ellington filed a response and JCTH followed with a reply. Following an unsuccessful attempt at mediation, a magistrate took JCTH's summary judgment under consideration and on April 8, 2014, granted the motion. The magistrate found that the hole in the parking lot was a danger that "was open and obvious to Mrs. Ellington." In addition, the magistrate relied primarily on two decisions from this court in concluding that Ellington had a duty to watch where she was walking, citing *Gray v. Totterdale Bros. Supply Co.*, 7th Dist. No. 07 BE 11, 2007-Ohio-4992, and *Dominic v. Glassman*, 7th Dist. No. 08-MA-66, 2008-Ohio-5936.

{¶5} *Gray* involved a plaintiff who tripped and fell on a water cover embedded in a sidewalk, breaking her ankle. Based on the plaintiff's testimony demonstrating that she could have easily avoided the danger if she had merely been watching where she was walking and that nothing prevented her from discovering the danger in time to avoid it, this court concluded that the water cover was an open and obvious danger. *Gray* at ¶ 22.

{¶6} In *Dominic*, the plaintiff tripped on an eyebolt protruding from the defendant's sidewalk and became injured. Upon observing photographs of the

eyebolt and noting the lack of testimony that pedestrian traffic in the area had significantly enhanced the danger, this court concluded that the eyebolt was an open and obvious danger. *Dominic* at ¶¶ 18-19. Again, this court noted a pedestrian's own duty to watch where they are walking. *Id.* at ¶ 20.

{¶7} Ellington filed objections to the magistrate's decision and JCTH filed a brief in opposition to those objections. On May 12, 2014, the trial court overruled Ellington's objections and affirmed the magistrate's decision. This appeal followed.

{¶8} Ellington's sole assignment of error states:

The Trial Court erred when it overruled the Objections to the Magistrate's Decision and adopting the decision of the magistrate when questions of material fact existed as to whether Appellant's fall was caused by an open and obvious hazard, as Appellee failed to show that summary judgment was proper pursuant to Civ. R. 56.

{¶9} An appellate court reviews a trial court's summary judgment decision anew, applying the same standard used by the trial court. *Ohio Govt. Risk Mgt. Plan v. Harrison*, 115 Ohio St.3d 241, 2007-Ohio-4948, 874 N.E.2d 1155, ¶ 5. A motion for summary judgment is properly granted if the court, upon viewing the evidence in a light most favorable to the nonmoving party, determines that: (1) there are no genuine issues as to any material facts; (2) the movant is entitled to judgment as a matter of law; and (3) the evidence is such that reasonable minds can come to but one conclusion and that conclusion is adverse to the opposing party. Civ.R. 56(C); *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 10.

{¶10} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). The trial court's decision must be based upon "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and

written stipulations of fact, if any, timely filed in the action.” Civ.R. 56(C). The nonmoving party has the reciprocal burden of specificity and cannot rest on the mere allegations or denials in the pleadings. *Id.* at 293.

{¶11} Summary judgment is appropriate when there is no genuine issue as to any material fact. A “material fact” depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.*, 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202. (1986)

{¶12} Here, the claim being litigated is negligence. A negligence claim requires the plaintiff to prove: (1) duty; (2) breach of duty; (3) causation; and (4) damages. *Anderson v. St. Francis-St. George Hosp., Inc.*, 77 Ohio St.3d 82, 84, 671 N.E.2d 225 (1996). The issue on appeal in this case concerns the first element of negligence – duty. More specifically, this is a premises liability case which hinges on a determination of whether a genuine issue of material fact exists as to whether the hole in JCTH’s parking lot was an open and obvious danger.

{¶13} “Where a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises.” *Armstrong v. Best Buy Co. Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, syllabus. That is because the owner may reasonably expect those entering the property to discover the dangers and take appropriate measures to protect themselves. *Simmers v. Bentley Constr. Co.*, 64 Ohio St.2d 642, 644, 597 N.E.2d 504 (1992).

{¶14} Whether a particular danger is open and obvious requires an objective evaluation without regard to the injured plaintiff. *Hissong v. Miller*, 186 Ohio App.3d 345, 2010-Ohio-961, 927 N.E.2d 1161, ¶10 (2d Dist.). As such, the open-and-obvious test “properly considers the nature of the dangerous condition itself, as opposed to the nature of the plaintiff’s conduct in encountering it.” *Id.*, quoting *Armstrong v. Best Buy Co.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 13.

{¶15} Attendant circumstances is another consideration that sometimes

arises in premises liability cases secondary to the determination of whether a hazard was open and obvious. Attendant circumstances may exist that distract a person from exercising the degree of care an ordinary person would have exercised to avoid the danger and can create a genuine issue of material fact as to whether a particular hazard is open and obvious. *Carpenter v. Mt. Vernon Gateway, Ltd.*, 5th Dist. No. 13CA6, 2014-Ohio-465, ¶ 23, quoting *Aycock v. Sandy Valley Church of God*, 5th Dist. No. 2006AP090054, 2008-Ohio-105. Thus, “the open and obvious rule does not apply if attendant circumstances prevent the invitee from discovering the otherwise open and obvious danger.” *Boston v. A&B Sales, Inc.*, 7th Dist. No. 11 BE 2, 2011-Ohio-6427, ¶ 29, citing *Zuzan v. Shutrump*, 155 Ohio App.3d 589, 802 N.E.2d 683, 2003-Ohio-7285, ¶ 15 (7th Dist.). Attendant circumstances are distractions that would come to the attention of a person in the same circumstances and reduce the degree of care an ordinary person would exercise at the time. *Id.*, citing *Godwin v. Erb*, 167 Ohio App.3d 645, 856 N.E.2d 321, 2006-Ohio-3638, ¶ 36 (5th Dist.).

{¶16} Here, Ellington argues that the magistrate’s reliance on this court’s decision in *Gray v. Totterdale Bros. Supply Co.*, 7th Dist. No. 07 BE 11, 2007-Ohio-4992, was misplaced for two reasons. First, Ellington argues that a different duty was owed to her by JCTH, pointing out that the plaintiff in *Gray* was a licensee whereas she was a business invitee of JCTH’s facility. Second, Ellington argues that there have been two cases decided in the other appellate districts which are more analogous to her case than *Gray*.

{¶17} Concerning Ellington’s first argument, this court has observed, in separate cases, that where a danger is open and obvious a landowner owes no duty of care to individuals lawfully on the premises. Therefore, as JCTH correctly notes, for purposes of application of the open and obvious danger doctrine, it is irrelevant whether the plaintiff was a licensee or business invitee. This court applied the doctrine to a licensee in *Gray* and subsequently applied the doctrine to a business invitee in *Dominic v. Glassman*, 7th Dist. No. 08-MA-66, 2008-Ohio-5936.

{¶18} Turning to Ellington’s second argument concerning the magistrate’s

improper reliance on *Gray*, she cites to *Sabella v. E. Ohio Gas Co.*, 11th Dist. No. 2011-T-0085, 2012-Ohio-5120, and *Jacobsen v. Coon Restoration & Sealants, Inc.*, 5th Dist. No. 2011-CA-00001, 2011-Ohio-3563. In *Sabella*, the plaintiff stepped into an uncapped hole in a sidewalk and was injured. The hole, a utility access outlet that had been left uncapped, was approximately six inches in diameter. The hole was level with but contrasted to the clean, newly-paved sidewalk surrounding it. The Eleventh District concluded that a genuine issue of material fact existed as to whether a reasonable person in the plaintiff's position would have been alerted to the condition and that the defendant had failed to submit sufficient evidentiary material to shift the burden to the plaintiff.

{¶19} JCTH argues that *Sabella* is distinguishable from the present case because Ellington in her deposition testimony stated that the hole she tripped on was a decent size and was visible. Contrary to *Sabella*, JCTH points out that here Ellington has not alleged that anything obstructed her view of the hole or that the parking lot was busy.

{¶20} In *Jacobsen*, the plaintiff was returning to her car in a parking lot after picking up a pizza. She tripped over a broken metal sign post protruding from a small area of dead, dry grass in the parking lot. The trial court granted summary judgment in favor of the landowner, concluding that the sign post was an open and obvious danger. It reasoned that although the metal stump was located in dead grass, the grass did not conceal it and the stump sticking out of the ground was a different color than the surrounding area. The court also found no attendant circumstances created by the plaintiff carrying a pizza box in front of her, reasoning that was within the plaintiff's control. The court also noted that the plaintiff noticed the grass after she had fallen.

{¶21} On appeal, the Fifth District reversed, emphasizing that the plaintiff's actions of parking farther away from the pizza shop door than necessary and carrying the pizza box in front of her were irrelevant to whether the hazard was open and obvious and instead were issues for comparative negligence. The court also found

that what the plaintiff was able to observe afterwards in photographs taken of the hazard and surrounding area was not necessarily determinative of whether the danger was open and obvious.

{¶22} The Fifth District noted two important factors in determining whether a hazard is open and obvious, citing this court's decision in *Kraft v. Dolgencorp Inc.*, 7th Dist. No. 06-MA-69, 2007-Ohio-4997. The first is whether the plaintiff had a sufficient advance opportunity to perceive the hazard before encountering it. *Jacobsen* at ¶ 26; see also *Kraft* at ¶ 30. The second is whether a reasonable person would have some expectation of encountering such a hazard. *Jacobsen* at ¶ 26; see also *Kraft* at ¶ 35. The Fifth District concluded that reasonable minds could differ regarding whether the metal stump in the parking lot was open and obvious, and whether a reasonable person under the prevailing attendant circumstances would have expected and discovered the danger, and taken precautions to avoid it.

{¶23} JCTH also contrasts *Jacobsen* with the present case. JCTH argues that there were not attendant circumstances here like there was with the plaintiff carrying the pizza box in front of her in *Jacobsen*. Additionally, because Ellington had visited her husband at this facility two to three times per week for several years, JCTH contends that Ellington should have been aware of the existence of the hole. JCTH states, "presumably the hole did not develop on the day of her injury." (JCTH's appellate brief, p. 14.)

{¶24} In this case, there remains a genuine issue of material fact as to whether the hole in the parking lot was an open and obvious danger. Preliminarily, we note that the trial court found that the hole in the parking lot was a danger that "was open and obvious to Mrs. Ellington." This statement alone suggests that the trial court did not undertake an objective evaluation of whether the hole was an open and obvious danger without regard to Ellington. *Hissong v. Miller*, 186 Ohio App.3d 345, 2010-Ohio-961, 927 N.E.2d 1161, ¶10 (2d Dist.). In other words, it suggests that the trial court first undertook to consider the nature of Ellington's conduct in encountering the hole rather than the nature of the dangerous condition itself. *Armstrong v. Best*

Buy Co., 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 13.

{¶25} Turning to the very limited evidence that JCTH offered in support of its summary judgment motion, the trial court focused on only two aspects in deciding that the hole was an open and obvious danger. First, the court cited to Ellington giving deposition testimony that the hole was “a pretty decent sized hole.” (Ellington Depo. at 21.) Second, the court cited to Ellington’s deposition testimony where she agreed that had she been looking down she would have seen the hole and avoided it. (Ellington Depo. at 21.)

{¶26} The trial court’s conclusion that the size of the hole was large enough for it to constitute an open and obvious danger is not supported by the record. In her deposition testimony, Ellington first described the hole as a “little hole.” (Ellington Depo. at 12.) It was only upon questioning by JCTH’s defense counsel that Ellington agreed with his statement that the hole was “pretty decent sized.” (Ellington Depo. at 21.) Thus, Ellington’s own conflicting deposition testimony suggests that there remains a genuine issue of material fact concerning the size of the hole. Furthermore, in this regard, JCTH offered no other evidence to clarify the issue of the size of the hole. It presented no evidence relative to the dimensions of the hole such as its width, height, or depth.

{¶27} JCTH did present what appear to be two photocopies of photographs of the hole, neither of which provide anything close to a clear depiction of the hole and the surrounding area. Contrast this with *Dominic v. Glassman*, 7th Dist. No. 08-MA-66, 2008-Ohio-5936, ¶ 18, where the defense counsel for the landowner presented actual photographs in support of its summary judgment motion which upon review made it plainly obvious to this court that the hazard was visible to all those who may have encountered it. See also *Riley v. Alston*, 7th Dist. No. 12 MA 42, 2013-Ohio-5769, ¶ 34 (where photographs were provided clearly depicting that the gap between the top of the top step and the floorboards of a porch was open and obvious to anyone walking up the steps). Contrast this also with *Gray v. Totterdale Bros. Supply Co.*, 7th Dist. No. 07 BE 11, 2007-Ohio-4992, where the focus of the case was not

the shape and size of the hazard itself (i.e., a water cover embedded in a sidewalk), but rather whether the plaintiff-pedestrian had the opportunity to perceive and avoid the danger.

{¶28} Further, while JCTH opines that “presumably” the hole did not develop on the day of Ellington’s injury, JCTH presented absolutely no evidence in support of this presumption in its summary judgment motion below. There is no evidence in the record to indicate when the hole may have developed. As for JCTH’s contention that Ellington should have been aware of the existence of the hole because she had visited her husband at this facility two to three times per week for several years, in addition to offering no evidence in support of when the hole may have developed, it offered no evidence indicating whether Ellington had ever traversed this particular part of the parking lot where the hole was located.

{¶29} Even construing Ellington’s belated agreement with defense counsel’s opinion that the hole was “pretty decent sized” as *some* evidence indicating that the hole may have been an open and obvious danger, it is not necessarily *determinative* of whether the hole was open and obvious. *Jacobsen* at ¶ 21. The size of the hole is only one factor in assessing whether it is open and obvious. For example, in attempting to meet its summary judgment burden in this case, JCTH did not provide evidence concerning how the hole contrasted to the surrounding pavement. *Sabella, supra*.

{¶30} Having determined that there exists a genuine issue of material fact regarding the size of the hole Ellington tripped in, the next inquiry concerns the trial court’s reliance on Ellington’s deposition testimony where she agreed that had she been looking down she would have seen the hole and avoided it. Numerous decisions, including some from this court, have acknowledged the duty of a pedestrian to watch where they are walking. *See e.g. Dominic v. Glassman*, 7th Dist. No. 08-MA-66, 2008-Ohio-5936, ¶ 20 (“Pedestrians are expected to take proper precautionary measures while walking.”); *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.”).

{¶31} But those cases also involved other factors tending to show that the danger was an open and obvious one. Additionally, it is important to note that the Ohio Supreme Court has observed that a pedestrian’s duty of care does not require that they look constantly downwards. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 680-681, 693 N.E.2d 271 (1998). The focus of the inquiry is whether a pedestrian exercising ordinary care under the circumstances would have seen and been able to guard him or herself against the condition. *Hissong v. Miller*, 186 Ohio App.3d 345, 2010-Ohio-961, 927 N.E.2d 1161, ¶ 12 (2d Dist.). A plaintiff’s failure to look where he is walking is not alone necessarily dispositive of whether a danger is open and obvious. *Id.* See also *Gingrich v. D’Ambrozio*, 11th Dist. No. 2008-T-0103, 2009-Ohio-2956, ¶ 27 (“A plaintiff’s failure to look down does not remove a danger from the realm of an open and obvious hazard”).

{¶32} JCTH attempts to distinguish the Ohio Supreme Court’s decision in *Texler* since it discussed a pedestrian’s duty of care in the context of causation and comparative negligence and not in the context of the open and obvious doctrine and the duty element of negligence. In support, JCTH cites *Ward v. Wal-Mart Stores Inc.*, 11th Dist. No. 2000-L-171, 2002 WL 5315 (Dec. 28, 2011). In *Ward*, the Eleventh District observed only that *Texler* did not modify the open and obvious doctrine:

In *Texler*, the Supreme Court of Ohio addressed only the third of the three elements required to establish actionable negligence, proximate cause. The court framed the issue as whether the “appellant had a duty to take due care in observing hazards in her path * * * that exceeded [the] appellee’s duty to keep dangerous obstructions out of the way of pedestrians.” The court assumed the existence of a duty on the part of the appellee, and that appellee had breached that duty. It then examined the issue of proximate cause in terms of comparative negligence. Nowhere in its opinion did the court mention the “open or

obvious” doctrine, much less explicitly reject it. *Texler* in no way limits the “open and obvious” doctrine into a determination of whether the defendant owes a duty to the plaintiff to protect him from a defect in the defendant’s premises.

{¶33} The plaintiff in *Ward* had tripped in a pothole in the parking lot and was injured. The Eleventh District concluded that the hole was an open and obvious hazard, reasoning:

In the instant case, appellant admitted her familiarity with the parking lot. The weather was sunny. Nothing impeded her view of the pothole. Appellant stated it was in the open and large. Appellant’s alleged distraction by other people and cars merely describes normal conditions found in most parking lots. Appellant never stated traffic was unusually heavy or close by at the time of the incident. Appellant admitted the hole was large, obvious, and that nothing impeded her view of the defect. In this instance, based upon the facts admitted below, appellant’s claim is precluded by the open and obvious doctrine. The trial court did not err by granting summary judgment in favor of Wal-Mart.

{¶34} While the *Ward* decision lends support to JCTH’s argument here that the hole in its parking lot was an open and obvious danger, it should not be given the weight that JCTH’s urges. First, another appellate district’s decision is persuasive authority only and is not binding upon this appellate district. See *Boatwright v. Penn-Ohio Logistics*, 7th Dist. No. 10 MA 80, 2011-Ohio-1006, ¶ 31. Also, whether a particular danger is open and obvious is very fact specific and, therefore, comparing the facts of this case to other cases is of limited value. *Kidder v. Kroger*, 2d Dist. No. 20405, 2004-Ohio-4261, ¶ 11. Second, the defendant in *Ward* offered only the plaintiff’s deposition testimony in support of its summary judgment motion argument

that the hole was an open and obvious hazard. There was no reference to any type of independent verification and description of the hole such as photographs or evidence concerning the dimensions of the hole. Third, this court has cited *Texler* approvingly and acknowledged that a pedestrian does not have a duty to look constantly downward in the context of applying the open and obvious doctrine in *Ohlin v. Sears, Roebuck & Co.*, 7th Dist. No. 99 CA 13, 2000 WL 816891, at *4 (June 13, 2000), and *Schuley v. Consol. Stores Corp.*, 7th Dist. No. 98 CA 138, 2000 WL 310547, at *3 (Mar. 24, 2000).

{¶35} Although JCTH failed in its summary judgment burden to establish that the hole was an open and obvious hazard, we will briefly address Ellington's contention on appeal that there were attendant circumstances surrounding her fall that create an issue of fact as to whether the hole was open and obvious. Ellington contends that the conversation she was having with her granddaughter diverted her attention from the parking lot thereby enhancing the danger of the hole. However, this court has recognized that an attendant circumstance is a circumstance which contributes to the fall and is 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). Here, reasonable minds could only conclude that Ellington's conversation with her granddaughter as they traversed the parking lot was something that was clearly within her control. Thus, there were no attendant circumstances which enhanced or hid the danger of the hole.

{¶36} In sum, the trial court erred in awarding summary judgment in favor of JCTH. As the movant, it was JCTH's burden to establish that the hole was an open and obvious danger. Looking only at Ellington's own deposition testimony, it cannot be said that reasonable minds would only conclude that the hole was an open and obvious danger. Her testimony provided little to no evidence on the actual size of the hole and her testimony concerning her impression of the hole was, at best, conflicted. While actual photographs of the hole in question might have shed some light on this question, the copies of the photographs of the hole are of such a poor quality that

they are of no evidentiary value.

{¶37} Accordingly, Ellington's sole assignment of error has merit.

{¶38} The judgment of the trial court is reversed and the matter remanded for further proceedings.

Waite, J., concurs.

DeGenaro, J., concurs