

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

PATRICIA SCHWEITZER,	:	APPEAL NO. C-150267
Plaintiff-Appellant,	:	TRIAL NO. A-1401228
vs.	:	<i>JUDGMENT ENTRY.</i>
T NORTHGATE MALL, LLC, d.b.a. NORTHGATE MALL,	:	
Defendant-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.*

In two assignments of error, plaintiff-appellant Patricia Schweitzer appeals from the trial court's entry of summary judgment in favor of defendant-appellee T Northgate Mall, LLC, d.b.a. Northgate Mall ("Northgate Mall"). We affirm.

Schweitzer fell and was injured while leaving a store at Northgate Mall when one of the heels of her high-heeled shoes allegedly became lodged in a hole in the pavement on steps outside of the store. She subsequently sued for damages arising from her fall, claiming that Northgate Mall had been negligent by failing to maintain its premises in a reasonably safe condition. Northgate Mall moved for and was granted summary judgment. This appeal followed.

We review the granting of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) the evidence, when viewed in favor of the nonmoving party, permits only one reasonable conclusion and that conclusion

OHIO FIRST DISTRICT COURT OF APPEALS

is adverse to the nonmoving party. Civ.R. 56(C); *Grafton; State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 639 N.E.2d 1189 (1994).

In her first assignment of error, Schweitzer asserts that the trial court erred when it determined that the hole that caused Schweitzer to trip was open and obvious.

Because Schweitzer was a business invitee, Northgate Mall owed her a duty to exercise ordinary care in maintaining its premises in a reasonably safe condition. *See Paschal v. Rite Aid Pharmacy, Inc.*, 18 Ohio St.3d 203, 480 N.E.2d 474 (1985). But a business owner is not an insurer of an invitee's safety. *Id.* "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.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, syllabus. "The rationale underlying this doctrine is 'that the open and obvious nature of the hazard itself serves as a warning. 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.* at ¶ 5, quoting *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644, 597 N.E.2d 504 (1992). "A danger is open and obvious if it is not 'hidden, concealed from view, or undiscoverable upon ordinary inspection.' " *Easterman v. Speedway, LLC*, 1st Dist. Hamilton No. C-140287, 2015-Ohio-659, ¶ 7, quoting *Thompson v. Ohio State Univ. Physicians, Inc.*, 10th Dist. Franklin No. 10AP-612, 2011-Ohio-2270, ¶ 12.

We agree with the trial court that the hole that allegedly caused Schweitzer's fall was open and obvious. There were numerous holes in the vicinity of Schweitzer's fall. Each was approximately the size of a penny. The holes were of a contrasting color to the pavement. Photographs taken at the scene depict holes that, while small, were readily apparent. They were not hidden or concealed from view, nor were they so small as to be undiscoverable upon ordinary inspection. Consequently, Northgate

OHIO FIRST DISTRICT COURT OF APPEALS

Mall could reasonably expect Schweitzer to have discovered the holes and to have taken appropriate measures to protect herself while walking in this area.

Schweitzer next contends that, even if the holes were open and obvious, the “attendant circumstances” surrounding her fall create a genuine issue of material fact concerning whether Northgate Mall had breached its duty of care to her.

“Attendant circumstances” can create an exception to the open and obvious doctrine. *See Martin v. Christ Hosp.*, 1st Dist. Hamilton No. C-060639, 2007-Ohio-2795, ¶ 19. Here, Schweitzer claims that, because she was carrying packages of items that she had purchased at stores in Northgate Mall, she could not be expected to notice the holes in the ground. But “attendant circumstances do not include a person’s activity at the time of a fall unless the person’s attention was diverted by ‘an unusual circumstance of the property owner’s own making.’ ” *Easterman*, 1st Dist. Hamilton No. C-140287, 2015-Ohio-659, at ¶ 11, quoting *McConnell v. Margello*, 10th Dist. Franklin No. 06AP-1235, 2007-Ohio-4860, ¶ 10. The exception does not apply where, as here, the circumstances were created by the injured invitee.

Finally, Schweitzer argues that the opinions submitted in an affidavit from engineer Joseph Kowalski create a genuine issue of material fact. Kowalski essentially opined that the standards for construction and maintenance required the holes in the steps to be filled in. However, his opinion does not address the open and obvious nature of the holes, and therefore does not create an issue of fact concerning Northgate Mall’s duty to Schweitzer in this case.

Schweitzer’s first assignment of error is overruled.

In her second assignment of error, Schweitzer claims that the trial court erred when it determined that the hole was trivial in nature and therefore was not unreasonably dangerous as a matter of law. Resolution of Schweitzer’s first assignment of error renders this one moot, and we decline to address it. *See App.R. 12(C)(1)(a).*

OHIO FIRST DISTRICT COURT OF APPEALS

The trial court's judgment is affirmed.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

DEWINE, P.J., MOCK and STAUTBERG, JJ.

To the clerk:

Enter upon the journal of the court on March 2, 2016
per order of the court _____.

Presiding Judge