[Cite as *Forste v. Oakview Constr., Inc.*, 2009-Ohio-5516.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

NANCY FORSTE, et al.,	:	
Plaintiffs-Appellants,	:	CASE NO. CA2009-05-054
	:	O P I N I O N
- vs -		10/19/2009
	:	
OAKVIEW CONSTRUCTION, INC., et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 07CV68367

Frost Brown Todd LLC, Scott D. Phillips, Benjamin J. Yoder, Site 300, 9277 Centre Pointe Drive, West Chester, Ohio 45069, for plaintiffs-appellants, Nancy and John D. Forste

McCaslin, Imbus & McCaslin, LPA, Thomas J. Gruber, 900 Provident Bank Bldg., Suite 900, 632 Vine Street, Cincinnati, Ohio 45202, for defendant-appellee, Oakview Construction, Inc.

Marshall, Dennehey, Warner, Coleman & Goggin, Samuel G. Casolari, Jr., 39 East Market Street, Suite 301, Akron, Ohio 44308, for defendant-appellee, SWH Corp. dba Mimi's Café

Raymond H. Decker, Jr., 36 E. Seventh Street, Suite 2420, Cincinnati, Ohio 45202, for defendant-appellee, Deerfield Town Center

BRESSLER, P.J.

{¶1} Plaintiffs-appellants, Nancy and John Forste, appeal the decision[1] of the Warren County Court of Common Pleas granting the motions for summary judgment filed by

defendants-appellees, Oakview Construction, Inc. (Oakview), SWH Corporation dba Mimi's Café (Mimi's) and Deerfield Towne Center, LLC (Deerfield).[2]

{¶2} Appellant alleged that she sustained an injury to her knee on April 30, 2005, when she tripped on the edge of a raised concrete pad and fell in the parking lot of Mimi's, a restaurant located on the premises owned by Deerfield. Oakview was the contractor that poured the parking lot concrete sub base and concrete dumpster pad.

{¶3} All three appellees filed motions for summary judgment, which were granted by the trial court. Appellant filed this appeal, presenting two assignments of error.

{¶4} Assignment of Error No. 1:

{¶5} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT BY GRANTING SUMMARY JUDGMENT AS TO SWH CORP. AND DTC, INC."

{¶6} Appellant argues in her first assignment of error that summary judgment should not have been granted to Deerfield and Mimi's, the owner and the occupier, respectively, of the premises where she fell.

{¶7} Summary judgment is a procedural device used to terminate litigation and avoid a formal trial when there are no issues in a case to try. *Barnett v. Beazer Homes Invests., L.L.C.*, 180 Ohio App.3d 272, 2008-Ohio-6756, ¶12. This court reviews summary judgment decisions de novo, which means that we review the trial court's judgment independently and without deference to its determinations and use the same standard in our review that the trial court should have employed. Id.

{¶8} Summary judgment is appropriate under Civ.R. 56 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) reasonable minds can come to but one conclusion and that conclusion is adverse to the

1. Pursuant to Loc.R. 6(A), we have sua sponte removed this appeal from the accelerated calendar.

nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389.

{¶9} In order to avoid summary judgment in a negligence action, the plaintiff must show the following: (1) the defendant owed plaintiff a duty of care, (2) the defendant breached the duty of care, and (3) as a direct and proximate result of defendant's breach, plaintiff was injured. *Barnett* at ¶14.

{¶10} Evidence presented to the trial court for purposes of summary judgment indicates that appellant's fall occurred about a month after Mimi's opened during appellant's first visit to the restaurant. Appellant acknowledged that the weather was clear and her vision of the parking lot was not obstructed.

{¶11} Oakview's project manager testified that Oakview contracted to and did pour the concrete sub base and the concrete pad at issue, which was one and one half inches above the concrete sub base. The project manager acknowledged that the parking lot area surface was uneven when Oakview finished its concrete work in early April 2005. A finished layer of asphalt was not applied to the parking lot, reportedly because asphalt plants were not yet open. Oakview did not provide the asphalt pavement for Mimi's.

{¶12} The parties offered different theories on their motions and responses to summary judgment. In granting appellees' motions, the trial court said the height difference between the sub base and the concrete pad was an insubstantial defect, that appellant showed no attendant circumstances to render the defect a substantial one, and that appellees were under no duty to warn appellant of the insubstantial defect.

{¶13} The parties do not contest for purposes of this appeal that appellant was an invitee of the owner or occupier of the premises. Generally, a premises owner or occupier

2. John Forste's claim is for a loss of consortium. Because the discussion will refer to Nancy Forste's actions, we will, hereinafter, refer to appellant in the singular in this opinion.

owes a business invitee a duty to exercise ordinary care to maintain the premises in a reasonably safe condition, so that an invitee will not be unreasonably or unnecessarily exposed to danger. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203. The owner or occupier is not, however, an insurer of the invitee's safety. Id.

{¶14} Courts have said that insubstantial defects or minor imperfections on the premises are simply not actionable and do not present a jury question on the issue of negligence. See *Kimball v. Cincinnati* (1953), 160 Ohio St. 370; see *Helms v. American Legion, Inc.* (1966), 5 Ohio St.2d 60 (minor or trivial imperfections that are not unreasonably dangerous and which are commonly encountered and to be expected, as a matter of law do not create liability on the part of such owners or occupiers toward a pedestrian who, on account of such minor imperfection, falls and is injured); *Fugate v. Strickers Grove, Inc.* (Nov. 1, 1993), Butler App. No. CA93-05-087.

{¶15} Minor defects are determined to be insubstantial if they are less than two inches in height, unless attendant circumstances are shown to elevate the defect to an unreasonably dangerous condition; thus, where an alleged defect is minor or insubstantial, no duty exists. See *Cash v. Cincinnati* (1981), 66 Ohio St.2d 319.

{¶16} Furthermore, an owner or occupier of property owes no duty to warn invitees of open and obvious dangers on the property. *Simmers v. Bentley Const. Co.*, 64 Ohio St.3d 642, 644, 1992-Ohio-42, citing *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45. A hazard is open and obvious when it is in plain view and readily discoverable upon ordinary inspection. See *Parsons v. Lawson Co.* (1989), 57 Ohio App.3d 49, 51.

{¶17} Appellant asserts that evidence was presented that Mimi's and Deerfield were aware of a previous fall or near falls on the uneven parking lot surface. However, no evidence was presented that the previous incidents involved the same area at question in the instant case.

{¶18} Appellant also argues that the concrete dumpster pad was not an open and obvious hazard because there was no obvious contrast between the appearance of the pad and the concrete sub base of the parking lot. Appellant testified that she does not believe she would have noticed the uneven surface had she been looking down as she was walking.

{¶19} Appellant refers to the deposition testimony of a Deerfield representative who indicated that she visited the site the day after the fall and stated that she did not recall a separate raised concrete dumpster pad. Photographs presented by appellant purportedly depict the scene where she fell a few days after the event and, again, several days after that when the edges of the raised pad were painted. Appellant was asked in her deposition about the photograph that appears to show a difference in color between the pad and the sub base, but appellant indicated she noticed no such contrast on the day she fell.

{¶20} Appellant further argues that she was distracted by attendant circumstances as she was returning to her vehicle, and therefore, did not see the uneven surface between the concrete pad and sub base. Appellant indicated that she was carrying carryout items from the restaurant in her hands as she walked to her car, but nothing obstructed her vision. Appellant argued that the court should consider that she was unfamiliar with the area, the similar appearance of the concrete sub base and dumpster pad, and the distraction of "patrons pulling in, you know, parking, different things," when she was walking in the parking lot.

{¶21} As we previously noted, a court must consider whether attendant circumstances are shown to elevate a minor defect to an unreasonably dangerous condition. See *Cash*, 66 Ohio St.2d at 319. In addition, attendant circumstances are an exception to the open and obvious doctrine and refer to distractions that contribute to an injury by diverting the attention of the plaintiff and reduce the degree of care an ordinary person would exercise at the time. *Galinari v. Michael Koop*, Clermont App. No. CA2006-10-086, 2007-Ohio-4540, ¶21.

{¶22} Attendant circumstances refers to all facts relating to the event, and have included such circumstances as the time of day, lack of familiarity with the route taken, and lighting conditions. Id. An attendant circumstance must divert the attention of the injured party, significantly enhance the danger of the defect, and contribute to the injury. Id. An attendant circumstance is one that is beyond the control of the injured party. *Hart v. Dockside Townhomes, Ltd.* (June 11, 2001), Butler App. No. CA2000-11-222. To be considered to be an attendant circumstance for the purpose of rebutting the "two-inch" rule, the traffic must be unusual or unreasonably increase the chance of harm. *Smith v. House of Hunan*, Marion App. No. 9-07-54, 2008-Ohio-1783, ¶8.

{¶23} Employing the applicable standard of review for summary judgment and construing the evidence most favorably for appellant, we find that no genuine issues of material fact remain and reasonable minds could only conclude that the uneven parking lot surface around the concrete dumpster pad was a minor defect. See *Sack v. Skyline Chili, Inc.*, Warren App. No. CA2002-09-101, 2003-Ohio-2226, ¶16 (a pedestrian may not expect the same flat surface found on a sidewalk in a parking lot; because of the nature of parking lots, plaintiff's description of the depth of the sewer lid as two to three inches does not necessarily dictate that a question of fact remains for a jury as to whether or not the depression is substantial); see *Lewis v. Key Market, Inc.* (Aug. 18, 1992), Athens App. No. 1508 (concluded that the three to four-inch "lip" in the parking lot was a minor imperfection; other cases have noted that uneven parking surfaces are not an uncommon occurrence and should be reasonably anticipated).

{¶24} Reasonable minds could also only conclude that the minor defect was not rendered a substantial one because of any attendant circumstances. The attendant circumstances argued by appellant did not as a matter of law divert appellant's attention, significantly enhancing the danger of the defect and contributing to the injury; additionally, the

traffic she described in the parking lot was not unusual and did not unreasonably increase the chance of harm. See *Cooper v. Meijer Stores Ltd. Partnership*, Franklin App. No. 07AP-201, 2007-Ohio-6086, ¶19 (cars, other pedestrians, and even a two-inch deviation en route are commonplace in a grocery store parking lot; without more, they do not create a distraction, or attendant circumstance, that would reduce the degree of care an ordinary person would exercise); *Michals v. Biskin Realty Co., Inc.* (May 29, 1997), Cuyahoga App. No. 71308.

{¶25} While also argued by the parties, based upon our determination of the minor defect, we need not decide for this appeal whether the open and obvious theory applies. The trial court did not err in granting summary judgment to Mimi's and Deerfield. Appellant's first assignment of error is overruled.

{¶26} Assignment of Error No. 2:

{¶27} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT BY GRANTING SUMMARY JUDGMENT AS TO OAKVIEW CONSTRUCTION."

{¶28} Appellant argues under her second assignment of error that the open and obvious doctrine was not available to Oakview, because Oakview was an independent contractor that poured the sub base and concrete pad and not an owner and occupier of the land.

{¶29} Appellant cites *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d at syllabus, which states that an independent contractor who creates a dangerous condition on real property is not relieved of liability under the doctrine which exonerates an owner or occupier of land from the duty to warn those entering the property concerning open and obvious dangers on the property.

{¶30} The *Simmers* court further held that since a contractor has no property interest

in the property, courts should look to the law of negligence and then consider the significance, for example, of the finding that the defect was open and obvious. Id. at 645.

{¶31} Under the law of negligence, a defendant's duty to a plaintiff depends upon the relationship between the parties and the foreseeability of injury to someone in the plaintiff's position. Id. Injury is foreseeable if a defendant knew or should have known that its act was likely to result in harm to someone. Id.

{¶32} We note that appellant argues that Oakview breached a duty to her because it poured the concrete sub base knowing that pedestrians and vehicles would share the parking lot and pedestrians could be distracted by those vehicles, "but did not intend to install the topcoat of asphalt until later in the spring." We can find no evidence in the record for purposes of summary judgment that Oakview had a role in the application of the asphalt or any responsibility for the delay in the application of the asphalt, and no evidence that Oakview participated in the decision to open the restaurant to the public without the finish asphalt.

{¶33} Based upon the previous determination that the height difference between the concrete sub base and the concrete pad was a minor defect with no attendant circumstances to enhance its dangerousness, there are no genuine issues of material fact present and reasonable minds could only conclude that the insubstantial defect did not present a foreseeable risk of harm. See *Tomlin v. Natl. City Corp.*, Trumbull App. No. 2003-T-0158, 2004-Ohio-6938, ¶31. Oakview did not breach a duty of care and the trial court did not err in granting summary judgment to Oakview. Appellant's second assignment of error is overruled.

{¶34} Judgment affirmed.

POWELL and HENDRICKSON, JJ., concur.

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