IN THE COMMON PLEAS COURT
GENERAL DIVISION
BUTLER COUNTY, OHIO

ALBERTA STATUM,	*	Case No.: CV 2018-07-1552
Plaintiff,	*	JUDGE: NOAH E. POWERS II
vs.	*	**DECISION AND ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
DOLGEN MIDWEST, LLC, et al.,	*	
Defendants.	*	**FINAL APPEALABLE ORDER**
	*	

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Final Appealable Order

THIS MATTER came before the Court on the motion of Defendant Dolgen Midwest, LLC for summary judgment on the claims brought by Alberta Statum. The matter has been fully briefed and the Court has reviewed the memoranda, record, and applicable law. As such, the Court does not find that *Oral Arguments* are necessary.

On July 14, 2016, Plaintiff went to a Dollar General store owned and operated by Defendant in Oxford, Ohio. Defendant had regularly shopped the store. *Depo. of Statum* at 8. On that day, her husband dropped her off in front of the store, and she approached the store directly from the parking lot in front. *Id.* at 9. In the past, Plaintiff parked on the side and proceeded along a walkway before entering the store. *Id.* at 8. While walking up a ramp to the walkway immediately leading into the store, she tripped and fell. *Id.* at 9. The ramp was covered by a black mat which Defendant provides was placed there to smooth over a defect in the pathway into the store. *Aff. of Summers* at ¶4. Plaintiff contends that her toe caught on a rise in the mat. *Depo. of Statum* at 8-10. She went through the entry door and suffered multiple injuries, including a broken wrist, which required surgery. She was taken by ambulance to the hospital. It was not until

after viewing pictures, taken by her nephew, that she identified any sort of defect in the path to the store. The pictures were taken the same day as her fall.

Summary judgment can only be granted when it appears from the evidence, construed most strongly in favor of the non-moving party, that there is no genuine issue of material fact; that reasonable minds can only come to one conclusion which is adverse to the non-moving party; and that as a matter of law the moving party is entitled to judgment. Civ.R. 56(C). The only evidence to be considered when ruling upon a motion for summary judgment are pleadings, depositions, affidavits, written discovery responses filed with the court, transcripts of evidence, and written stipulations of fact. Civ.R. 56(C).

Where a motion for summary judgment is properly made and supported, the non-moving party may not rest upon its pleadings, but, instead, must produce evidence showing a genuine issue of fact as to issues upon which it has the burden of proof. *Dresher v. Burt,* 75 Ohio St.3d 280, 1996-Ohio-107.

Summary judgment is proper when there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds, construing the evidence most strongly in favor of the non-moving party, can come to only one conclusion adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.,* 54 Ohio St.2d 64, 66 (1978).

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To establish negligence in a premises liability case, Plaintiff must show the existence of a duty, a breach of the duty, causation, and damages. *Dickerson v. Kirk,* 12th Dist. No CA98-09-186, 1999 WL 17788, *2 (Jan. 19, 1999).

There are three classifications under which a plaintiff in a premises liability case may fall with regards to a property owner: invitee, licensee, and trespasser. *Salmon v.*

Rising Phoenix Theatre, 12th Dist. No. CA2005-11-491, 2006-Ohio-4328 at ¶13, citing *Gladon v. Greater Cleveland Regional Transit Auth.,* 75 Ohio St.3d 312, 315, 1996-Ohio-137. An invitee is a person who enters the premises of another by invitation for a purpose beneficial to the owner. Id., citing *Gladon.* A licensee enters the property of another with permission for purposes beneficial to the licensee and not the owner. Id. citing *Provencher v. Ohio Dept. of Transp.*, 49 Ohio St.3d 265, 266 (1990). Whereas a trespasser is one who enters the property without invitation or permission only for his own purpose or convenience. *Id.* citing *McKinney v. Hartz & Restle Realtors, Inc.*, 31 Ohio St.3d 244, 246 (1987).

In premises liability cases, a business owner's superior knowledge gives rise to a duty to protect or warn a business invitee of danger. *LaCourse v. Fleitz*, 28 Ohio St.3d 209, 210 (1986). While a business owner is not an absolute insurer, he has a duty to warn invitees of any latent dangers that he knew about or should have reasonably known about. *Id.*; *Paschal v. Rite Aid Pharmacy Inc.*, 18 Ohio St.3d 203, 203 (1985). However, a business owner is under no duty to protect invitees from dangers which are known or are so obvious that an invitee might be reasonably expected to discover and thereby protect himself from. *Paschal* at 203-204.

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There is no dispute that Plaintiff was a business invitee of Defendant. While the fact that Plaintiff fell is not in dispute, Defendant contends that it is not liable for Plaintiff's fall based on a number of theories. The Court need only find that one of the reasons would relieve Defendant of the duty to warn Plaintiff.

In this case *sub judice*, there can be no dispute that there was an uneven break in the pavement that led into the store as one walked up the ramp from the parking lot. As

noted above, Defendant knew of the deviation and took steps to minimize it. What cannot be disputed is that the rise at the break in the pavement is less than two inches. *Aff. of Summers at* ¶5. "Minor defects that 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. *Forste v. Oakview Construction, Inc.*, 12th Dist. No. CA2009-05-054, 2009-Ohio-5516 at ¶15.

Attendant circumstances involve distractions that would divert a pedestrian's attention and reduce the degree of care an ordinary person would exercise. *Issacs v. Meijer, Inc.,* 12th Dist. No. CA2005-10-098, 2006-Ohio-1439 at ¶16, citing *McGuire v. Sears, Roebuck & Co.* (1996), 118 Ohio App.3d 494, 498-499. The attendant circumstances must be beyond the control of the invitee. *Issacs* at ¶16.

Plaintiff contends that the covering of the defect in the pavement constitutes attendant circumstances, thereby enjoining Defendant from citing the minor nature of the imperfection in the pavement as well as the "open and obvious" doctrine to relief it from any duty.

The Court does not agree. Plaintiff, upon viewing the photographs taken by her nephew clearly observed the defect, noting that she could see it on both sides of the mat. *Depo. of Statum* at 40. While she did not see the unevenness of the pavement at the time, a "dangerous condition at issue does not actually have to be observed by the claimant to be an open and obvious condition under the law. Rather, the determinative issue is whether the condition is observable.'" *Rigdon v. Great Miami Valley YMCA,* 12th Dist.

No. CA2006-06-155, 2007-Ohio-1648 at ¶13, citing *Souther v. Preble Cty. Dist. Library, West Elkton Branch,* 12th Dist. No. CA2005-04-006, 2006-Ohio-1893.

Construing the facts most strongly in favor of Plaintiff, the non-moving party, the Court finds that the alleged defect that caused Plaintiff's fall and subsequent injuries, was both open and obvious, as well as so minor that a duty does not fall upon Defendant to warn Plaintiff of the condition.

ENTRY

For reasons set forth above, the Court finds Defendant Dolgen Midwest, LLC's *Motion for Summary Judgment* well-taken. Therefore, it is

ORDERED that Defendant Dolgen Midwest, LLC's *Motion for Summary Judgment* be, and the same is hereby, **GRANTED**. Further, it is

ORDERED that judgment be entered in favor of Defendant Dolgen Midwest, Inc. on the claims set forth by Plaintiff Alberta Statum

SO ORDERED:

NOAH E. POWERS II, JUDGE

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