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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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|                        |   |                               |
|------------------------|---|-------------------------------|
| BONNIE M. CHARGO,      | ) | Appeal from the Circuit Court |
|                        | ) | of Lake County.               |
| Plaintiff-Appellant,   | ) |                               |
|                        | ) |                               |
| v.                     | ) | No. 08—L—746                  |
|                        | ) |                               |
| THE VILLAGE OF GURNEE, | ) | Honorable                     |
|                        | ) | Raymond J. McKoski,           |
| Defendant-Appellee.    | ) | Judge, Presiding.             |

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JUSTICE HUTCHINSON delivered the judgment of the court.  
Justices Zenoff and Birkett concurred in the judgment.

**ORDER**

*Held:* The trial court properly granted defendant summary judgment on plaintiff's negligence complaint because defendant owed plaintiff no duty: as plaintiff essentially conceded in her deposition (which she could not dispute in an affidavit), the condition (an elevated municipal water valve) was open and obvious, and it was not reasonably foreseeable that plaintiff, in raking leaves, would be distracted from seeing it; thus, the injury was not reasonably foreseeable, and, because the condition was open and obvious, the remaining three factors in the duty analysis weighed in defendant's favor. We affirmed the judgment of the trial court.

¶ 1 Plaintiff, Bonnie M. Chargo, sued defendant, the Village of Gurnee, for damages sustained when she tripped over a municipal water valve owned by defendant and located on her property. The trial court granted defendant's motion for summary judgment, finding that the valve was an open and

obvious condition and that the distraction exception did not apply. Plaintiff timely appealed. Plaintiff argues that a genuine issue of material fact exists as to whether the valve was open and obvious and that, even if it was not, a question of fact exists as to the applicability of the distraction exception. We affirm.

¶ 2

## I. BACKGROUND

¶ 3 Plaintiff brought a negligence action against defendant for injuries sustained when she tripped over a municipal water valve, commonly referred to as a “buffalo box,” which was owned, operated, and maintained by defendant and which was located on the front lawn of her property. Plaintiff alleged that defendant was negligent in: allowing the buffalo box to protrude about four to six inches above the ground, creating a tripping hazard; failing to alter or repair the buffalo box to eliminate the tripping hazard; failing to properly inspect the buffalo box; failing to warn plaintiff about the hazard; failing to maintain the buffalo box; and failing to properly install the buffalo box.

¶ 4 In her discovery deposition, plaintiff testified that, on November 10, 2007, at approximately 11:30 a.m., she was raking leaves and grouping them together on her front lawn. This was the first time that she had raked leaves. As she was looking in front of her at the pile of leaves that she had created and was walking backwards, she tripped over the buffalo box. She was not distracted by anything.

¶ 5 Plaintiff had lived at her current residence since 2001, and the buffalo box had been present since that time. When she first moved into her home, the buffalo box was about one inch above the ground. The buffalo box was brown, and it was a “circular metal piece that sits in [her] front lawn.” It was located about two feet from the sidewalk, and it was used to control the water supply to her property. When plaintiff mowed her lawn that year, she had to “go around” the buffalo box, because

she was worried that mowing over it would cause a leak. During the few times that she had mowed that year, she was able to see the buffalo box “when [she] would get up against it.”

¶ 6 Plaintiff testified that, on the date of the accident, the buffalo box was about four inches above the ground. Grass and leaves were around the buffalo box; there were no sticks. The top of the buffalo box was not obstructed by anything. Plaintiff had been raking for about 15 minutes prior to her fall, and she did not see the buffalo box during that time. She knew the buffalo box was in her yard, but she did not know how high it was until after she had tripped. When she walked on the sidewalk, she focused on what was on the sidewalk in front of her, not on what was in the yard.

¶ 7 Michael Chargo, plaintiff’s 16-year-old son, testified that, in 2007, he was in charge of mowing the lawn. At the time of the accident, the buffalo box had been about four inches above the ground for over a year. He estimated the top of the buffalo box to be about two to three inches in diameter, although he had never measured it. When he walked by the buffalo box, he could see it from the sidewalk “[b]ecause it stuck out of the ground.”

¶ 8 Allan Chargo, plaintiff’s husband, testified that, at the time of the accident, the buffalo box was about four to six inches above the ground. He recalled measuring it after the accident. When asked whether the buffalo box was “obvious” from the sidewalk, he responded: “Yeah. I mean, it could be seen from there, yeah.” When asked whether it was raised high enough off the ground that someone could see it when walking by, he responded: “Sure, if one was looking for it.” Prior to the accident, he never contacted defendant about the height of the buffalo box, because “it seemed to be a normal thing.” Other buffalo boxes in the neighborhood were as high as, or higher than, the buffalo box located on his property. “[He] just assumed that is just the way they were, and there was a reason for it.”

¶ 9 Richard Opal, plaintiff's next-door neighbor, testified that, in 2007, plaintiff's buffalo box was about two inches higher than the surface of the lawn. He stated that the top of the buffalo box was about four inches in diameter. When asked how often he had observed plaintiff's buffalo box, he responded: "Often." He further stated: "I often wondered how the Chargos could mow their lawn and not ruin their lawn mower on the buffalo box." When asked whether the buffalo box was "obvious" when he walked by on the sidewalk, he responded: "Yes."

¶ 10 Robert J. Denis, utilities superintendent for defendant, testified that he had trained water meter readers and that they are not instructed to look for or report buffalo boxes that are raised above ground level.

¶ 11 Defendant moved for summary judgment. Defendant argued that it owed no duty to plaintiff because the buffalo box was an open and obvious condition. In the alternative, defendant argued that there was no evidence that it had actual or constructive notice of the condition of the buffalo box and thus it was immune from liability under section 3—102 of the Local Governmental and Governmental Employees Tort Immunity Act (the Tort Immunity Act) (745 ILCS 10/3—102 (West 2008)). Further, defendant argued, in the alternative, that it was immune under sections 2—201 and 3—104 of the Tort Immunity Act for any failure to maintain, repair, inspect, or warn. See 745 ILCS 10/2—201, 3—104 (West 2008). Lastly, defendant argued that any claim that plaintiff may have regarding the installation or placement of the buffalo box was barred by the one-year limitations period set forth in section 8—101(a) of the Tort Immunity Act (745 ILCS 10/8—101(a) (West 2008)).

¶ 12 Plaintiff responded to defendant's motion, arguing that a question of fact existed as to whether the buffalo box was an open and obvious condition at the time of plaintiff's fall. Plaintiff

maintained that her deposition testimony alone created a question of fact on the issue. Additionally, she asserted that no village employee ever noticed the condition of the buffalo box prior to the accident while on plaintiff's property reading her water meter. She attached an affidavit wherein she averred that defendant planted and maintained on her parkway a tree that drops leaves on the parkway, sidewalk, and front lawn; that defendant conducted an annual leaf-collection program in the fall; that defendant asked residents to rake leaves to the curb; and that, on the day of the accident, she did not see the buffalo box before her fall because "fallen brown leaves concealed it."

¶ 13 The trial court granted defendant's motion for summary judgment, finding that the condition of the buffalo box was open and obvious and that the distraction exception did not apply. Plaintiff timely appealed.

¶ 14 II. ANALYSIS

¶ 15 Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2—1005(c) (West 2010); *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011). A reviewing court's function is to determine whether a genuine issue of fact was raised and, if none was raised, whether judgment as a matter of law was proper. *American Family Mutual Insurance Co. v. Page*, 366 Ill. App. 3d 1112, 1115 (2006). The entry of summary judgment is subject to *de novo* review. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 16 To prevail in a negligence action, a plaintiff must establish that the defendant owed the plaintiff a duty, that the defendant breached that duty, and that the plaintiff's injury proximately resulted from that breach. *Thompson*, 241 Ill. 2d at 438; *Vesey v. Chicago Housing Authority*, 145

Ill. 2d 404, 411 (1991); *Bonavia v. Rockford Flotilla 6-1, Inc.*, 348 Ill. App. 3d 286, 290-91 (2004).

The question here is whether defendant owed a duty to plaintiff. “In determining whether a duty exists, a court should consider the following factors: (1) the reasonable foreseeability of injury, (2) the reasonable likelihood of injury, (3) the magnitude of the burden that guarding against injury places on the defendant, and (4) the consequences of placing that burden on the defendant.” *Sollami v. Eaton*, 201 Ill. 2d 1, 17 (2002). The existence of a duty is a question of law and, therefore, may be resolved on a motion for summary judgment. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114 (1995); *Bonavia*, 348 Ill. App. 3d at 291.

¶ 17 Defendant contends that the buffalo box was an open and obvious condition, negating any alleged duty owed to plaintiff. The open-and-obvious doctrine is an exception to the general duty of care owed by a landowner and is based on the Second Restatement of Torts:

“A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.” Restatement (Second) of Torts §343A(1) (1965).

¶ 18 Our supreme court has held that the doctrine implicates the first two factors of the traditional duty analysis: likelihood of injury and foreseeability. *Sollami*, 201 Ill. 2d at 15, 17. Where a condition is deemed open and obvious, the likelihood of injury is generally considered slight because it is assumed that people encountering potentially dangerous conditions that are open and obvious will appreciate and avoid the risks. *Buchelares v. Chicago Park District*, 171 Ill. 2d 435, 456 (1996). Injuries caused by open and obvious conditions are unlikely to be reasonably foreseeable, as people

will generally appreciate the risks associated with such conditions and exercise care for their own safety. *Bucheleres*, 171 Ill. 2d at 456-57.

¶ 19 A condition is open and obvious where a reasonable person in the plaintiff's position, exercising ordinary perception, intelligence, and judgment, would recognize both the condition and the risk involved. *Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430, 435 (1990); *Green v. Jewel Food Stores, Inc.*, 343 Ill. App. 3d 830, 832 (2003); see also *Sandoval v. City of Chicago*, 357 Ill. App. 3d 1023, 1028 (2005) (whether a condition is open and obvious "depends not on plaintiff's subjective knowledge but, rather, on the objective knowledge of a reasonable person confronted with the same condition."). Here, the trial court found that the buffalo box was open and obvious. We agree.

¶ 20 Plaintiff testified that she knew the buffalo box had been in her yard for six years. Within the year prior to her fall, she mowed the area around the buffalo box. When she mowed, she saw the buffalo box. She stated that she mowed around it, because she was afraid that she would cause a leak if she went over it. According to plaintiff, on the day of the accident, the only things around the buffalo box were grass and leaves. She stated that the top of the buffalo box was not obstructed by anything. Plaintiff's husband, son, and neighbor each testified that the buffalo box could be seen from the sidewalk because it was four to six inches above ground. Contrary to plaintiff's argument, that the meter readers did not observe the buffalo box while on her property to read her water meter does not create a question of fact as to whether it was open and obvious, as testimony from Denis, utilities superintendent for defendant, established that meter readers were not instructed to look for or report buffalo boxes that were raised above ground level.

¶ 21 Although plaintiff stated in her affidavit that she did not see the buffalo box on the day of the accident because “fallen brown leaves concealed it,” that statement does not create a question of fact. As noted, she testified at her deposition that the top of the buffalo box was not obstructed by anything. See *Wallace v. Alexian Brothers Medical Center*, 389 Ill. App. 3d 1081, 1090 (2009) (“It is well established that a party cannot create genuine issue of material fact in an effort to defeat a motion for summary judgment by filing an affidavit that conflicts with her prior sworn testimony.”). Given the abundance of testimony concerning the visibility of the buffalo box, we conclude that a reasonable person in plaintiff’s position, exercising ordinary perception, intelligence, and judgment, would recognize both the condition and the risk involved.

¶ 22 We are not be persuaded by plaintiff’s reliance on *Buchaklian v. Lake County Family Young Men’s Christian Ass’n*, 314 Ill. App. 3d 195 (2000). There, the plaintiff tripped at a YMCA while walking across a black mat from the shower area to the pool. One portion of the mat was standing an inch or two higher than the other portions of the mat. The plaintiff testified that she had never observed the mat in that condition before and that she did not know what caused the mat to stick up like that. The trial court found that the defect was open and obvious, based on the plaintiff’s admission that, had she been looking at the mat, she “ ‘would have seen this thing sticking up’ ” and would not have tripped. *Id.* at 202. On appeal, this court disagreed with the trial court’s conclusion that the condition of the mat was open and obvious. We noted that the plaintiff’s admission was not dispositive. We specifically noted that the plaintiff did not observe the defect until after she had fallen and had never seen it before. We also pointed to testimony from the plaintiff’s friend who stated that she had not seen the defect. We stated that “[t]he evidence in the record can support a reasonable inference that the defect in the mat was difficult to discover because of its size, the lack

of significant color contrast between the defect and the surrounding mat, or merely the short time that a person has in which to discover the defect as he or she takes a few steps toward the mat.” *Id.* at 202. Here, unlike in *Buchaklian*, plaintiff had seen the buffalo box before and other testimony established that it could be seen easily from the sidewalk.

¶ 23 Based on the foregoing, we conclude that the condition of the buffalo box was open and obvious. As correctly noted by plaintiff, however, our analysis does not end there. The mere existence of an open and obvious condition “is not a *per se* bar to the existence of a duty, because a defendant will still owe a duty where he should anticipate the harm despite the obviousness of the condition.” *Belluomini v. Stratford Green Condominium Ass’n*, 346 Ill. App. 3d 687, 691 (2004). Here, plaintiff contends that, even if the condition of the buffalo box is deemed open and obvious, defendant still owed her a duty because it was reasonably foreseeable that plaintiff would fail to avoid the risk of the condition due to being distracted. See *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 156 (1990). We disagree.

¶ 24 Plaintiff cites *Clifford v. Wharton Business Group, L.L.C.*, 353 Ill. App. 3d 34 (2004), and *Rexroad v. City of Springfield*, 207 Ill. 2d 33 (2003), for the proposition that the defendant need not have created the distraction nor anticipated the precise nature of the distraction; rather, all that is necessary is the defendant’s awareness that those in proximity to the open and obvious hazard are likely to become distracted in some way and forget about the presence of the hazard. According to plaintiff, it is undisputed that, before she fell, her attention was more focused on the leaves piled in front of her. Further, she contends that defendant created the leaf distraction by its ownership of the parkway tree located on her property and by its annual leaf-collection program.

¶ 25 We find that it was not reasonably foreseeable to defendant that plaintiff, while in her front yard, two feet from the sidewalk, would be distracted to the extent that she could not appreciate or would forget about the presence of the buffalo box that she had been aware of for six years prior. The nature of the distraction exception is that the distraction takes the plaintiff's attention *away* from the hazard. See *Clifford*, 353 Ill. App. 3d at 47 (reasonably foreseeable that a carpenter erecting walls would be looking upward and be distracted from the presence of a hole in the floor); see also *Rexroad*, 207 Ill. 2d at 46 (reasonably foreseeable that a high-school student would be distracted from the presence of a hole in a football-field parking lot).

¶ 26 Because we find that the condition of the buffalo box was open and obvious and that the distraction exception does not apply, plaintiff's injury was not reasonably foreseeable. See *Sollami*, 201 Ill. 2d at 17. We next address the remaining three factors of the duty analysis: the reasonable likelihood of injury, the magnitude of the burden that guarding against injury places on the defendant, and the consequences of placing that burden on the defendant. See *Sollami*, 201 Ill. 2d at 17.

¶ 27 With respect to the reasonable likelihood of injury, we find that this factor also does not favor plaintiff. In *Sollami*, the court noted that "the law generally considers the likelihood of injury slight when the condition in issue is open and obvious, because it is assumed that persons encountering the potentially dangerous condition of the land will appreciate and avoid the risks." *Sollami*, 201 Ill. 2d at 17. Here, because the condition of the buffalo box was open and obvious, the likelihood of injury was slight.

¶ 28 We also find that the last two factors—the magnitude of the burden that guarding against injury places on the defendant and the consequences of placing that burden on the defendant—do

not favor imposing a duty on defendant. Here, even assuming *arguendo* that the magnitude of the burden and the consequences of placing the burden on defendant are slight, placing such a burden on defendant is unjustified given the open and obvious nature of the buffalo box. See *Sollami*, 201 Ill. 2d at 18 (imposition of burden on defendant property owner unjustified where the risk of jumping on trampoline was open and obvious to plaintiff).

¶ 29 Based on the foregoing, we conclude that defendant owed no duty to plaintiff. Accordingly, the trial court properly granted summary judgment in favor of defendant.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the order of the circuit court of Lake County granting summary judgment for defendant.

¶ 32 Affirmed.