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No. 3--10--0503

Order filed March 21, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2011

MARSHA ALLEN,	)	Appeal from the Circuit Court
	)	of the 13th Judicial Circuit,
Plaintiff-Appellant,	)	Bureau County, Illinois,
	)	
v.	)	No. 09--L--3
	)	
ART HARTZELL,	)	Honorable
	)	Cornelius J. Hollerich,
Defendant-Appellee.	)	Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Justices McDade and Schmidt concurred in the judgment.

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**ORDER**

*Held:* Where plaintiff was aware that defendant's dog left bones lying on the floor in his house, defendant home owner did not owe plaintiff a duty of care to protect her from the condition which caused her injury.

Plaintiff, Marsha Allen, brought a premise liability action against defendant, Art Hartzell, claiming that Hartzell was negligent for failing to warn her about a dog bone lying on his floor, which caused Allen to trip and fall. The trial court found that the condition was open and obvious and granted summary

judgment in favor of Hartzell. We affirm.

Allen and Hartzell began dating in 2006. During their courtship, Allen spent the night at Hartzell's house 50 or 60 times. Hartzell owned a Labrador Retriever named "Cocoa." Cocoa loved bones, and Allen often brought bones from the local meat market for the dog when she came to visit. Cocoa had many bones and typically left them lying in areas around the house.

One evening, Allen and Hartzell were eating dinner in the living room while they watched television. Allen sat on the loveseat. Cocoa laid at Allen's feet, curved around the loveseat, with her head facing the kitchen. When Allen was finished with her meal, she got up and headed toward the kitchen, carrying her empty plate. As she walked around the corner of the couch, she tripped and fell on a bone lying on the floor. Allen broke her femur, which required two surgeries.

Allen filed suit against Hartzell, claiming Hartzell was negligent for failing to warn her about the bone on the floor and failing to remove it from her path. In her deposition, Allen stated that the dog had a lot of bones. When she spent the night at Hartzell's, she would clean the house. As she vacuumed, she often saw dog bones on the floor and would pick them up. She described Hartzell's dog as a good dog, except that the dog did not put her bones away when she finished playing with them. It was common for Cocoa to take a bone with her as she traveled around the

house. When she saw food, she would drop the bone. That evening, Allen was unable to see the bone because she was carrying her dish and silverware. She stated that the lighting in the room was sufficient to see the bone if she had looked down.

Hartzell was also deposed. He stated that if he saw bones lying around, he would pick them up and return them to the corner of the living room where they were kept. He would pick up bones two or three times a week. Hartzell stated that he picked them up because he did not want to fall over them. He had almost fallen over bones on occasions and had kicked bones that he did not know were there.

Hartzell moved for summary judgment, asserting that he had no duty to warn Allen under the Premises Liability Act (Act) (740 ILCS 130/2 (West 2008)) because she knew the dog left bones lying on the floor and the condition was open and obvious. The trial court found that Allen was "aware of the situation and she was well aware of the hazard which was bones lying on the floor in the house" and granted Hartzell's motion.

#### ANALYSIS

Allen argues that, although she was aware of the propensity of the dog to leave bones lying around the house, Hartzell is not relieved from liability because the hazard of tripping over them was not open and obvious. She further claims that even if the condition was open and obvious, the "distraction" exception

applies.

To sustain a cause of action for negligence, the plaintiff must establish that defendant owed a duty of care and breached that duty, resulting in an injury proximately caused by the breach. *Curatola v. Village of Niles*, 154 Ill. 2d 201 (1993). Relevant factors to consider are: (1) foreseeability that the defendant's conduct will result in injury; (2) likelihood of injury; (3) the magnitude of guarding against it; and (4) the consequences of placing the burden on the defendant. *Curatola*, 154 Ill. 2d at 214. Whether a duty of care exists is a question of law which may be determined in a summary judgment motion. *Sandoval v. City of Chicago*, 357 Ill. App. 3d 1023 (2005). We review an order granting summary judgment *de novo*, construing all evidence strictly against the moving party and liberally in favor of the nonmovant. *Bonner v. City of Chicago*, 334 Ill. App. 3d 481 (2002).

Generally, landowners are not required to foresee and protect against injuries if the potentially dangerous condition is open and obvious. *Buchelers v. Chicago Park District*, 171 Ill. 2d 435 (1996). "Open and obvious" conditions include those in which the condition and risk are apparent to, and would be recognized by, a reasonable person exercising ordinary perception, intelligence and judgment in visiting an area. *Bonner v. City of Chicago*, 334 Ill. App. 3d at 484.

An exception to the rule exists where the property owner has

"reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he had discovered or will fail to protect himself against it." *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 45 (2003). This exception is commonly referred to as the "distraction exception," and applies if the injured party was distracted from the open and obvious condition because circumstances required that he focus his attention on another condition or hazard. *Sandoval*, 357 Ill. App. 3d at 1028. If it is reasonable for the defendant to anticipate injury to an invitee who is otherwise exercising reasonable care but may reasonably be expected to be distracted from an obvious condition on the premises, then a duty is owed. *Id.* at 1028.

Here, the bone on the living room floor was an open and obvious condition. Both Hartzell and Allen stated that the dog had numerous bones and often left them lying on the floor in various locations around the house. The bones were large enough that Hartzell picked them up because he did not want to trip over them, and Allen picked them up when she vacuumed the house. Allen even complained at her deposition that the dog had a lot of bones and dropped them in various places around the house. A reasonable person exercising ordinary care in visiting Hartzell's home would recognize the risk of tripping over a bone that was lying on the floor. Thus, Hartzell did not owe Allen a duty under the act.

Even so, Allen argues that the distraction exception applies.

She claims that it was reasonably foreseeable that a person would be distracted as he or she attempted to cross from the living room to the kitchen, where Cocoa had a propensity to leave bones.

In most cases that have applied the distraction exception, the landowner created, contributed to, or was responsible for the distraction which diverted the plaintiff's attention from the open and obvious condition. See *Rexroad*, 207 Ill. 2d at 46 (reasonably foreseeable that attention of football player who tripped in parking lot hole would be focused on carrying helmet to player who needed it upon coach's orders); *Clifford v. Wharton Business Group, L.L.C.*, 353 Ill. App. 3d 34 (2004) (contractor distracted from and injured by opening in floor near area where he was assigned to work on project); *Ward v. K Mart Corp.*, 136 Ill. 2d 132 (1990) (customer collided with a concrete post located near the store entrance while carrying large purchase that obstructed his view). The evidence in this case does not merit the application of the distraction exception. Allen stated that she was distracted because she was carrying her empty plate to the kitchen. She knew that the dog was lying near her. She knew that the dog had a propensity to leave bones lying on the floor. She also knew the dog dropped her bones when she wanted food. Allen stated that the living room was well lit and that she would have noticed the bone if she had looked down.

A landowner is not required to make his home injury proof.

See *Sandoval*, 357 Ill. App. 3d at 1031. Landowners are entitled to the expectation that guests "will exercise reasonable care for their own safety and will not blind themselves to the probable consequences of their own actions." *Id.* at 1031. In this case, Allen's injury did not arise from a distraction that could be reasonably anticipated by Hartzell. Hartzell owed no duty to warn or otherwise safeguard Allen from potential harm posed by the open and obvious condition in his home. Accordingly, the trial court properly granted summary judgment in Hartzell's favor.

#### CONCLUSION

The judgment of the circuit court of Bureau County affirmed.  
Affirmed.