FIFTH DIVISION
SEPTEMBER 30, 2015

No. 1-14-1934

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DEBRA ANNOLINO and JOE ANNOLINO,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Cook County.
	)	
v.	)	No. 13 L 120
	)	
THE CITY OF CHICAGO, a Municipal Corporation,	)	Honorable
	)	John H. Ehrlich,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Justices Lampkin and Palmer concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court properly granted defendant's motion for summary judgment on plaintiff's negligence claim because the sidewalk "defect" was open and obvious despite plaintiff's failure to observe it, and the distraction exception did not apply.

¶ 2 Plaintiff, Debra Annolino, was injured when she fell on a public sidewalk in Chicago. She filed a complaint alleging that defendant, the City of Chicago, failed to exercise ordinary care in keeping and maintaining the public sidewalk in a reasonable and safe condition.[1]

[1] The complaint also alleged a loss of consortium claim by Debra's husband Joe. There are no arguments as to that count on appeal.

Defendant responded by filing a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2012)), claiming that it owed plaintiff no duty because the unevenness of the sidewalk was open and obvious to a reasonable person. The circuit court subsequently granted defendant's motion. We affirm.

¶ 3 In her complaint, plaintiff alleged that on August 7, 2012, she was a pedestrian walking on a public sidewalk at or around 65 East Scott Street in Chicago when she tripped and fell on a "broken and irregular" portion of the sidewalk. She alleged that defendant was careless and negligent in that, *inter alia*, it failed to maintain and repair the sidewalk, warn the public of the dangerous and defective condition of the sidewalk, and ignored complaints about the disrepair of the sidewalk although defendant knew, or in the exercise of ordinary care should have known, about the state of the sidewalk.

¶ 4 Defendant filed an affirmative defense, alleging, in pertinent part, that the proximate cause of plaintiff's injuries was her own negligence and failure to keep a proper lookout. Discovery ensued.

¶ 5 In plaintiff's deposition, she stated that she and her husband left their daughter's apartment at 65 East Scott Street at approximately 8:40 a.m. on August 7, 2012. The weather was "clear" and she was wearing her glasses. They walked south on Stone Street. As plaintiff approached 1210 North Stone Street, she was not carrying anything in her hands and was not distracted, other than talking to her husband and looking around. Plaintiff was looking ahead and nothing covered the sidewalk in front of her. Her left foot then caught on an elevated slab of the sidewalk and she fell onto her left knee, right hand and right side of her face. She described the

unevenness as 2.5 inches between the sidewalk slabs and identified a photograph of the area. During the deposition, the following exchange took place:

"Q. Was there anything obstructing your view of the condition just before your accident?

A. No.

Q. If you had looked at the condition, could you have seen it?

A. I would have to say yes."

¶ 6 Plaintiff suffered a broken right index finger and a fractured left kneecap. She testified that the manager of the apartment building came outside and told her that both the current and prior aldermen had been notified of the condition so that the sidewalk could be repaired. Plaintiff's daughter told plaintiff, after the fall, that she had almost tripped on the same area several times.

¶ 7 Defendant filed a motion for summary judgment, claiming that it owed no duty to plaintiff because the condition of the sidewalk was open and obvious. The motion relied upon plaintiff's deposition.

¶ 8 Plaintiff filed a response to the motion for summary judgment, arguing that the sidewalk defect was not open and obvious, and even if it was, the distraction exception applied. Plaintiff also argued that the defect could not be considered open and obvious because the hazardous condition "prompted warning letters from the neighboring property manager," and multiple community residents tripped or fell on the defect prior to plaintiff. Attached to plaintiff's response in support was the affidavit of Gloria Dougherty, the property manager at 65 East Scott Street.

¶ 9 Dougherty averred that she was familiar with the sidewalk where plaintiff was alleged to have tripped, and that she sent three letters to Alderman Vi Daley regarding the "uneven\raised condition of the sidewalk and the tripping hazard that it created." Attached to Dougherty's affidavit were letters dated May 12, 2009, August 12, 2010, and June 7, 2011.

¶ 10 After briefing, the circuit court granted defendant's motion for summary judgment. Specifically, the court concluded that plaintiff fell and injured herself after tripping on a 2.5 inch "differential" between two sidewalk slabs that plaintiff admitted that she would have observed if she had been looking. The court also struck Dougherty's affidavit, as her averment that the sidewalk was a tripping hazard constituted a "factual conclusion reserved for expert testimony." The court further explained that even if the letters attached to Dougherty's affidavit were considered independently, they were inadmissible because "at best" they were hearsay, and, even if the letters were admissible, they were insufficient as matter of law to put defendant on notice as to the defect, as notice of a defect reported to an alderman cannot be imputed as notice to the mayor's office. In any event, the court noted that there was no evidence in the record that the alderman forwarded the letters to the mayor's office. The court also rejected plaintiff's assertion that the shade from a nearby tree distracted her, because her disposition testimony "belies her argument," that is, she did not testify that she was distracted by a tree or "anything else." Therefore, because plaintiff "failed to establish any evidence from which it could even be inferred" that defendant owed her a duty of care, defendant was entitled to judgment as a matter of law.

¶ 11 Plaintiff then filed a motion to reconsider alleging, in pertinent part, that defendant owed her a duty of care because it had notice of the sidewalk defect because aldermanic staff had

previously inspected the sidewalk and the alderman had funds which could be used to repair sidewalks. Attached to the motion in support was the deposition of Chasse Rehwinkel, who worked for Alderman Michele Smith. In his deposition, Rehwinkel stated that in the spring aldermanic employees and volunteers would walk the ward, "grade" the streets and sidewalks, and add the "poorer" streets and sidewalks to the alderman's infrastructure budget. Plaintiff also argued that the court was wrong to rely on plaintiff's "inadmissible speculative testimony" that she would have seen the sidewalk defect if she had been looking. The court denied the motion. Plaintiff now appeals.

¶ 12 Summary judgment is proper when the pleadings, depositions, and other matters on file establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012). We review the circuit court's grant of summary judgment *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 13 To prevail in a negligence action, a plaintiff must plead and prove that the defendant owed her a duty, that the defendant breached that duty, and that an injury proximately resulted from that breach. *Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430, 434 (1990). The existence of a duty depends upon "whether defendant and plaintiff stood in such a relationship to one another that the law imposed upon defendant an obligation of reasonable conduct for the benefit of plaintiff." *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 140 (1990). Whether a duty exists is determined by weighing four factors: (1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant. *Simpkins v. CSX Transportation, Inc.*,

2012 IL 110662, ¶ 18. The weight to be given to each factor depends upon the circumstances of a given case. *Simpkins*, 2012 IL 110662, ¶ 18.

¶ 14 Here, the underlying facts are not in dispute. The only issue is whether, under those facts, defendant owed a duty to plaintiff. The existence of a duty is ordinarily a question of law. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 13. "In the absence of a showing from which the court could infer the existence of a duty, no recovery by the plaintiff is possible as a matter of law and summary judgment in favor of the defendant is proper." *Vesey v. Chicago Housing Authority*, 145 Ill. 2d 404, 411 (1991).

¶ 15 Here, plaintiff contends that the court improperly granted summary judgment because defendant owed her a duty of care because it was reasonably foreseeable that a pedestrian would be injured by the sidewalk defect. She further argues that there are genuine issues of material fact as to whether the defect in the sidewalk was open and obvious.

¶ 16 Generally, "a party who owns or controls land is not required to foresee and protect against an injury if the potentially dangerous condition is open and obvious." *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 44 (2003). "Obvious" means that "both the condition and the risk are apparent to and would be recognized by a reasonable man." Restatement (Second) of Torts § 343A cmt. b, at 219 (1965). As our supreme court has explained, the "open and obvious nature of the condition itself gives caution and therefore the risk of harm is considered slight; people are expected to appreciate and avoid obvious risks." *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 448 (1996). " 'Whether a condition is open and obvious depends on the objective knowledge of a reasonable person, not the plaintiff's subjective knowledge.' " *Ballog v. City of Chicago*, 2012 IL App (1st) 112429, ¶ 22 (quoting *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 86

(2004)). When no dispute exists as to the physical nature of the condition, "whether a danger is open and obvious is a question of law." *Choate v. Indiana Harbor Belt R.R. Co.*, 2012 IL 112948, ¶ 34.

¶ 17 Although plaintiff testified that she did not observe the defect in the sidewalk before she fell, that does not, in and of itself, establish that the defect was not open and obvious. Initially, we reject plaintiff's assertion that her deposition testimony that she would have seen the defect in the sidewalk if she had looked was too speculative to be admissible. Although "a lay witness should not be permitted to testify to a legal conclusion at issue," such a witness "can express an opinion on an issue in a cause if that opinion will assist the trier of fact." *Klingelhoets v. Charlton-Perrin*, 2013 IL App (1st) 112412, ¶ 44. As long as the witness's opinion is based upon "personal observation, is one that a person is generally capable of making, and is helpful to a clear understanding of an issue at hand, it may be permitted at trial." *Klingelhoets*, 2013 IL App (1st) 112412, ¶ 44. Further, pursuant to Illinois Rules of Evidence 701 (eff. Jan. 1, 2011) and 704 (eff. Jan.1, 2011), a lay witness may testify, in the form of an opinion, regarding an ultimate issue to be decided by the trier of fact. Here, plaintiff was asked if she would have seen the sidewalk defect had she been looking, and she gave her opinion, based upon her observations.

¶ 18 In the case at bar, plaintiff testified in her deposition that the weather was clear, nothing was covering the sidewalk, and she was wearing her glasses and was not distracted. Given this evidence, "a reasonable person in the plaintiff's position, exercising ordinary perception, intelligence, and judgment, would recognize both the condition and the risk involved" (see *Bezanis v. Fox Waterway Agency*, 2012 IL App (2d) 100948, ¶ 16).

¶ 19 *Ballog v. City of Chicago*, 2012 IL App (1st) 112429, is instructive. In that case, the plaintiff injured herself when she fell while crossing an intersection in Chicago. It was a sunny day, and the plaintiff was familiar with the area. She knew, for example, that construction had been done on the street even though there were no signs stating that construction was ongoing. As the plaintiff crossed the street, she did not observe an unfilled portion of the street that created a gap between the end of the street and the start of the sidewalk. The plaintiff testified that the gap was not covered by leaves or debris. A witness who was present when the plaintiff fell testified that she almost tripped over the same gap, that although the gap was visible she could not see it when approaching from the opposite side of the street, and that the gap created a height difference of no more than two inches. The defendant City of Chicago moved for summary judgment, arguing that the condition was open and obvious, and that it owed no duty of care to the plaintiff. Although the plaintiff responded that whether the gap created an open and obvious condition was an issue of material fact, the circuit court granted the motion.

¶ 20 On appeal, the court stated that because the parties did not dispute the physical nature of the condition, the issue of whether the condition was an open and obvious danger was a matter of law. *Ballog*, 2012 IL App (1st) 112429, ¶¶ 23, 30. It also found that photographs in the record clearly depicted the condition of the street and the physical nature of the condition, therefore, any dispute as to the physical nature of the condition would not be objectively reasonable. *Ballog*, 2012 IL App (1st) 112429, ¶ 30.

¶ 21 Similarly, in the case at bar, the record contains a photograph depicting the condition of the sidewalk where plaintiff fell and injured herself. The defect is visible and, as plaintiff testified, she would have observed it had she looked. Additionally, plaintiff testified that it was a

clear morning, she was wearing her glasses, nothing covered the sidewalk, and she was looking ahead and not distracted. Ultimately, given the evidence in the record before us, we conclude that a reasonable person in plaintiff's position, exercising ordinary perception and judgment, would recognize both the condition and the risk involved (*Bezanis*, 2012 IL App (2d) 100948, ¶ 16), and that therefore the condition was open and obvious (*Ballog*, 2012 IL App (1st) 112429, ¶ 22).

¶ 22 Plaintiff argues that even if the sidewalk defect was open and obvious, defendant still owed her a duty of care because she was distracted by the surroundings of a "foreign" city and conversation with her husband. Defendant disagrees, arguing that the distraction exception does not apply because plaintiff testified she was not distracted and that she would have observed the condition of the sidewalk if she had been looking. It is the plaintiff's own testimony here that seals her fate.

¶ 23 Pursuant to the "distraction" exception to the open-and-obvious rule, a possessor of land will owe a duty to a plaintiff to protect against an obvious condition "where the possessor 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 has discovered, or fail to protect himself against it." Restatement (Second) of Torts § 343A(1) cmt. f, at 220. Our supreme court has instructed that the distraction exception only applies when there is evidence from which a court can infer that the plaintiff was actually distracted. See *Bruns*, 2014 IL 116998, ¶ 22 ("the mere fact of looking elsewhere does not constitute a distraction").

¶ 24 Here, the only "distractions" identified by plaintiff were that she was talking to her husband, looking around, and not looking at the uneven structure of the sidewalk. Our supreme court has rejected the argument that looking somewhere else constitutes a distraction. See *Bruns*,

2014 IL 116998, ¶ 31 ("To the extent that looking elsewhere could, itself, be deemed a distraction, then it is, at most, a self-made distraction.") Talking to her husband, similarly, was a self-created distraction. See *Bruns*, 2014 IL 116998, ¶ 31 (" 'In order for the distraction to be foreseeable to the defendant so that the defendant can take reasonable steps to prevent injuries to invitees, the distraction should not be solely within the plaintiff's own creation.' ") (quoting *Whittleman v. Olin Corp.*, 358 Ill. App. 3d 813, 817-18 (2005)).

¶ 25 We are unpersuaded by the cases plaintiff cites as support for her argument that the distraction exception applies because in all of those cases the defendants created the distraction. See, *e.g., Ward v. K Mart Corp.*, 136 Ill. 2d 132, 153-54 (1990) (the plaintiff was distracted by carrying merchandise out of the defendant's store and walked into a post located just outside the store's exit); *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 46 (2003) (the plaintiff was distracted, because of the job he was instructed to do, from observing a hole in the parking lot); *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14, 29 (1992) (the defendant could foresee that a painter's concern for his own safety as he stepped on a billboard walkway would distract him from the overhead power line); *Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430, 438-39 (1990) (an electrician was distracted from a tire rut because he had to protect himself by looking for construction debris being thrown off a balcony); *Green v. Jewel Food Stores, Inc.*, 343 Ill. App. 3d 830, 834-35 (2003) (a customer was distracted from irregular pavement in a parking lot by a rolling, unattended shopping cart).

¶ 26 In the case at bar, plaintiff has failed to identify any circumstance, much less a circumstance that was reasonably foreseeable by defendant, which required her to divert her attention from the open and obvious sidewalk defect. See Restatement (Second) of Torts § 343A

cmt. e, illus. 1, at 220 (no liability would lie for a customer's injury from an open and obvious plate glass door where the customer was "preoccupied with his own thoughts"). Plaintiff was not looking around to avoid another potential hazard (see, *e.g.*, *Deibert*, 141 Ill. 2d at 438-39), nor did she fail to avoid the sidewalk defect because some other task required her attention (see, *e.g.*, *Rexroad*, 207 Ill. 2d at 46). Since there is no evidence of an actual distraction, we disagree with plaintiff that it was objectively reasonable for defendant "to expect that a pedestrian, generally exercising reasonable care for her own safety, would look elsewhere and fail to avoid the risk of injury from an open and obvious sidewalk defect." See *Bruns*, 2014 IL 116998, ¶ 34.

¶ 27 Additionally, the aldermanic letters are irrelevant to our analysis to determine whether the city had a duty to plaintiff. Whether a condition is open and obvious depends on the objective knowledge of a reasonable person, rather than a person's subjective knowledge. See *Ballog*, 2012 IL App (1st) 112429, ¶ 22.

¶ 28 Since we find that the defect in the sidewalk was open and obvious and that there was no distraction exception, the first two factors in the duty analysis weigh in favor of defendant. See *Bruns*, 2014 IL 116998, ¶ 19 ("Where the condition is open and obvious, the foreseeability of harm and the likelihood of injury will be slight, thus weighing against the imposition of a duty."); *Sollami v. Eaton*, 201 Ill. 2d 1, 17 (2002) ("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"). The remaining two factors, the magnitude of the burden that guarding against injury places on a defendant and the consequences of placing that burden on a defendant by themselves, do not favor the imposition of a duty on defendant in this case.

¶ 29 In *Bruns*, our supreme court concluded that even assuming that the financial burden of repairing a sidewalk or otherwise protecting pedestrians from a sidewalk defect was not great, the consequences of imposing such a burden would extend "well beyond" any one specific sidewalk defect. *Brun*s, 2014 IL 116998, ¶ 37. The court explained that because the defendant city had countless miles of sidewalk to maintain, the imposition of such a burden was not justified given the open and obvious nature of the risk involved. *Brun*s, 2014 IL 116998, ¶ 37. Therefore, the defendant had no duty to protect the plaintiff from the open and obvious sidewalk defect. *Brun*s, 2014 IL 116998, ¶ 37.

¶ 30 Based on the foregoing, we similarly conclude that defendant owed no duty to plaintiff in the case at bar. See *Brun*s, 2014 IL 116998, ¶ 37 ("the City had no duty to protect plaintiff from the open and obvious sidewalk defect"). Accordingly, absent a showing from which a court could have inferred the existence of a duty, no recovery by plaintiff was possible as a matter of law and the court properly granted summary judgment in favor of defendant. See *Vesty*, 145 Ill. 2d at 411.

¶ 31 For the reasons stated, we affirm summary judgment in favor of defendant.

¶ 32 Affirmed.