2015 IL App (2d) 140663-U
No. 2-14-0663
Order filed March 20, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JASON WHITTINGHILL, Plaintiff-Appellant, v. STARBUCKS CORPORATION, d/b/a Starbucks Coffee Company, STARBUCKS PROPERTY MANAGEMENT, MUNDELEIN 83, LLC, MUNDELEIN 83, II, LLC, and MUNDELEIN 83, III, LLC, Defendants-Appellees.	)	Appeal from the Circuit Court of Lake County. No. 13-L-236 Honorable Thomas M. Schippers, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Jorgensen and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted defendants summary judgment on plaintiff's negligence claim: the dangerous condition was objectively open and obvious (despite plaintiff's failure to see it), and the distraction exception did not apply to plaintiff's self-created distraction (talking on a cell phone).

¶ 2 Plaintiff, Jason Whittinghill, sued defendants, Starbucks Corporation, d/b/a Starbucks Coffee Company, Starbucks Property Management (collectively Starbucks), Mundelein 83, LLC, Mundelein 83 II, LLC, and Mundelein 83, III, LLC (collectively Mundelein), for damages

sustained when he stepped on "debris" located on a sidewalk outside of a store, which was owned by Starbucks and located on property in which Mundelien had an interest. The trial court granted defendants' motions for summary judgment, and plaintiff timely appealed. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff testified at his deposition that, on April 10, 2011, at about 10 a.m., he arrived at a store owned by Starbucks and entered through a side door. After spending about four to six hours studying in the store, plaintiff went outside to talk on his phone, exiting though the front door. It was a sunny, 70-degree day. After pacing for about 10 minutes, he stepped on "debris," and a "twig or much" punctured his gym shoe, his sock, and his left foot. It was not the only piece of twig or mulch on the sidewalk. The debris covered the entire width of the sidewalk. According to plaintiff, the debris came from a landscaped area adjacent to the sidewalk and was probably there due to a strong storm on the night before. He stated: "It looked like tree, mulch, leaf, grass, so essentially whatever makeup of the direct vicinity, so there's a pine tree, a bush and mulch, so it would have been exactly that." He stated that there was "[q]uite a bit" of debris. Plaintiff did not see the debris prior to stepping on it, because he was talking on his phone and not paying attention. The piece of "twig or mulch" that he stepped on was about a half-centimeter in diameter and about two inches long. The stick went all the way into his foot. Plaintiff "[l]ikely" told one of the doctors that it was a tree branch that he had stepped on. When plaintiff told the store supervisor, David Boyd, what had happened, plaintiff heard Boyd tell another employee that he had told him to clear that area.

¶ 5 Plaintiff sued defendants for negligence, alleging that defendants had a duty to keep the premises "in a reasonably safe condition for ordinary use, and to eliminate dangers and defects in

that area, including unsafe conditions created by garbage, debris, mulch, branches, and other items, which would pose harm to pedestrians."

¶ 6 Starbucks moved for summary judgment, arguing that it owed no duty to plaintiff. Starbucks argued: (1) under its lease agreement with Mundelein, it had no duty to maintain the sidewalk; (2) the presence of the twig or mulch did not create a hazardous condition; (3) there was no evidence that Starbucks had actual or constructive knowledge of the debris; and (4) the debris was open and obvious.

¶ 7 Mundelein also moved for summary judgment. Mundelein adopted Starbucks' motion, with the exception of Starbucks' argument as to the lease agreement, arguing instead that the lease agreement relieved Mundelein of any duty to plaintiff.

¶ 8 The trial court granted summary judgment for defendants "for the reasons stated in open court."[1] Plaintiff timely appealed.

¶ 9 II. ANALYSIS

¶ 10 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 2012). However, it is a drastic means of resolving litigation and should be allowed only when the right of the moving party to judgment is clear and free from doubt. *Adams v. Northern*

[1]The record does not contain a transcript of the summary-judgment hearing. The record does contain three bystander's reports filed by the parties, purporting to set forth what took place at the hearing. However, the trial court did not certify the reports, "based on the appeal being heard *de novo*." As the reports are not certified, they are not properly part of the record on appeal, and we will not consider them. See Ill. S. Ct. R. 323(c) (eff. Dec.13, 2005).

Illinois Gas Co., 211 Ill. 2d 32, 43 (2004). This court reviews *de novo* an order granting summary judgment. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 11 To prevail in a negligence action, the plaintiff must prove that the defendant owed a duty to him, that the defendant breached that duty, and that the plaintiff's injury proximately resulted from that breach. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. A legal duty is a prerequisite to liability, and therefore, where there is no legal duty, there can be no liability. *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 447 (1996). Whether a duty exists is a question of law. *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280 (2007). At issue here is whether defendants owed a duty to plaintiff.

¶ 12 The supreme court's decision in *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, sets forth the legal principles that guide our analysis. We restate those principles here:

> " '[T]he touchstone of this court's duty analysis is to ask whether a plaintiff and a defendant stood in such a *relationship* to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff.' (Emphasis added.) [Citations.] The 'relationship' referred to in this context acts as a shorthand description for the sum of 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. [Citations.] The determination of such a 'relationship,' as sufficient to establish a duty of care, requires considerations of policy inherent in the consideration of these four factors and the weight accorded each of these factors in any given analysis depends on the circumstances of the case at hand. [Citation.]" *Id.* ¶ 18.

¶ 13 Also relevant to our duty analysis are the rules set forth in sections 343(a) and 343A of the Restatement (Second) of Torts, and adopted in Illinois, regarding the duty of possessors of land to their invitees. See *Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430, 434-36 (1990). Under section 343(a), a possessor of land owes its invitees a duty of reasonable care to maintain the premises in a reasonably safe condition. Restatement (Second) of Torts § 343(a), at 215 (1965); see *Ward v. K mart Corp.*, 136 Ill. 2d 132, 141 (1990). However, section 343A provides that a possessor of land generally cannot be liable for an invitee's injury if the condition on the land that caused the injury was known or obvious to the invitee. Restatement (Second) of Torts §343A(1), at 218 (1965). The rule espoused in section 343A has become known as the "open and obvious rule." *Ward*, 136 Ill. 2d at 147; *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 88 (2004). "Application of the open and obvious rule affects the first two factors of the duty analysis: the foreseeability of injury, and the likelihood of injury. [Citation.] 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. [Citation.]" *Bruns*, 2014 IL 116998, ¶ 19. "Where there is no dispute about 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.

¶ 14 Here, there is no genuine issue of fact concerning the open-and-obvious nature of the condition. Although plaintiff testified that he did not see the debris before he stepped on it, this does not, standing alone, establish that the debris was not open and obvious. " '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). Plaintiff testified that

it was a sunny, 70-degree day. He stated that there was "[q]uite a bit" of debris and that the debris covered the entire width of the sidewalk. Given this evidence, we find that "a reasonable person in the plaintiff's position, exercising ordinary perception, intelligence, and judgment, would recognize both the condition and the risk involved" (*Bezanis v. Fox Waterway Agency*, 2012 IL App (2d) 100948, ¶ 16) and that therefore the condition was open and obvious.

¶ 15 Nevertheless, as plaintiff argues, even if the condition on the land was obvious to the invitee, a possessor of land can be liable if the possessor should have anticipated the harm. Restatement (Second) of Torts § 343A(1), at 218 (1965); see *Belluomini v. Stratford Green Condominium Ass'n*, 346 Ill. App. 3d 687, 691 (2004). For instance, under 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 (1965); see *Ward*, 136 Ill. 2d at 156.

¶ 16 Plaintiff argues that the distraction exception applies, because, when he was injured, he was using a cell phone, which is inherently distracting. In support, plaintiff relies on *Rexroad v. City of Springfield*, 207 Ill. 2d 33 (2003). In *Rexroad*, a high-school student was injured when he fell in an area under excavation in a parking lot located adjacent to a high-school football field. *Id.* at 36. At the time of the injury, the student was returning to the football field after getting a helmet from the locker room for one of the players. *Id*. at 37. He was distracted, because he was "focusing his attention on the player who needed the helmet." *Id*. The supreme court held that it was reasonably foreseeable that students might fail to avoid the risk posed by the hole by becoming distracted or momentarily forgetful. *Id*. at 46.

¶ 17 We find *Rexroad* distinguishable because here, unlike in *Rexroad*, plaintiff's act of talking on his phone was nothing more than a self-created distraction. In *Bruns*, our supreme court stated:

> " 'A plaintiff should not be allowed to recover for self-created distractions that a defendant could never reasonably foresee. 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. The law cannot require a possessor of land to anticipate and protect against a situation that will only occur in the distracted mind of his invitee.' " *Bruns*, 2014 IL 116998, ¶ 31 (quoting *Whittleman v. Olin Corp.*, 358 Ill. App. 3d 813, 817-18 (2005)).

In discussing *Rexroad*, the *Bruns* court emphasized that, in that case, "the plaintiff was distracted by the task he was directed to perform—retrieving a helmet." *Id*. ¶ 28. Here, as noted, plaintiff's act of talking on his phone was nothing more than a self-created distraction. See also *Wilfong v. L.J. Dodd Construction*, 401 Ill. App. 3d 1044, 1055 (2010) (finding that "to any extent that talking on the cell phone was a distraction to crossing the ruts, plaintiff created that distraction by answering the phone and continuing to walk across the site while talking"). Accordingly, we find that the distraction exception to the open-and-obvious rule does not apply.

¶ 18 Because we find that the debris on the sidewalk was open and obvious and that the distraction exception does not apply, the first two factors in the duty analysis weigh in favor of defendants. 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) ("[T]he 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.").

¶ 19 We also find that the last two factors—the magnitude of the burden that guarding against injury places on the defendants and the consequences of placing that burden on the defendants—do not favor imposing a duty on defendants. Here, even assuming *arguendo* that the magnitude of the burden and the consequences of placing that burden on defendants are slight, placing such a burden on defendants is unjustified given the open-and-obvious nature of the debris. 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).

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

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, we affirm summary judgment in favor of defendants.

¶ 23 Affirmed.