NOTICE
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2016 IL App (5th) 150129-U

NO. 5-15-0129

NOTICE
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IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JANICE JUDD and JIM JUDD, Plaintiffs-Appellants, v. PANERA, LLC, and STOLTZ MANAGEMENT OF DELAWARE, INC., Defendants-Appellees, v. UNIVERSITY MALL ASSOCIATES, LLC, and PARIC CORPORATION, Third-Party Defendants and Third-Party Plaintiffs-Appellees, v. BERRY CONCRETE CONSTRUCTION, INC., TIMOTHY BERRY, and P&K BUSINESS CORPORATION, Third-Party Defendants-Appellees.	)	Appeal from the Circuit Court of Jackson County. No. 08-L-152 Honorable Mark H. Clarke, Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Schwarm and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held*: Where the plaintiffs present no genuine issue of material fact on the issue of liability, the trial court's order granting the defendants' motion for summary judgment is correct.

¶ 2 Janice Judd and her husband, Jim Judd, appeal from an order granting summary judgment to Panera, LLC, and Stoltz Management of Delaware, Inc. This case stems from a slip and fall at the entrance to a Panera restaurant located in Carbondale, Illinois. In granting the defendants' motion, the trial court found that all causal possibilities for Judd's slip and fall were open and obvious, and therefore the defendants were not required to protect Judd from defects. Additionally, the court concluded that Judd was not distracted and therefore the distraction exception to the open and obvious rule did not apply.

¶ 3 FACTUAL BACKGROUND

¶ 4 Judd testified that she went to this particular Carbondale Panera's restaurant every workday morning for approximately two years before the day she fell. She routinely parked in the same area of the parking lot and took the same path across the parking lot. Judd testified that on December 15, 2006, she arrived at the Panera after sunrise and parked her car. Judd testified that she ensured that her car doors were locked, looked for traffic in and around the building, saw construction workers in the area, and crossed the parking lot towards the entrance. The weather was clear that morning, and the area was well-lit. She testified that she had an unobstructed view of where she was headed and that nothing blocked her view as she was walking. There were no other people on the parking lot, and Judd testified that she had a clear path to the entrance. She testified that

as she approached the Americans with Disabilities Act (ADA) ramp at the entrance to the restaurant, she remained focused on where she was going. In a deposition, Judd was asked: "As you were approaching the curb there, were you distracted by anything in any way?" Judd answered, "no."

¶ 5 Judd also testified that she was familiar with the ADA ramp at the entrance and explained that she would walk up the ramp to get to the restaurant door. In approaching the ramp, Judd explained that she could clearly see the difference in color between the pavement and the ramp, and that there was a slight elevation difference between the parking lot and the ramp that required a step up in order to transition between the two. She testified that on December 15, 2006, she noticed and appreciated the difference in height and color between the parking lot asphalt pavement and the concrete entrance ramp. Judd additionally testified that there were no foreign substances on the ramp on that date.

¶ 6 Judd next testified about the mechanics of her fall. She testified that she stubbed her toe on something, then took a step with the opposite foot, and then stubbed the same toe a second time. She was then propelled forward and fell approximately 15 feet before striking the door of the restaurant.

¶ 7 Judd testified that immediately after the fall, she had no idea why she fell other than the fact that she stubbed her toe. Several weeks later, she returned to the scene of the accident to review the area. She discovered a hole in the parking lot pavement at the juncture of the pavement and the ADA ramp. Judd then determined that this hole must have caused her fall. At her July 2010 deposition, she testified that earlier that day she

and her attorney went to the Panera restaurant and measured the depth of the hole. Based on the measurements she and her attorney took in July 2010, she testified that the hole was approximately three quarters of one inch deep. She conceded that the slightly elevated area of the curb (the transition between the parking lot and the curb edge of the entrance ramp) is very close to the hole. She testified that she was not certain that the cause of her fall was the hole rather than the curb edge. She also testified that the hole was clearly noticeable when she went back to the scene, although she commented that the hole was dark in color and the pavement was black, and so they were essentially the same color.

¶ 8 Carbondale's building inspector, John Lenzini, testified that the ADA ramp at the Panera restaurant was installed a few months before Judd's fall. Lenzini testified that he inspected the ramp on October 30, 2006, and found no tripping hazard. He explained that if there had been a tripping hazard, it was Carbondale's policy and practice to note the hazard and to mandate its correction. In general, he testified that it was Carbondale's policy and practice to bar the public from using an unsafe ADA ramp or its surrounding area. Lenzini additionally testified that he noted on his inspection report that the ADA ramp and its tactile warnings (circular "bumps" on the bottom of the ADA ramp) looked "good."

¶ 9 In support of her theory, Judd hired a safety expert, Chris Janson, who offered opinion testimony. Janson concluded that the area of the fall was hazardous because there was an unmarked elevation change between the parking lot pavement and the base edge of the ADA ramp (the hole). He testified that his interpretation of the photographs

taken of this ADA ramp is that there is a gap or a depression between the end of the ramp and the asphalt pavement. The gap extended the full width of the base of the ADA ramp where the concrete ramp met the asphalt pavement. The gap was not of uniform depth. Janson testified that the gap was at times approximately one-quarter of one inch in depth, and at the location where Judd claims she stubbed her toe, as much as fifteen-sixteenths of one inch in depth. He based his depth estimates solely on the photographs and his own experience as an expert witness. He further testified that these elevation changes between the base of the ADA ramp and the asphalt pavement failed to comply with codes and standards and that it was feasible for the defendants to have eliminated the elevation difference or otherwise have warned of the hazard. In Janson's opinion, Judd fell as a direct result of the hazardous change in elevation in what was an expected pedestrian walkway.

¶ 10 PROCEDURAL BACKGROUND

¶ 11 Janice and Jim Judd filed suit against Panera, LLC, and Stoltz Management of Delaware, Inc., on December 12, 2008, seeking damages for the defendants' alleged negligence. Panera owned and operated the restaurant at issue, while Stoltz was the property manager for the Panera restaurant. Janice sought recovery for injuries and damages she sustained in a fall outside Panera's entrance. Her husband, Jim, sued for loss of consortium. Judd alleged that she "fell over a raised and uneven portion of the sidewalk at the entryway of the doorway." She claimed that Panera and Stoltz owed a duty to exercise ordinary reasonable care and diligence in operating and maintaining the facility in order to ensure customer safety. She contended that both defendants breached

their duties by failing to properly operate and manage the site, failed to warn patrons, permitted the sidewalk in front of the entrance to be uneven, and created the uneven and raised area of the sidewalk. Subsequently, Panera and Stoltz filed third-party complaints against other entities, who constructed the ADA ramp at the restaurant entrance.

¶ 12 All of the defendants and third-party defendants filed a joint motion for summary judgment on September 9, 2013. The trial court initially denied the motion, relying on this court's opinion that in certain circumstances, a person can be distracted simply by looking forward. See *Bruns v. City of Centralia*, 2013 IL App (5th) 130094, 996 N.E.2d 321. Subsequent to the trial court's decision, the supreme court reversed this appellate court's *Bruns* opinion concluding that the distraction exception did not apply factually. *Bruns v. City of Centralia*, 2014 IL 116998, 21 N.E.3d 684. Following the supreme court's reversal in *Bruns*, the trial court reconsidered and granted the defendants' joint motion for summary judgment. Citing to *Bruns*, the court found that the distraction theory did not apply to these facts. Additionally, the court analyzed the duty the defendants owed to Judd under these circumstances finding that the defendants were not required to foresee an injury because the defect was open and obvious; the likelihood of the injury did not weigh in Judd's favor because a person would appreciate the obvious condition and avoid the risk; and the burden to defendants was not justified because the risk involved was open and obvious.

¶ 13 The Judds appeal from the trial court's order entering judgment in favor of the defendants.

¶ 14 LAW AND ANALYSIS

¶ 15 Section 2-1005(c) of the Code of Civil Procedure states that a party is entitled to summary judgment as a matter of law when "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." 735 ILCS 5/2-1005(c) (West 2012); see also *Sollami v. Eaton*, 201 Ill. 2d 1, 6, 772 N.E.2d 215, 218 (2002); *Myers v. Health Specialists, S.C.*, 225 Ill. App. 3d 68, 72, 587 N.E.2d 494, 497 (1992). The purpose of summary judgment is to determine if a question of fact exists. *Kleiber v. Freeport Farm & Fleet, Inc.*, 406 Ill. App. 3d 249, 255, 942 N.E.2d 640, 646 (2010); *Koziol v. Hayden*, 309 Ill. App. 3d 472, 476, 723_N.E.2d 321, 323 (1999). "Summary judgment is a drastic remedy that should be granted only where the movant's right to it is clear and free of doubt." *Hutchcraft v. Independent Mechanical Industries, Inc.*, 312 Ill. App. 3d 351, 357, 726 N.E.2d 1171, 1176 (2000); see also *Harris v. Old Kent Bank*, 315 Ill. App. 3d 894, 899, 735 N.E.2d 758, 762 (2000). In determining whether to grant or deny a motion for summary judgment, the trial court strictly construes all evidence in the record against the moving party and liberally in favor of the opposing party. *Purtill v. Hess*, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986); *Koziol*, 309 Ill. App. 3d at 476, 723 N.E.2d at 323. If a material fact remains in dispute or reasonable people could reach contrary inferences from the undisputed material facts, then the trial court should deny the motion. *Koziol*, 309 Ill. App. 3d at 476, 723 N.E.2d at 323. To survive a summary judgment motion, the plaintiff does not have to prove her case, but "she must present a factual basis that would arguably entitle her to a judgment." *Bruns*, 2014 IL 116998, ¶ 12, 21 N.E.3d 684. Our review of a trial court's summary

judgment order is *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102, 607 N.E.2d 1204, 1209 (1992); *Myers*, 225 Ill. App. 3d at 72, 587 N.E.2d at 497.

¶ 16 On appeal, the Judds argue that there are unresolved questions of fact about whether the defect was open and obvious and about whether Judd was distracted.

¶ 17 The elements of a cause of action for negligence are the existence of a duty, breach of that duty, an injury that was proximately caused by the breach of duty, and damages. *Ward v. K mart Corp.*, 136 Ill. 2d 132, 140, 554 N.E.2d 223, 226 (1990). Whether a defendant owes a plaintiff a duty of due care is a legal question. *Id.* There are four factors that the court must consider in determining whether a defendant owes a duty of due care: (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. *Bruns*, 2014 IL 116998, ¶ 14, 21 N.E.3d 684 (citing *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 18, 965 N.E.2d 1092, and *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 389, 706 N.E.2d 441, 446 (1998)). The weight given to each factor depends upon the individual circumstances of the case. *Id.* (citing *Simpkins*, 2012 IL 110662, ¶ 18, 965 N.E.2d 1092).

¶ 18 Generally, a party that owns, controls, or maintains property must maintain the premises in a reasonably safe condition. *Ward*, 136 Ill. 2d at 141, 554 N.E.2d at 227. Furthermore, if there is a dangerous condition on the property, the party must either remove or correct the condition, or must warn invitees of the danger. *Id.* at 141-42, 554 N.E.2d at 227. However, a property owner does not need to protect invitees from a

danger that is considered to be open and obvious. *Id.* at 142, 554 N.E.2d at 227; *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 44, 796 N.E.2d 1040, 1046 (2003); see also Restatement (Second) of Torts § 343A, at 218 (1965). The term "obvious" is defined in the Restatement as "both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment." Restatement (Second) of Torts § 343A, cmt. b, at 219 (1965). Whether a dangerous condition is open and obvious presents a legal question when there is no dispute as to the physical nature of the condition. *Bruns*, 2014 IL 116998, ¶ 18, 21 N.E.3d 684. Here, the trial court concluded that the defect in question–the hole between the parking lot pavement and the concrete ADA ramp and/or the height difference–was open and obvious. Judd disagrees with that assessment.

¶ 19 In this case, there is no proof that the hole is what caused Judd's fall. She admits that fact. However, for purposes of this analysis, we will assume that the hole between the pavement and the ramp was the causal factor in her fall. Judd was aware of the slight height difference between the curb edge of the end of the ramp and the parking lot pavement. She was also aware of the gap or hole at the juncture of the edge of the ramp and the parking lot pavement. In other cases, sidewalk and parking lot defects have been determined to be open and obvious. *Rexroad*, 207 Ill. 2d at 36, 46, 796 N.E.2d at 1041-42, 1047 (large hole in a parking lot next to a football field); *Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430, 433, 438, 566 N.E.2d 239, 240, 243 (1990) (heavy equipment tire rut on a construction site); *Sandoval v. City of Chicago*, 357 Ill. App. 3d 1023, 1029, 830 N.E.2d 722, 728 (2005) (sidewalk section missing most of its concrete

surface with exposed dirt). We have reviewed the record, which includes a description and photocopies of photographs of this hole. Although this defect was not large, we agree with the trial court's assessment that the hole was open and obvious. Judd's testimony supports this conclusion, as she saw the hole as she walked towards Panera's entrance. We find that the general rule applies and that defendants were not required to warn Judd of any risk posed by this hole or the slight height difference between the curb edge at the end of the ramp and the parking lot pavement.

¶ 20 We next turn to Judd's claim that she was distracted, and that this exception should apply to override the open and obvious nature of the defect. The distraction exception applies in situations where the owner of land 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.' " *Sollami*, 201 Ill. 2d at 15, 772 N.E.2d at 223 (quoting Restatement (Second) of Torts § 343A, cmt. f, at 220 (1965)). We find that the case of *Bruns v. City of Centralia* is factually similar and directly on point.

¶ 21 In *Bruns v. City of Centralia*, an eye clinic's patient stubbed her toe on a raised crack on a city-maintained sidewalk, causing her to fall. *Bruns*, 2014 IL 116998, ¶ 4, 21 N.E.3d 684. At the time of her fall, Bruns was not looking down at her feet, but was looking forward to the clinic's steps and door. *Id.* Bruns testified that she had seen the crack on prior visits and was certain that she saw it on the day of her fall. *Id.* Bruns sued the city, alleging negligence. *Id.* The city filed its motion for summary judgment arguing that the sidewalk defect was open and obvious, and that it was therefore not required to

foresee and protect against injuries resulting from the defect. *Id.* In answer to the motion, Bruns argued that she was distracted because she was looking at the clinic door, and that it was reasonable for the city to foresee that a person could become distracted in this manner. *Id.* ¶ 7. In granting summary judgment, the trial court concluded that the defect was open and obvious and that the distraction theory was inapplicable. *Id.* ¶ 8.

¶ 22 This appellate court reversed and remanded concluding that it was "reasonable to foresee that an elderly patron of an eye clinic might have his or her attention focused on the pathway forward to the door and steps of the clinic as opposed to the path immediately underfoot." *Bruns v. City of Centralia*, 2013 IL App (5th) 130094, ¶ 12, 996 N.E.2d 321. Our appellate court found that while the city of Centralia had a duty to fix the sidewalk within a reasonable time, the question of whether the city breached that duty was a question of fact for the jury. *Id.* ¶ 13.

¶ 23 The supreme court reversed stating that the distraction theory only applies when there is evidence from which the court can infer that the plaintiff was actually distracted, and that the "mere fact of looking elsewhere does not constitute a distraction." *Bruns*, 2014 IL 116998, ¶ 22, 21 N.E.3d 684. The court explained that in other cases where the court found that the plaintiff was distracted, "some circumstance was present that required the plaintiff to divert his or her attention from the open and obvious danger, or otherwise prevented him or her from avoiding the risk." *Id.* ¶ 28. Additionally, in these other cases, the distraction was reasonably foreseeable by the defendant. *Id.* ¶ 29; see *Ward*, 136 Ill. 2d at 153-54, 554 N.E.2d at 232-33 (Kmart sold the plaintiff bulky merchandise that obscured his view and prevented him from walking into a five-foot

concrete post outside the entrance of the store); *Deibert*, 141 Ill. 2d at 439-40, 566 N.E.2d at 243-44 (plaintiff fell in a heavy equipment tire rut when exiting a bathroom because he was looking upward to ensure that workers were not throwing debris down from a balcony as the workers had historically done on this project); *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14, 28-29, 594 N.E.2d 313, 320 (1992) (billboard painter who came into contact with a high-voltage power line hanging above a walkrail that ran the length of the billboard was distracted by having to carefully watch where to place his feet on the walkrail); *Rexroad*, 207 Ill. 2d at 46, 796 N.E.2d at 1047 (student manager of a football team instructed by a coach to retrieve a helmet in the locker room, and forced to return using a different path because the original access gate was locked, was focused on returning the helmet to the coach and was distracted from a large hole in this alternate path to the field).

¶ 24 The supreme court contrasted the *Bruns* case from the four cited distraction cases, stating that the plaintiff in *Bruns* was unable to identify any actual reason that distracted her from the open and obvious sidewalk crack. *Bruns*, 2014 IL 116998, ¶ 30, 21 N.E.3d 684. The only circumstance Bruns cited was that she was looking forward to the steps and the door of the clinic. *Id.* The court explained that the issue would not be *whether* Bruns was looking elsewhere when she fell, but *why* she would be looking elsewhere. *Id.* Bruns was not focusing on the steps and door of the clinic in order to avoid another hazard or another potential hazard as the plaintiffs did in *Deibert* and *American National Bank*. *Id.* Furthermore, Bruns did not fail to avoid the sidewalk crack because there was another task that required her attention, as the plaintiffs had in *Ward* and in *Rexroad*. The

court stated that if looking elsewhere, by itself, could be construed as a distraction, at most then it would be a self-made distraction. *Id.* ¶ 31; see also *Whittleman v. Olin Corp.*, 358 Ill. App. 3d 813, 817-18 832 N.E.2d 932, 936 (2005). Furthermore, the court noted that the position advanced by Bruns was contrary to the "essence" of the open and obvious rule in that the risk was obvious and known and therefore the defendant should not reasonably be expected to anticipate that people will not protect themselves from the obvious and known danger. *Bruns*, 2014 IL 116998, ¶ 34, 21 N.E.3d 684 (quoting *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 448, 665 N.E.2d 826, 832 (1996), quoting *Ward*, 136 Ill. 2d at 148, 554 N.E.2d at 230). Finally, the court concluded that if it ruled as Bruns requested–"that simply looking elsewhere constitutes a legal distraction, then the open and obvious rule would be upended and the distraction exception would swallow the rule." *Id.* ¶ 33.

¶ 25 We find that this case is analogous to the facts of *Bruns v. City of Centralia*. We know that Judd fell, but just like the plaintiff in *Bruns*, she cannot identify any actual circumstance which diverted her attention from the open and obvious sidewalk hole. Judd testified that she checked for traffic before she crossed the parking lot. There were no weather or lighting issues. Her view of the Panera entrance was unobstructed. There were no other people in the parking lot or the entrance area. Judd testified that she was aware of the slight elevation difference between the parking lot and the entrance area; she was familiar with the ADA ramp; she was able to see the hole at issue; and she kept her attention focused on the entrance. Judd was not distracted by her involvement in another task connected to the defendants as the plaintiffs did in *Ward* and in *Rexroad*.

Furthermore, Judd was not focusing on the entrance in order to avoid another hazard as the plaintiff did in *Deibert* and the decedent did in *American National Bank*. Consequently, Judd's failure to avoid the sidewalk hole could not have been reasonably foreseeable by the defendants. Alternatively, Judd argues on appeal that she was distracted by looking for traffic and ongoing construction. However, her own testimony refutes these arguments.

¶ 26 We hold that the distraction exception to the open and obvious rule does not apply in this case. However, application of the open and obvious doctrine does not end the inquiry as to whether the premises owner or occupier owes a duty of due care. *Sollami*, 201 Ill. 2d at 17, 772 N.E.2d at 224. Accordingly, we must consider the four factors referenced earlier in this order: "(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." *Id.*

¶ 27 The first two factors carry little weight in this case. When a condition is open and obvious, the defendant is not typically required to foresee injury. *Id.* (citing *Bucheleres*, 171 Ill. 2d at 457, 665 N.E.2d at 836). Additionally, if the condition is open and obvious, the reasonable likelihood of injury is very slight because the law presumes that people will appreciate and avoid the dangerous condition. *Id.* (citing *Bucheleres*, 171 Ill. 2d at 456, 665 N.E.2d at 836). We also conclude that the last two factors carry little weight. There is no record of the cost to repair the hole, but even if we assume that the burden to do so would be minimal, the burden to the defendants would be greater overall because

defendants would then be required to repair any similar hole on this property and any others they own or possess. Here, the hole found weeks after the fall was open and obvious, and any imposition upon the defendants to repair any and all such defects is, therefore, not justified in light of the risk involved. See *Bruns*, 2014 IL 116998, ¶ 37, 21 N.E.3d 684; *Sollami*, 201 Ill. 2d at 17-18, 772 N.E.2d at 224-25. Therefore, we conclude that the defendants do not owe Judd a legal duty.

¶ 28 CONCLUSION

¶ 29 For the reasons expressed in this order, we affirm the judgment of the circuit court of Jackson County.

¶ 30 Affirmed.