

No. 1-13-1391

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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**IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT**

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|----------------------------------|---|------------------|
| PATRICIA NINO,                   | ) | Appeal from the  |
|                                  | ) | Circuit Court of |
| Plaintiff-Appellant,             | ) | Cook County.     |
|                                  | ) |                  |
| v.                               | ) | No. 11 L 2933    |
|                                  | ) |                  |
| CITY OF CHICAGO, a Municipality, | ) | Honorable        |
|                                  | ) | Randy A. Kogan,  |
| Defendant-Appellee.              | ) | Judge Presiding. |

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PRESIDING JUSTICE HARRIS delivered the judgment of the court  
Justices Pierce and Liu concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Defendant owed plaintiff no duty of care where the dangerous condition was open and obvious, as clearly depicted in the photographs on file, and the distraction exception did not apply where plaintiff was distracted by the ordinary occurrence of a little boy playing across the street.
- ¶ 2 Plaintiff, Patricia Nino, appeals the order of the circuit court granting defendant City of Chicago's motion for summary judgment on her cause of action for negligence. On appeal, Nino contends the trial court erred in ruling (1) the issue of whether the condition of the sidewalk

presented an open and obvious danger was a matter of law; and (2) the distraction exception to the open and obvious doctrine did not apply. For the following reasons, we affirm.

¶ 3 JURISDICTION

¶ 4 The trial court granted defendant's motion to reconsider and granted summary judgment in its favor on April 2, 2013. Nino filed her notice of appeal on April 24, 2013. This court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 5 BACKGROUND

¶ 6 On August 10, 2010, around 10 a.m., Nino was taking her daily walk around her neighborhood. It was a beautiful, sunny day as she walked southbound on the west side of Orange Street. Nino did not always walk down Orange Street, but she had walked that path before. Eight months prior, the homeowner at 3454 N. Orange Street notified defendant about the condition of the sidewalk in front of the house. Nino did not recall whether she had noticed the uneven condition of the sidewalk in the past.

¶ 7 As Nino walked towards 3454 N. Orange Street, she noticed a little boy playing on the other side of the street. As she watched him she tripped and fell over the uneven pavement of the sidewalk, sustaining a fracture to her wrist. Nino did not notice any debris on the sidewalk where she fell. Photographs of the sidewalk reveal that three of the sidewalk squares in front of 3454 N. Orange Street were sunken and lower than the other sidewalk squares. The affected squares were clearly darker than the other squares, and the portion that was cracked created an uneven condition on the sidewalk that was visible as one approached the area.

¶ 8 In his deposition, city of Chicago civil engineer John Errera acknowledged that the condition of the sidewalk posed a tripping hazard "[f]or somebody who is not paying attention how they are walking [ ] if they're not watching where they're stepping." Errera stated that the cracked sidewalk was "not like a hidden trap to grab your heels, sort of visible. It stands out. You have time to see it as you're approaching it."

¶ 9 Defendant filed a motion for summary judgment which the trial court denied because "material issues of fact exist." Defendant filed a motion to reconsider, arguing that this court in *Ballog v. City of Chicago*, 2012 IL App (1st) 112429, ¶ 23, recently held that "[w]here there is no dispute about the physical nature of the condition, whether a danger is open and obvious is a question of law." Defendant contended that the parties did not dispute the condition of the sidewalk, which was open and obvious, and therefore the trial court should grant summary judgment in its favor. Upon reconsideration, the trial court granted defendant's motion, finding that no issue of fact existed as to whether the condition was open and obvious, and that a child playing across the street "is not a distraction that removes it from the open and obvious doctrine." Nino filed this timely appeal.

¶ 10 ANALYSIS

¶ 11 On appeal, Nino contends that the trial court erred in granting defendant's motion to reconsider, and then granting its motion for summary judgment. The "purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the court's previous application of existing law." *Pence v. Northwest Illinois Regional Commuter R.R. Corp.*, 398 Ill. App. 3d 13, 16 (2010). A motion to reconsider a grant of summary judgment questions the trial court's application of existing law and we review the court's ruling *de novo*. *Wilfong v. L.J. Dodd*

*Construction*, 401 Ill. App. 3d 1044, 1063 (2010). Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Buchaklian v. Lake County Family Young Men's Christian Ass'n*, 314 Ill. App. 3d 195, 199 (2000).

¶ 12 In a negligence action, the court must first determine whether defendant owed a duty to the plaintiff. *Choate v. Indiana Harbor Belt R.R. Co.*, 2012 IL 112948, ¶ 34. Absent a legal duty owed to the plaintiff, defendant cannot be found negligent. *Washington v. City of Chicago*, 188 Ill. 2d 235, 239 (1999). Regarding conditions on property, generally no duty of care exists where the dangerous condition is open and obvious because a property owner "could not reasonably be expected to anticipate that people will fail to protect themselves from any danger posed by the condition." *Ward v. Kmart Corp.*, 136 Ill. 2d 132, 140 (1990). "Obvious" means that "both the condition and the risk are apparent to and would be recognized by a reasonable [person], in the position of the visitor, exercising ordinary perception, intelligence, and judgment." *Deibert v. Bauer Brothers Construction Co., Inc.*, 141 Ill. 2d 430, 435 (1990). Therefore, whether a condition is obvious depends on the objective knowledge of a reasonable person, and not on the subjective knowledge of the plaintiff. *Prostran v. City of Chicago*, 348 Ill. App. 3d 81, 86 (2004). "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*, 2012 IL 112948, ¶ 34.

¶ 13 Here, the trial court initially denied defendant's motion for summary judgment, finding that material issues of fact existed. Defendant filed a motion to reconsider, arguing that where, as here, the parties did not dispute the physical nature of the condition of the sidewalk, the issue

of whether the condition is open and obvious is a matter of law properly disposed of by summary judgment. As support, defendant cited to *Ballog*. Since the motion to reconsider brought attention to the trial court's possible misapplication of existing law, the trial court properly granted the motion.

¶ 14 In *Ballog*, the plaintiff injured herself when she fell at the intersection of North Leavitt Street and West Belle Plaine Avenue in Chicago. On the day she fell, plaintiff was walking to church. It was a sunny August day, and she was familiar with the area. She knew that construction had been done on the street but there were no signs stating that construction was ongoing. As she crossed the street at the intersection, she did not see the unfilled portion of the street that created a gap between the end of the surface of the street and the start of the sidewalk. Plaintiff stated that the gap was not covered by leaves or debris. Karin Meyers, who was at the scene when plaintiff fell, testified that she almost tripped over the same gap. She testified that she could not see the gap when approaching from the opposite side of the street, but acknowledged that in a photograph of the intersection the gap is visible. Meyers estimated that the gap created a height difference of no more than two inches. *Ballog*, 2012 IL App (1st) 112429, ¶¶ 3-8.

¶ 15 Defendant City of Chicago moved for summary judgment, arguing that the condition was open and obvious, and thus defendant owed no duty of care to plaintiff. Plaintiff responded that the issue of whether the gap created an open and obvious condition was an issue of material fact. *Id.* at ¶ 9. The court in *Ballog* found that the parties did not dispute the physical nature of the condition, and therefore the issue of whether the condition is an open and obvious danger was a matter of law. *Id.* at ¶ 29. It also found that the photographs clearly depicted the condition of the street and showed the physical nature of the condition. Therefore, any dispute over the

physical nature of the condition would not be objectively reasonable. *Id.* at ¶ 30. Furthermore, plaintiff encountered the same condition when she began crossing the street, indicating that she was able to cross safely over the gap. This court concluded that "had the plaintiff exercised ordinary care for her own safety, as she apparently did in traversing the very same gap in the street surface as she began to cross Belle Plaine Avenue, she would have been able to safely traverse the gap on the opposite side of the crosswalk." *Id.* at ¶ 34. This court reiterated that the City of Chicago has no duty to remove all dangers from its property, and cannot be expected to render its streets "injury-proof." *Ward*, 136 Ill. 2d at 148, 156.

¶ 16 Like *Ballog*, the record here contains photographs clearly depicting the condition of the sidewalk where Nino fell and injured herself. The defect is visible from a distance as one approaches the affected area of the sidewalk. The photographs show that no leaves or debris obscured the defect. Civil engineer John Errera stated in his deposition that the condition of the sidewalk posed a tripping hazard "[f]or somebody who is not paying attention how they are walking [ ] if they're not watching where they're stepping." However, the cracked sidewalk was "not like a hidden trap to grab your heels, sort of visible. It stands out. You have time to see it as you're approaching it." Nino did not present expert testimony to counter Errera's conclusions. Furthermore, Nino acknowledges in her brief that the parties agree on the size and nature of the physical condition. We find, as a matter of law, that the condition of the sidewalk in front of 3454 N. Orange Street presented an open and obvious danger and therefore defendant owed no duty of care to Nino.<sup>1</sup>

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<sup>1</sup> Nino disputes that the issue is one of law, arguing that Nino could not say whether she was aware of the condition prior to her accident. However, there is no requirement that the plaintiff must have prior knowledge of the condition for it to be an open and obvious danger as a matter of law, and Nino cites no cases standing for that proposition.

¶ 17 Nino contends that even if the condition of the sidewalk presented an open and obvious danger, defendant still owed her a duty of care because she was distracted by the little boy playing across the street and defendant should have reasonably foreseen that her attention may be distracted by neighborhood children. She argues that, "[a]t a minimum, this is a question of fact for the jury to decide." However, the distraction exception speaks to the foreseeability of harm, which is part of the duty of care analysis. Whether a defendant owes a duty of care to plaintiff is generally a question of law to be decided by the court. *Ward*, 136 Ill. 2d at 140. Therefore, whether the distraction exception applies is a question of law for the courts. See *Waters v. City of Chicago*, 2012 IL App (1st) 1000759, ¶ 16.

¶ 18 The distraction exception provides that a property owner owes a duty of care if it is reasonably expected that the plaintiff's attention may be distracted so that she would not discover the open and obvious condition. *Ward*, 136 Ill. 2d at 149-50. However, "[d]efendants should not be confronted with the impossible burden of rendering their premises injury-proof, and they are entitled to the expectation that their patrons will exercise reasonable care for their own safety." *Richardson v. Vaughn*, 251 Ill. App. 3d 403, 409 (1993).

¶ 19 Nino cites the following cases as support: *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 46 (student distracted from hole in the parking lot when he carried a football helmet to a player); *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14, 29 (1992) (painter distracted from power lines because he had to watch where he stepped on a billboard walk-rail); *Deibert*, 141 Ill. 2d 430 at 438 (electrician distracted from tire rut when he had to look out for construction materials being thrown off a balcony); *Ward*, 136 Ill. 2d at 154 (customer distracted from concrete post because he was carrying a large item from the store); *Green v. Jewel Food Stores, Inc.*, 343 Ill. App. 3d 830 (2003) (customer distracted from a ridge

in parking lot pavement by a rolling, unattended shopping cart); *Courtney v. Allied Filter Engineering, Inc.*, 181 Ill. App. 3d 222, 228 (1989) (trucker distracted from lowered dockplate while he was unloading his truck); and *Shaffer v. Mays*, 140 Ill. App. 3d 779 (construction worker distracted from uncovered hole because he was looking at the person helping him to carry a large truss). However, in all of these cases the defendants created the distraction whereas in the case before us, defendant did not create the distraction of the little boy playing across the street.

¶ 20 Nino also cites to *Waters*, 2012 IL App (1st) 100759, as a case where the defendant did not create the distraction and the court found that the defendant should have reasonably foreseen that the jackhammer's noise would distract pedestrians from the dangerous condition. However, *Waters* is also inapposite in that the defendant created the dangerous condition itself by erecting a barricade over a sidewalk with a portion of the base extending to the ingress and egress of the public sidewalk. The court held that in erecting the barricade, the defendant faces liability if it was negligent in placing the barricade. The defendant should reasonably have foreseen that this "partial barricade" was insufficient to protect pedestrians from possible injury, and "[i]t would have been easy for the defendant to have barricaded the entire walkway so that no one could use it until the construction was complete and the consequences of doing so would not have placed any great burden on the defendant." *Id.* at ¶ 18.

¶ 21 Here, the dangerous condition involved a naturally formed crack in the sidewalk rather than the negligent placement of a barricade. Furthermore, one may assume that while walking down a residential street on a sunny summer day one would come across commonplace events such as a child playing in his yard. However, a finding that any of these ordinary outdoor occurrences provide a reasonable distraction exposes defendant to unlimited liability for cracks

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in the sidewalk that are visible and can be traversed with ordinary care. The burden on defendant of preventing injuries in this situation would be enormous. We hold that the distraction exception does not apply here.

¶ 22 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 23 Affirmed.