SIXTH DIVISION
March 11, 2011

No. 1-09-2632

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALFREDO MONTENEGRO, Plaintiff-Appellant, v. ANNA E. VOLTATTORNI AND MARIE L. VOLTATTORNI, Defendants-Appellees.	) Appeal from) the Circuit Court) of Cook County)) No. 06 M 64090))) Honorable) Loretta Eadie-Daniels,) Judge Presiding.

JUSTICE CAHILL delivered the judgment of the court.
Presiding Justice Garcia and Justice McBride concurred in the judgment.

O R D E R

Held: The trial court properly granted defendants' motion for summary judgment over plaintiff's contention that the crack in the walkway that caused him to fall was not open and obvious.

Plaintiff Alfredo Montenegro appeals summary judgment on his premises liability complaint. We affirm.

About 2 p.m. on March 21, 2006, plaintiff, a door-to-door salesman, tripped and fell on a crack in the cement walkway leading to the front door of defendants' house. He suffered an injury to his left knee. The crack was about two feet long and four inches wide. In his deposition testimony, plaintiff said he did not see the many cracks in the walkway, including the one that caused him to fall because while he was walking, he was "looking at [his] goal," "the door" of defendants' house. That door is elevated by a set of stairs at the end of the walkway. Defendants' nephew, Frank Voltattorni, testified in his deposition that in June 2005 defendants asked him to repair the walkway. Frank said he attempted to repair the walkway by using gravel and sealant to fill the cracks. He used gravel on the crack in question to "level it off" but did not apply sealant.

Plaintiff's complaint alleged defendants' breached their duty to maintain their premises in a safe condition by allowing the walkway to fall into disrepair. Defendants moved for summary judgment on plaintiff's complaint, arguing that they owed no duty to plaintiff because: (1) the crack in the walkway was open and obvious; and (2) plaintiff should have reasonably discovered the crack. In support of the motion, defendants attached plaintiff's deposition testimony and photographs of the walkway. Plaintiff responded, arguing that defendants voluntarily assumed a duty to repair the walkway and did so negligently which worsened the condition. He also claimed the crack was not open and obvious because the gravel "would have given any reasonable person the illusion that *all* the gaps on the walkway were repaired when in fact they were not." (Emphasis in original.) Plaintiff maintained that defendants knew of the dangerous condition on their property for several months but failed to fix it properly.

After a hearing on defendants' motion for summary judgment, the trial court continued the matter to review the cases submitted by the parties and plaintiff's response to the motion. When the case was recalled, the court found that the crack was open and obvious and that defendants owed no duty to plaintiff. In reaching its decision, the court relied on *Sandoval v. City of Chicago*, 357 Ill. App. 3d 1023, 830 N.E.2d 722 (2005), and granted defendants' motion. Plaintiff appeals.

Summary judgment is appropriate if the pleadings, depositions and admissions on file show there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2006). Summary judgment is a drastic measure and should be allowed only when the right of the moving party is clear and free from doubt. *Mydlach v. DaimlerChrysler Corp.*, 226 Ill. 2d 307, 311, 875 N.E.2d 1047 (2007). We review *de novo* a trial court order granting summary judgment. *Mydlach*, 226 Ill. 2d at 311.

To state a cause of action for negligence a plaintiff must plead: (1) the existence of a duty owed to the plaintiff by the defendant; (2) a breach of that duty; (3) an injury proximately caused by the breach; and (4) damages. *Boyd v. Travelers Ins. Co.*, 166 Ill. 2d 188, 194-95, 652 N.E.2d 267 (1995). On appeal, plaintiff claims defendants owed him a duty to protect him from the dangerous condition–the crack in the walkway–on their property. Whether a duty exists is determined by asking if the defendant and the plaintiff stood in such a relationship to one another that the law imposed on the defendant an obligation of reasonable conduct for the benefit of the plaintiff. *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 445, 665 N.E.2d 826 (1996). Whether defendants owed plaintiff a duty of reasonable care is a question of law for the court.

Bucheleres, 171 Ill. 2d at 445.

Defendants contend they did not owe plaintiff a duty of reasonable care because the crack was an open and obvious condition, the dangerous nature of which plaintiff should have been aware. In Illinois, the open and obvious doctrine is an exception to the general duty of care owed by a landowner. See Restatement (Second) of Torts §343A(1) (1965) ("A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness"); *Sandoval*, 357 Ill. App. 3d at 1027-28 ("No duty to warn or protect may be imposed upon a defendant where the danger is open and obvious"). When a condition is deemed open and obvious, the likelihood of injury is generally considered slight as it is assumed people encountering potentially dangerous conditions that are open and obvious will appreciate and avoid the risks. *Bucheleres*, 171 Ill. 2d at 456.

The existence of an open or obvious danger is not an automatic bar to finding a legal duty on the part of the landowner. *Huggins v. The Village of Bishop Hill*, 294 Ill. App. 3d 466, 471, 690 N.E.2d 656 (1998). Rather, the existence of a duty in the face of a known or obvious condition is subject to the same analysis of a duty as is necessary in every claim of negligence. *Ralls v. Village of Glendale Heights*, 233 Ill. App. 3d 147, 155, 598 N.E.2d 337 (1992). The factors used to determine the existence of a duty include: (1) the likelihood of injury; (2) the reasonable foreseeability of such injury; (3) the magnitude of the burden of guarding against injury; and (4) the consequences of placing that burden on the defendant. *Bucheleres*, 171 Ill. 2d at 456. Our supreme court has held that the open and obvious doctrine implicates the first two

factors: likelihood of injury and foreseeability. *Sollami v. Eaton*, 201 Ill. 2d 1, 15, 17, 772 N.E.2d 215 (2002), citing *Bucheleres*, 171 Ill. 2d at 456.

A condition is open and obvious where a reasonable person in the plaintiff's position exercising ordinary perception, intelligence and judgment would recognize both the condition and the risk involved. *Deibert v. Bauer Brothers Construction Co., Inc.*, 141 Ill. 2d 430, 435, 566 N.E.2d 239 (1990); *Green v. Jewel Food Stores, Inc.*, 343 Ill. App. 3d 830, 832, 799 N.E.2d 740 (2003); see also *Sandoval*, 357 Ill. App. 3d at 1028 (whether a condition is open and obvious "depends not on plaintiff's subjective knowledge but, rather, on the objective knowledge of a reasonable person confronted with the same condition. This is because property owners are entitled to the expectation that those who enter upon their property will exercise reasonable care for their own safety").

If there is no dispute about the physical nature of the condition, the question of whether a condition is open and obvious is a legal one for the court. *Wilfong v. L.J. Dodd Construction*, 401 Ill. App. 3d 1044, 1053, 930 N.E.2d 511 (2010), citing *Belluomini v. Stratford Green Condominium Ass'n*, 346 Ill. App. 3d 687, 692-93, 805 N.E.2d 701 (2004). But, "where there is a dispute about the condition's physical nature, such as its visibility, the question of whether a condition is open and obvious is factual." *Wilfong*, 401 Ill. App. 3d at 1053, citing *Belluomini*, 346 Ill. App. 3d at 693.

Here, the trial court found as a matter of law that the crack in the walkway that caused plaintiff's injury was open and obvious. Plaintiff contends that the crack was not open and obvious because it was masked by defendants' failed attempt to repair the condition. He claims

defendants altered what may have been an open and obvious condition, making it more difficult for a reasonable person to notice.

Plaintiff admitted in his deposition that he did not see the crack in the walkway because he was not looking down while he was walking. We cannot say plaintiff exercised reasonable care for his own safety on entering defendants' property. *Sandoval*, 357 Ill. App. 3d at 1028. We believe there is no question of fact that plaintiff could have avoided the crack if he had been looking down while walking. See *Stephen v. Swiatkowski*, 263 Ill. App. 3d 694, 702, 635 N.E.2d 997 (1994) (a nail protruding from a board on the floor of the defendant's house was open and obvious where the plaintiff said he would have seen it if he had looked down at it); *Deibert*, 141 Ill. 2d at 434 (tire rut on a construction site was open and obvious where the plaintiff said he would have seen it if he had watched where he was walking). There was no showing that the crack was hidden in any way. See *Swiatkowski*, 263 Ill. App. 3d at 702. It was not dark at the time the injury occurred nor was the crack concealed. The pictures on record also show the open and obvious nature of the crack. We believe that a reasonable person in the exercise of "ordinary perception, intelligence and judgment" would have recognized the crack and the risk it presented. *Deibert*, 141 Ill. 2d at 435. The trial court did not err in finding as a matter of law that the crack in the walkway was open and obvious.

We are unpersuaded by plaintiff's argument that defendants' repairs masked the crack. The pictures in the record show the distinct difference between the cracks that had been sealed and the ones that were left untreated. Although the crack in question was partially sealed, the largest portion of it–two feet in length and four inches wide–was clearly a hole.

We are also unpersuaded by *Nickon v. City of Princeton*, 376 Ill. App. 3d 1095, 877 N.E.2d 776 (2007), cited by plaintiff in support of his argument. Here, unlike *Nickon*, the crack in the walkway was not a "small depression similar in color to the sidewalk but partially covered by weeds," nor was the extent of the depression invisible until a person was almost directly above it. *Nickon*, 376 Ill. App. 3d at 1106.

There are two limited exceptions to the rule that a defendant has no duty to protect a plaintiff from an open and obvious condition. *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 147, 554 N.E.2d 223 (1990). "[W]hether a possessor of land should guard against harm to the invitee, despite the obviousness of the danger, depends upon whether either the 'distraction exception' or the 'deliberate encounter exception' applies in a given case." *Sollami*, 201 Ill. 2d at 15-16. The distraction exception is relevant here.

Plaintiff contends that the location of defendants' front door at the end of the walkway caused him to become distracted due to its elevated position. He claims that because the door is located "up a flight of stairs from the walkway, anyone would be distracted away from the ground" while approaching defendants' house.

Under the distraction exception, a property owner may have a duty to protect if there is a reason to expect that the plaintiff's attention might be distracted so that he would not discover the obvious condition. *Ward*, 136 Ill. 2d at 149-50. The question is "whether the defendant should reasonably anticipate injury to those entrants on his premises who are generally exercising reasonable care for their own safety, but who may reasonably be expected to be distracted." *Ward*, 136 Ill. 2d at 152. A defendant does not need to anticipate that a plaintiff would blind

himself to the probable consequences of his own actions. See *Bonner v. City of Chicago*, 334 Ill. App. 3d 481, 485, 778 N.E.2d 285 (2002), citing *Richardson v. Vaughn*, 251 Ill. App. 3d 403, 408, 622 N.E.2d 53 (1993). We note that "the line between mere inattention and reasonably foreseeable distraction is not susceptible to mathematical precision and requires a careful focus upon the particular facts at hand." *Richardson*, 251 Ill. App. 3d at 409.

The issue here is whether, as a matter of law, it was foreseeable that plaintiff would be distracted from the obvious crack in defendants' walkway due to the location of the elevated front door of defendants' house. Plaintiff testified that he did not see the crack in defendants' walkway because he was focused on his "goal," "looking towards the door" of defendants' house. We cannot say that defendants should have foreseen that a reasonable person walking on the sidewalk would be so distracted by the location of the front door to their house that he could not exercise reasonable care for his own safety. As mentioned, defendants do not need to anticipate that a plaintiff would blind himself to the consequences of his own actions. *Bonner*, 334 Ill. App. 3d at 485. We find the distraction exception to the rule that there is no duty to protect a plaintiff from an open and obvious condition does not apply.

In reaching this conclusion, we have considered the numerous cases cited by plaintiff and find them distinguishable. See *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 46, 796 N.E.2d 1040 (2003) (a duty was imposed on the defendant under the distraction exception where the plaintiff, a student, was distracted from a hole in a parking lot because he was focused on carrying a football helmet to a player who needed it); *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14, 29, 594 N.E.2d 313 (1992) (the plaintiff, a

painter, was distracted from power lines because he had to watch where he placed his feet on a billboard walk-rail); *Deibert*, 141 Ill. 2d at 438 (the plaintiff, an electrician, was distracted from a tire rut when he looked up to see whether construction materials were being thrown off a balcony); *Ward*, 136 Ill. 2d at 154 (the plaintiff, a customer, was distracted from seeing a concrete post outside the defendant's store because he was carrying a large item he had just purchased); and *Green v. Jewel Food Stores Inc.*, 343 Ill. App. 3d 830, 835, 799 N.E.2d 740 (2003) (the plaintiff, a customer, was distracted from a ridge in the pavement of a parking lot when she grabbed the handle of an unattended, rolling shopping cart).

Here, unlike the cases cited, plaintiff was not distracted by "something external to the dangerous condition." See *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 88-89, 811 N.E.2d 364 (2002). He was not carrying a large item that obscured his vision or that caused him to become distracted. He was also not in a place such as a construction site where it is reasonably foreseeable he would get distracted.

We find *Sandoval* instructive. The plaintiff in *Sandoval*, a pedestrian, fell into a large hole on a sidewalk and brought suit against the City of Chicago. The defendant's motion for summary judgment was granted and the plaintiff appealed to this court. The plaintiff argued that despite the open and obvious nature of the hole she was distracted because she was focused on the child she was caring for at the time. *Sandoval*, 357 Ill. App. 3d at 1029. In finding that the distraction exception did not apply, this court noted "the instant occurrence more aptly falls within the line of cases which reinforces that when a plaintiff's attention is diverted by her own independent acts *for which the defendant has no direct responsibility*, the distraction exception

does not apply." (Emphasis added.) *Sandoval*, 357 Ill. App. 3d at 1030-31. We explained that "in those instances where our courts have applied the distraction exception to impose a duty upon a landowner, it is clear that the landowner created, contributed to, or was responsible in some way for the distraction which diverted the plaintiff's attention from the open and obvious condition" and was charged with reasonable foreseeability that an injury might occur. *Sandoval*, 357 Ill. App. 3d at 1030. We cannot say that the location of the front door to defendants' house here falls into this line of cases.

The judgment of the circuit court is affirmed.

Affirmed.