IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Patricia Ann Casey Powell and Richard Hays Powell,	)	
Plaintiffs,	)	
v.	)	No. 19 L 7412
City of Chicago,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

A landowner is generally not liable for conditions that are open and obvious unless the landowner had reason to anticipate the harm. The evidence presented establishes that the condition that caused the plaintiff's injury—a sign pole lying on a sidewalk—was open and obvious. Further, neither exception to the open-and-obvious rule applies under the circumstances. The defendant's motion for summary judgment is, therefore, granted.

Facts

On June 8, 2019, Patricia Powell was in Chicago's Loop with her family sightseeing and observing the city's architecture. Patricia was walking west on West Adams Street towards Willis Tower when she tripped on a "no parking" sign pole lying on the sidewalk at 151 West Adams Street. Patricia fell and suffered a fractured shoulder that required replacement surgery.

On July 8, 2019, Patricia filed a two-count complaint against the City. Count one presents a cause of action for negligence and alleges the City owed Patricia a duty of care as the property owner. She claims the City breached its duty by, among other things, failing to: (1) maintain the sign pole; (2) remove it; and (3)

warn of the danger. Count two is Richard's cause of action for loss of consortium.

The case proceeded to discovery, and Patricia presented for her deposition. Patricia stated that just before she tripped and fell, she was looking at the buildings and making sure she was not going to run into someone. She further stated there was a lot of foot traffic that Saturday afternoon, but does not know if anyone was blocking her view of the sign pole. She stated her preoccupation precluded her from also noticing hazards on the sidewalk. According to Patricia, the flow of pedestrian traffic pushed her to the right edge of the sidewalk where the sign pole was lying, parallel to the curb. She does not recall having to change where she was walking in the three to five steps leading up to tripping on the sign pole. At one point, Patricia says she does not recall being distracted in the seconds leading up to her trip and fall. At another point, she says that she was distracted by pedestrian traffic coming on her left heading east.

Records produced in discovery establish that the City had twice been notified of the fallen sign pole—on May 26 and May 30, 2019. The City removed the fallen sign pole on June 20, 2021.

Analysis

The City brings its summary judgment motion pursuant to the Code of Civil Procedure. Summary judgment is authorized "if 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. The purpose of summary judgment is not to try a question of fact, but to determine whether one exists that would preclude the entry of judgment as a matter of law. *See Land v. Board of Educ. of the City of Chicago*, 202 Ill. 2d 414, 421, 432 (2002).

A defendant moving for summary judgment may disprove a plaintiff's case by showing the plaintiff lacks sufficient evidence to

establish an element essential to a cause of action. This is the so-called "*Celotex* test." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (followed *Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶ 6). A court should grant summary judgment on a *Celotex*-style motion only if the record indicates the plaintiff had extensive opportunities to establish his or her case but failed in any way to demonstrate he or she could do so. *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 2012 IL App (2d) 110624, ¶ 33.

A plaintiff creates a genuine issue of material fact only by presenting enough evidence to support each essential element of a cause of action that would arguably entitle the plaintiff to judgment. *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 85 (1st Dist. 2004). To determine whether a genuine issue as to any material fact exists, a court is to construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the opponent. *See Adams v. Northern Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004). The inferences drawn in favor of the nonmovant must, however, be supported by the evidence. *Destiny Health, Inc. v. Connecticut Gen'l Life Ins. Co.*, 2015 IL App (1st) 142530, ¶ 20. A triable issue precluding summary judgment exists if the material facts are disputed, or if the material facts are undisputed but a reasonable person might draw different inferences from the undisputed facts. *Id.* On the other hand, if no genuine issue of material fact exists, a court has no discretion and must grant summary judgment as a matter of law. *See First State Ins. Co. v. Montgomery Ward & Co.*, 267 Ill. App. 3d 851, 854-55 (1st Dist. 1994).

To prevail on a negligence cause of action, a plaintiff must prove the defendant owed the plaintiff a duty, the defendant breached that duty, and the defendant's breach proximately caused the plaintiff's injury. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430 (2006). Patricia alleges in count one that the City breached its duty of care by, among other things, failing to remove the sign pole from the sidewalk. In its motion, the City argues the

sign pole was an open-and-obvious danger and, therefore, the City owed Patricia no duty.

Absent a defendant's duty, there is, of course, no negligence. *Washington v. City of Chicago*, 188 Ill. 2d 235, 239 (1998). Whether a duty exists is a question of law for the court to decide. *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 140 (1990). Local Governmental and Governmental Employees Tort Immunity Act section 3-102(a) codifies the pre-existing common-law duty of public entities to maintain their property in a reasonably safe condition. *See* 745 ILCS 10/3-102(a); *Lawson v. City of Chicago*, 278 Ill. App. 3d 628, 640 (1st Dist. 1996). That duty is memorialized in the Restatement (Second) of Torts section 343, which provides that:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
> a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
> b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts § 343 (1965). The Illinois Supreme Court adopted section 343 in *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456 (1976).

Section 343 is intended to be read in conjunction with section 343A. Restatement (Second) of Torts § 343 cmt. *a* (1965); *American Nat'l Bank & Trust Co. v. National Adver. Co.*, 149 Ill. 2d 14, 17 (1992). Section 343A limits the application of section 343 by providing that:

> 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.

Restatement (Second) of Torts § 343A (1965). The Illinois Supreme Court adopted section 343A in *Ward*, 136 Ill. 2d at 150-51.

It is accepted that, following *Genaust* and *Ward*, a landowner is ordinarily not required "to foresee and protect against injuries from potentially dangerous conditions that are open and obvious." *Bucheleres v. Chicago Park Dist.*, 171 Ill. 2d 435, 447-48 (1996). "The open and obvious nature of the condition itself gives caution" so "the law generally assumes that persons who encounter these conditions will take care to avoid any danger inherent in such condition." *Id.* at 448. The obviousness of a condition is based on "a reasonable person in the visitor's position, [who is] exercising ordinary intelligence, perception and judgment, [and] would recognize both the condition and the risk." *Atchley v. University of Chicago Med. Ctr.*, 2016 IL App (1st) 152481, ¶ 34. "[W]here no dispute exists as to the physical nature of the condition, whether the dangerous condition is open and obvious is a question of law." *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 18.

In this case, the photographs in the record make plain the location of the sign pole on the West Adams Street sidewalk, parallel and close to the curb. In instances in which photographs plainly depict the condition at issue, any dispute as to the condition's physical nature is objectively unreasonable. *Ballog v. City of Chicago*, 2012 IL App (1st) 112429, ¶ 30. Thus, "[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." *Id.* at ¶ 23.

Patricia testified she did not see the sign pole before she tripped on it. Her testimony does not mean, however, the sign pole was not open and obvious. The afternoon was sunny, and Patricia could not recall if any person or obstacle blocked her view immediately preceding her fall. Patricia admitted that she was focusing on directions to her destination as opposed to observing conditions on the sidewalk. She also did not think anyone was going to collide with her right before she tripped on the sign pole. Patricia could not verify that she was looking at the sidewalk in front of her as she approached the sign pole.

The photographs in the record are particularly compelling evidence and support the conclusion that the sign pole was an open-and-obvious condition. The sign pole is easily visible given that it is painted dark and contrasts sharply against the light-colored sidewalk. The photographs also show the sign pole was not obscured or covered in any way that would have made it difficult to see. Based on the evidence in the record, a reasonable person in Patricia's position, exercising ordinary perception and judgment, would recognize both the condition and risk involved by the sign pole laying on the sidewalk; therefore, the condition was open and obvious. *See id.* at ¶ 22.

The open-and-obvious nature of the downed sign pole on a well-lighted sidewalk in this case contrasts with others in which dim lighting contributed to conditions not being open and obvious. In *Becker v. Alexian Bros. Med. Ctr.*, for example, dim lighting obscured the downward sloping gaps in a foot grate. 2021 IL App (1st) 200763, ¶ 16. Dim lighting also raised a question of fact as to the size and depth of a pothole. *Barrett v. FA Group, LLC*, 2017 IL App (1st) 170168, ¶¶ 35, 37. Here, the contrast between the dark sign pole and the light sidewalk differs markedly from situations in which a lack of contrast paint disguised a change in vertical elevation, *Alqadhi v. Standard Parking, Inc.*, 405 Ill. App. 3d 14, 18 (1st Dist. 2010), or an unusual floor pattern created a deceptive impression of depth, *Duffy v. Togher*, 382 Ill. App. 3d 1, 6, 8 (1st Dist. 2008).

This court's duty analysis must also consider whether an exception to the open-and-obvious rule applies, as Patricia argues they do. Exceptions to the rule exist if "the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger." Restatement (Second) of Torts § 343A cmt. *f*. Illinois law recognizes two such exceptions, the distraction exception, and the deliberate encounter exception. *Sollami v. Eaton*, 201 Ill. 2d 1, 15 (2002); *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 391 (1998). If either exception to the open-and-obvious rule applies, the outcome of the duty analysis is reversed. *Belluomini v. Stratford Green Condo. Ass'n*, 346 Ill. App. 3d 687, 692 (2d Dist. 2004). In other words, the open-and-obvious rule means foreseeability and likelihood of injury are more remote, while an exception means they are more likely. *Id.*

Patricia argues first that the distraction exception applies in her case. The distraction exception applies if "the possessor [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 (quoting Restatement (Second) of Torts § 343A cmt. *f*). As applied, the distraction exception operates only if evidence exists from which a court may infer that the plaintiff was actually distracted. *See id.* at 16-17. In contrast, "the mere fact of looking elsewhere does not constitute a distraction." *Bruns*, 2014 IL 116998, ¶ 22. "To the extent that looking elsewhere could, itself, be deemed a distraction, then it is, at most, a self-made distraction." *Id.* at ¶ 31. Self-made distractions do not trigger application of the distraction exception. As explained:

> 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.

Whittleman v. Olin Corp., 358 Ill. App. 3d 813, 817-18 (5th Dist. 2005).

Courts have applied the distraction exception to impose a duty on a landowner if the landowner created, contributed to, or was in some way responsible for the distraction that diverted the plaintiff's attention away from the open and obvious condition. *Sandoval v. City of Chicago*, 357 Ill. App. 3d 1023, 1030 (1st Dist. 2005). In contrast, if the distraction is a commonplace event that could occur anywhere, landowners are not required to guard against it. *Negron v. City of Chicago*, 2016 IL App (1st) 143432, ¶ 18. In short, "personal inattentiveness" is not something a landowner is legally required to anticipate. *Sandoval*, 357 Ill. App. 3d at 1031.

The record in this case establishes that the only distraction Patricia identified was other pedestrians on the sidewalk. She maintains that because it was a busy summer day in the Loop, the foot traffic distracted her from seeing the sign pole laying on the sidewalk. According to Patricia, the City should have anticipated that pedestrians would be distracted by the flow of pedestrian traffic and by Chicago's renowned architecture. In support of her position, Patricia relies on *Bruns*, in which the court wrote that "people do not ordinarily look downward when they walk" and, therefore, a municipality should foresee that people would not notice sidewalk hazards. *Bruns*, 2014 IL 116998, ¶ 21.

Patricia further argues that the City should have anticipated accidents because it had at least two prior notices that about the downed sign pole. The City may have received notice, but that does not mean Patricia's trip and fall was foreseeable. "[T]he concept of foreseeability is not boundless." *Id.* at ¶ 34. That something "might conceivably occur," does not make it foreseeable. *Hills v. Bridgeview Little League Ass'n*, 195 Ill. 2d

210, 238 (2000). Rather, something is foreseeable only if it is "objectively reasonable to expect." *Id.*

Patricia also argues it was far more certain that, as a tourist, she would be distracted while walking. That argument stands reasoning on its head. Indeed, Patricia's unfamiliarity with the city should have prompted her to pay closer attention to potential obstacles instead of relying on the city to guard tourist pedestrians from obstacles on a sidewalk.

Absent evidence of an actual distraction, it is not objectively reasonable for the City to expect that a pedestrian, such as Patricia, generally exercising reasonable care for her own safety, would look elsewhere and fail to avoid the risk of injury from an open and obvious hazard on the sidewalk. Indeed, Patricia's position is contrary to the very essence of the open-and-obvious rule: in the case of obvious risks, the defendant "'could not reasonably be expected to anticipate that people will fail to protect themselves from any danger posed by the condition.'" *Bucheleres*, 171 Ill. 2d at 448 (quoting *Ward*, 136 Ill. 2d at 148). If simply looking elsewhere constituted a legal distraction, the distraction exception would swallow the open-and-obvious rule. Such a conclusion is unacceptable.

Patricia also argues the deliberate-encounter exception to the open-and-obvious rule applies in her case. "The deliberate encounter exception arises when the landowner has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk." *Ballog*, 2012 IL App (1st) 112429, ¶ 38. The deliberate encounter exception is applied most commonly in situations in which "workers are compelled to encounter dangerous conditions as part of their employment obligations." *Morrissey v. Arlington Park Racecourse, LLC*, 404 Ill. App. 3d 711, 726 (1st Dist. 2010).

In *Winters v. MIMG LII Arbors at Eastland, LLC*, 2018 IL App (4th) 170669, the court considered whether to apply the

deliberate-encounter exception outside the workplace context. In *Winters*, the plaintiff injured himself after falling on a snow pile in the path leading to his apartment building's on-site laundry. *Id.* at ¶¶ 9 & 18. Winters knew there were alternative routes available, *id.* at ¶¶ 19-20, but the path over the snow pile was the shortest. *Id.* at ¶ 76. The court found the snow pile to be an open-and-obvious condition, and refused to apply the deliberate-encounter exception because the plaintiff "failed to demonstrate that a reasonable person in his position would have found greater utility in choosing to walk over the snow pile instead of using one of the alternative paths." *Id.* at ¶ 75. As the court concluded, the deliberate-encounter exception does not apply if the plaintiff is faced with only a minor inconvenience in taking an alternative path and economic compulsion exists. *Id.* at ¶ 76.

As in *Winters*, the deliberate-encounter exception to the open-and-obvious rule is inapplicable. Patricia was certainly under no economic compulsion to visit Willis Tower; rather, her activities were purely for personal enjoyment. Critically, nothing in the record suggests that there were no alternative routes for Patricia to take either to reach Willis Tower or to avoid the pedestrians walking towards her.

This court's analysis does not end here because "[t]he existence of an open and obvious danger is not an automatic or *per se* bar to the finding of a legal duty on the part of a defendant." *Bruns*, 2014 IL 116998, ¶ 19. Even if a court concludes the condition causing the plaintiff's injury was open and obvious, a court is still obligated to conduct a traditional duty analysis. *Id.* To determine whether a duty exists, a court is to consider "(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." *Id.* ¶ 14. Application of the open-and-obvious rule affects the first two factors. *Id.* ¶ 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." *Id.* ¶ 19.

The reasonable-foreseeability factor carries very little weight because a defendant is ordinarily not required to foresee injury from a dangerous condition that is open and obvious. *Bucheleres*, 171 Ill. 2d at 447-48. The likelihood-of-injury factor also carries little weight because "it is assumed that persons encountering the potentially dangerous condition of the land will appreciate and avoid the risks," thereby making the likelihood of injury slight. *Sollami*, 201 Ill. 2d at 17. As to the third and fourth factors, the City confirms there exists a process to address hazards, but that expediting the process would require hiring a substantial number of workers and impose a substantial financial burden on the City. Even if the burden is not as great as the City contends, the consequences of imposing that burden on the City would go well beyond the instant hazard. The City has miles of sidewalks to maintain, and the imposition of an increased burden is not justified given the open-and-obvious nature and risks of a downed sign pole. *See Sollami*, 201 Ill. 2d at 18. In sum, the City owed no duty to protect Patricia from the open-and-obvious condition posed by the sign pole laying on the sidewalk.

Finally, since Patricia's substantive cause of action fails, Richard's derivative claim for consortium must also fail.

Conclusion

Based on the foregoing reasons, it is ordered that:

1. Defendant's summary judgment motion is granted;
2. This case is dismissed with prejudice.

John H. Ehrlich, Circuit Court Judge