

paign, Illinois. Due to "potholes and significant height defects and discrepancies that existed in the surface of the street," plaintiff "tripped on a height discrepancy while attempting to walk on the street" to the driver's side of a vehicle.

¶ 6 Plaintiff alleged defendant owed a duty to exercise ordinary care in the maintenance of its property and breached that duty "by allowing potholes and other significant height defects and discrepancies to exist in the surface of the street such that an unreasonable tripping hazard existed in the street." Plaintiff also alleged defendant breached its duty by failing to (1) provide adequate lighting and warnings, (2) exercise reasonable and ordinary care in the maintenance of the street, and (3) take reasonable steps to protect individuals using the street from a dangerous height differential which pedestrians were likely to fail to recognize.

¶ 7 In May 2010, defendant filed an answer and asserted affirmative defenses. As to the latter, defendant asserted the complaint was barred by the Local Governmental and Governmental Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/1-101 to 10-101 (West 2008)) because (1) defendant did not have actual or constructive notice of the alleged defect and (2) plaintiff was not a permitted and intended user of the premises.

¶ 8 In May 2011, defendant filed a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2010)). Defendant argued plaintiff could not make a *prima facie* case as there was no evidence as to where she fell, and therefore no evidence existed that any particular alleged defective condition on the street was a proximate cause of her fall and no evidence existed that the alleged defective condition was not *de minimis*. Defendant also argued it had no duty to maintain the street in the area of plaintiff's vehicle because she was illegally parked at the time of the incident.

¶ 9 In support of the motion for summary judgment, defendant attached plaintiff's discovery deposition. She testified she was 57 years old. She used to volunteer at the Church of the Living God by driving the van and cooking. The van was usually parked on the street in front of the church. On April 29, 2009, plaintiff used the church van at approximately 5 p.m. to pick up members for Bible study that started at 6:30 p.m. After the Bible study ended at approximately 8 p.m., church members loaded into the van. As plaintiff walked around the front of the vehicle, she stepped into a hole in the street and fell on her arm and shoulder. She stated she was "trying to be more careful" at the time and tried to step "so [she] wouldn't fall."

¶ 10 Given that it was dark at the time of the incident, plaintiff could not pinpoint exactly where she fell in the exhibit photos. She stated the light pole in the vicinity is "not very bright." Plaintiff was also not aware of a no-parking-zone sign on Fourth Street in the vicinity of her fall. An exhibit photo shows a no-parking sign attached to the post of a streetlight. The sign prohibits parking except on Sundays and holidays. The sign is south of the intersection and the entrance to the church parking lot.

¶ 11 In August 2011, the trial court heard arguments on the motion for summary judgment. The court found the van was not legally parked based on the no-parking sign and city code and state law prohibiting parking within a certain distance from an intersection. The court then looked at whether defendant owed plaintiff a duty. The court found plaintiff's injury was not foreseeable because she was walking to a vehicle that was illegally parked. However, the court pointed out, had it been a Sunday, plaintiff would have been at the location legally. Thus, "it makes no sense to say that there's no foreseeability and, therefore, no duty on a Wednesday, but there would be foreseeability and a duty on a Sunday." As plaintiff would be seen as an

intended user, defendant had a duty to exercise ordinary care

¶ 12 Although the trial court found defendant did have a duty, it concluded plaintiff did not exercise ordinary care when dealing with an open and obvious condition. The court noted plaintiff was not distracted, knew of the conditions of the road, and therefore knew of the danger. The court also found no deliberate-encounter exception. Moreover, even if plaintiff could be said to have acted with ordinary care, the court stated "her negligence under all the facts was equal to or outweighed that of the defendant." The court found the motion for summary judgment was well taken and entered judgment in favor of defendant and against plaintiff. This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 A. Standard of Review

¶ 15 "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.'" *Ioerger v. Halverson Construction Co.*, 232 Ill. 2d 196, 201, 902 N.E.2d 645, 648 (2008) (quoting 735 ILCS 5/2-1005(c) (West 2000)). "Although summary judgment can aid in the expeditious disposition of a lawsuit, it remains a drastic means of disposing of a litigation and, therefore, should be allowed only where the right of the moving party is clear and free from doubt." *Williams v. Manchester*, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 9 (2008). "Accordingly, where reasonable persons could draw divergent inferences from the undisputed material facts or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact." *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 424, 706 N.E.2d 460, 463

(1998). On appeal from a trial court's decision granting a motion for summary judgment, our review is *de novo*. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163, 862 N.E.2d 985, 991 (2007).

¶ 16 B. The Trial Court's Grant of Summary Judgment

¶ 17 Plaintiff argues the trial court erred in finding her more than 50% at fault for her injuries, claiming the issue was one for the trier of fact to determine. Defendant contends the court was correct in granting summary judgment, but it disagrees with the court's rationale in doing so. Defendant claims it owed no duty to plaintiff because (1) the alleged defect was an open and obvious condition and (2) plaintiff was not an intended user because she was illegally parked. Further, and as alternative grounds on which to uphold the court's ultimate ruling, defendant argues (3) plaintiff failed to establish proximate causation because she could not identify the location of her fall and (4) she could not establish the defect involved was not *de minimis*. We find the defect was open and obvious.

¶ 18 Our supreme court has noted that "to state a legally sufficient claim of negligence, a complaint must allege facts establishing the existence of a duty of care owed by the defendants to the plaintiff, a breach of that duty, and an injury proximately caused by that breach." *Thompson v. Gordon*, 241 Ill. 2d 428, 438, 948 N.E.2d 39, 45 (2011); see also *Buerkett v. Illinois Power Co.*, 384 Ill. App. 3d 418, 422, 893 N.E.2d 702, 709 (2008).

¶ 19 Whether a duty of care exists is a question of law for the court to decide. *Thompson*, 241 Ill. 2d at 438, 948 N.E.2d at 45. " 'Unless a duty is owed, there is no negligence.' " *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 388, 706 N.E.2d 441, 446 (1998) (quoting *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14, 26,

594 N.E.2d 313, 318 (1992)); see also *Buerkett*, 384 Ill. App. 3d at 422, 893 N.E.2d at 709 (stating "[i]f there is no duty, a plaintiff cannot recover").

¶ 20 Defendant argues it had no duty because the alleged defect was open and obvious to plaintiff. In determining whether a duty exists, courts look at the following 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 the burden on the defendant." *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 226, 938 N.E.2d 440, 447 (2010). "The open and obvious doctrine addresses the first two factors of the traditional duty analysis: the likelihood and reasonable foreseeability of the injury." *Van Gelderen v. Hokin*, 2011 IL App (1st) 093152, ¶ 27, 958 N.E.2d 1029, 1037.

¶ 21 "Illinois law holds that persons who own, occupy, or control and maintain land are not ordinarily required to foresee and protect against injuries from potentially dangerous conditions that are open and obvious." *Buchelers v. Chicago Park District*, 171 Ill. 2d 435, 447-48, 665 N.E.2d 826, 832 (1996). When an open and obvious condition exists, "the likelihood of injury is generally considered slight as it is assumed that people encountering potentially dangerous conditions that are open and obvious will appreciate and avoid the risks." *Park v. Northeast Illinois Regional Commuter R.R. Corp.*, 2011 IL App (1st) 101283, ¶ 12, 960 N.E.2d 764, 769.

¶ 22 In the case *sub judice*, the trial court found plaintiff failed to exercise ordinary care when dealing with the defect in the road, which the court also found was an open and obvious condition. The court noted plaintiff intentionally parked on the street instead of the parking lot. She was also familiar with the conditions of the road, worried about her footing, and

tried to step so as not to fall. The court found plaintiff knew of the danger but encountered it anyway.

¶ 23 "[T]he determination of whether the 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." *Sandoval v. City of Chicago*, 357 Ill. App. 3d 1023, 1028, 830 N.E.2d 722, 727 (2005); *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 86, 811 N.E.2d 364, 368 (2004) ("Whether a condition is open and obvious depends on the objective knowledge of a reasonable person, not the plaintiff's subjective knowledge"); see also *Park*, 2011 IL App (1st) 101283, ¶ 14, 960 N.E.2d at 769 (stating the determination of whether a condition is open and obvious depends on whether "a reasonable person in the plaintiff's position exercising ordinary perception, intelligence and judgment would recognize both the condition and the risk involved").

¶ 24 Plaintiff's deposition testimony indicates the van was parked on the street at approximately 5 p.m., the time she entered it and left to pick up church members. Upon return, she parked the van on the street at approximately 6:15 p.m. After Bible study concluded at approximately 8 p.m., she fell in the street as she prepared to drive the church members home.

¶ 25 Plaintiff's testimony indicates she was familiar with that particular part of the street where she fell. She had been driving the van for over a year and usually parked in the same general area. She encountered that portion of the street at 5 p.m. and again at 6:15 p.m., both during the daylight hours. The photos show large defects—the crumbling pavement and potholes—in the parking lane of the road. Thus, the condition of the road was readily apparent. A reasonable person in plaintiff's position would therefore realize that walking over the crum-

bling side of the street would present the danger of loose footing and the possibility of tripping or falling. Moreover, a reasonable person, with intimate knowledge of the condition of the road, would appreciate the danger even if he or she approached it at night. We agree with the trial court that the condition of the road was open and obvious as a matter of law.

¶ 26 We note two exceptions are applicable to the open-and-obvious doctrine—the distraction exception and the deliberate-encounter exception. *Wilfong v. L.J. Dodd Construction*, 401 Ill. App. 3d 1044, 1054, 930 N.E.2d 511, 521 (2010). Plaintiff, however, did not raise the exceptions in the trial court and does not do so now on appeal. Thus, we need not address them. Because the defect in the road was open and obvious and no exceptions to the open-and-obvious doctrine have been shown to apply, we find the trial court did not err in granting summary judgment.

¶ 27

III. CONCLUSION

¶ 28 For the reasons stated, we affirm the trial court's judgment.

¶ 29 Affirmed.