



took place during a birthday party the Maxhams held for the plaintiff and her brother in August 2007. The plaintiff tripped over an area of raised concrete at the edge of the pool area. She broke her fall by grabbing hold of the fence surrounding the pool area; however, she injured her hip in the process.

¶ 4 The raised concrete that the plaintiff tripped over surrounds a light fixture and houses the electrical wiring to power the light. There are three such raised concrete mounds (which the plaintiff refers to as "humps"), one on each of three of the pool's sides. The "humps" are located near the outer edge of the pool area and are approximately four or five inches in height.

¶ 5 The plaintiff filed a petition alleging that the defendant failed to provide her with a safe environment and failed to warn of the "uneven surface in the pool area." The petition further alleged that the plaintiff fell and sustained injuries proximately caused by the defendant's negligence.

¶ 6 In a discovery deposition, the plaintiff testified that she had been using the pool at Halia Crest as a guest for approximately three to four years before the incident at issue took place. She testified that she usually brought her two young daughters to visit and use the pool once or twice a week during the summer. The plaintiff became aware that the "humps" surrounding the lights were there on her first visit to the pool. She testified that she had scraped her toes on them or stumbled over them without falling "probably a dozen times" prior to the incident at issue. She further testified that other members of her family had also scraped their toes on the raised concrete, and she had seen other residents or guests stumble over them as well. She explained, "You get your hands full and you're walking and you trip over them."

¶ 7 The incident involved here took place during a party held by the Maxhams. Guests included the plaintiff and her two daughters and the plaintiff's three siblings

and their families. The plaintiff testified that the group spent most of the day at the pool. They had brought pool toys with them, including three or four splash balls. A splash ball is a small cloth ball that absorbs water. The plaintiff testified that, just before her accident, one of the other guests (her brother's girlfriend's father, Dennis) threw a splash ball at her from outside the fence. She dipped the ball into the pool and then attempted to throw it back at him. As she did this, the toe on her right foot hit the raised concrete and she stumbled. She attempted to break her fall by grabbing onto the fence. She testified that, although she did not land on the ground, she injured her hip. The injury required surgery, and the plaintiff continued to experience pain at the time her deposition was taken, 2½ years after the accident.

¶ 8 The plaintiff admitted that when the accident occurred, she knew she was in the general vicinity of the raised concrete hump, but she explained that she was not sure exactly where it was in relation to where she was standing. She further stated that she was not looking down at the ground, but was instead looking at Dennis. The defendant's attorney then asked, "Now, just so we're clear, would you define the conduct of throwing the splash ball at Dennis as horseplay?" The plaintiff replied, "Yes."

¶ 9 The defendant filed a motion for summary judgment, arguing that (1) the raised surface of the pool area constituted an "open and obvious danger" against which it had no duty to warn, (2) the distraction exception was not applicable, and (3) no genuine issues of material fact remained regarding either of these issues. Attached to the motion were six color photographs showing the raised concrete "humps" around the lights and one photograph showing a sign that read, in pertinent part, "NO HORSEPLAY." In its motion, the defendant argued that the raised surface was an open and obvious danger as a matter of law because it appears obvious in the

photographs and the plaintiff admitted she was aware of their location. The defendant further argued that the distraction exception was inapplicable as a matter of law because it was not foreseeable that an adult invitee such as the plaintiff would disregard the rule against "horseplay."

¶ 10 The trial court granted the defendant's motion. The plaintiff filed a motion to reconsider that ruling, which the court denied. This appeal followed.

¶ 11 Summary judgment is appropriate only when the pleadings, depositions, and affidavits on file leave no genuine issue of material fact to be resolved and the moving party is entitled to a judgment as a matter of law. *Sollami v. Eaton*, 201 Ill. 2d 1, 6, 772 N.E.2d 215, 218 (2002). In determining whether genuine issues of material fact exist, we view the factual record in the light most favorable to the nonmoving party. *United National Insurance Co. v. Faure Brothers Corp.*, 409 Ill. App. 3d 711, 716, 949 N.E.2d 1185, 1190 (2011). In addition, summary judgment should not be granted if it is possible to draw more than one reasonable inference from undisputed facts. *Buchaklian v. Lake County Family Young Men's Christian Ass'n*, 314 Ill. App. 3d 195, 199, 732 N.E.2d 596, 599 (2000). Summary judgment should not be granted unless the moving party's right to a judgment is "clear and free from doubt." We review the court's ruling on a motion for summary judgment *de novo*. *United National Insurance Co.*, 409 Ill. App. 3d at 716, 949 N.E.2d at 1190.

¶ 12 In a negligence case, a plaintiff must demonstrate, among other things, that the defendant owed the plaintiff a duty of care. *Ward v. K mart Corp.*, 136 Ill. 2d 132, 140, 554 N.E.2d 223, 226 (1990). Whether a duty exists depends on factors including (1) the reasonable foreseeability of the harm, (2) the likelihood of injury, (3) the magnitude of the burden of guarding against the harm, and (4) the consequences of imposing that burden on the defendant. *Ward*, 136 Ill. 2d at 140-41, 554 N.E.2d at

226. Foreseeability is the cornerstone of duty analysis. *Grant v. South Roxana Dad's Club*, 381 Ill. App. 3d 665, 671, 886 N.E.2d 543, 549 (2008) (citing *Corcoran v. Village of Libertyville*, 73 Ill. 2d 316, 326, 383 N.E.2d 177, 180 (1978)).

¶ 13 This case involves the open-and-obvious-danger rule and the distraction exception, both of which reflect this emphasis on foreseeability. In general, a party that owns, controls, or maintains property has a duty to maintain the premises in a reasonably safe condition. *Ward*, 136 Ill. 2d at 141, 554 N.E.2d at 227. This means either removing the dangerous condition or providing a warning to invitees who might encounter the danger. *Ward*, 136 Ill. 2d at 141-42, 554 N.E.2d at 227. However, a property owner is generally under no obligation to guard against injury from open and obvious dangers. *Ward*, 136 Ill. 2d at 142, 554 N.E.2d at 228. This is because the owner is not expected to foresee an injury from an open and obvious danger. *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 447-48, 665 N.E.2d 826, 832 (1996). As our supreme court explained in *Bucheleres*, "the law generally assumes that persons who encounter these conditions will take care to avoid any danger inherent in such condition. The open and obvious nature of the condition itself gives caution and therefore the risk of harm is considered slight." *Bucheleres*, 171 Ill. 2d at 448, 665 N.E.2d at 832.

¶ 14 The distraction exception to the open-and-obvious-danger rule is similarly grounded in considerations of foreseeability. It applies where "there is 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." *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 45, 796 N.E.2d 1040, 1046 (2003). In such cases, property owners owe a duty to exercise reasonable care to protect invitees from harm in spite of the open and obvious nature of the danger. *Rexroad*, 207 Ill. 2d at 45, 796 N.E.2d at 1046.

¶ 15 Applying these principles to the instant case, we agree with the plaintiff that the evidence on file leaves genuine questions of material fact that preclude summary judgment on both of these issues. We first consider whether there was a question that the raised areas of concrete constituted an open and obvious danger.

¶ 16 As previously mentioned, the plaintiff testified that she had stubbed her toes or stumbled over the bumps on previous occasions, as had other people. In addition, the record contains photographs of one of the lighting fixtures with the raised concrete mound surrounding it. We disagree with the defendant's assertion that these photographs make it clear that the raised concrete was an open and obvious condition. The raised concrete is the same color as the surrounding concrete. In all of the photographs, the light fixture itself is visible. However, in some of the photographs, a mound of raised concrete is visible surrounding the light, while in others, it is not visible at all. It is impossible to determine from the existing record whether the "humps" appear more distinct in person. We find that this evidence is at least sufficient to raise a genuine question as to the open and obvious nature of the raised concrete.

¶ 17 We note, however, that the plaintiff admitted in her deposition that she was aware of the existence of the "humps." She also admitted that she knew she was in the "general vicinity" of one of them when she was injured. Although these facts are relevant, we do not believe they require us to find that the raised concrete was open and obvious as a matter of law. In that regard, we find the Second District's decision in *Buchaklian* instructive.

¶ 18 In *Buchaklian*, the plaintiff was injured when she tripped over the raised portion of a mat while walking from the locker room to the shower area of the YMCA before using the pool. *Buchaklian*, 314 Ill. App. 3d at 198, 732 N.E.2d at 598. The

portion of the mat was raised approximately an inch or two higher than the rest of the mat. *Buchaklian*, 314 Ill. App. 3d at 198, 732 N.E.2d at 598. The plaintiff had not previously seen the mat in that condition and did not know how long it had been like that. *Buchaklian*, 314 Ill. App. 3d at 202, 732 N.E.2d at 601. However, she admitted that had she been looking down, the raised portion of the mat would have been visible. *Buchaklian*, 314 Ill. App. 3d at 198, 732 N.E.2d at 598. The trial court granted summary judgment in favor of the defendant based primarily on this admission. *Buchaklian*, 314 Ill. App. 3d at 202, 732 N.E.2d at 600.

¶ 19 The Second District reversed that ruling, finding that the evidence on file could "support a reasonable inference that the defect in the mat was difficult to discover because of its size [or] the lack of significant color contrast between the defect and the surrounding mat." *Buchaklian*, 314 Ill. App. 3d at 202, 732 N.E.2d at 601. The court also emphasized that it "refuse[d] to hold that invitees, as a matter of law, are required to look constantly downward." *Buchaklian*, 314 Ill. App. 3d at 202, 732 N.E.2d at 601.

¶ 20 Here, too, the defect was relatively small and lacked significant color contrast from the surrounding concrete. This makes the raised surface hard to detect, particularly by a person who is walking without looking constantly at the ground as she does so. We note that the plaintiff here, unlike the plaintiff in *Buchaklian*, was aware of the existence and general location of the raised concrete humps before her accident. While her awareness of their existence and *general* vicinity obviously makes them easier to detect than they might be to a guest visiting the Halia Crest pool for the first time, we do not believe that an invitee using a pool area can reasonably be expected to remember the precise location of such a hazard. We find that the record as it exists leaves a genuine issue of material fact as to whether the raised

concrete was an open and obvious danger that the defendant could reasonably have expected the plaintiff to avoid.

¶ 21 Assuming that the "hump" is determined to be an open and obvious danger, we must also consider whether the distraction exception applies. The plaintiff contends that the evidence on file raises a genuine issue of material fact on this question, and we agree.

¶ 22 The plaintiff argues that it was reasonably foreseeable to the defendant that invitees using its pool would engage in activities normally associated with using a pool, such as playing with water toys like the splash ball. The defendant, by contrast, argues that it could not be expected to foresee that an adult invitee would be distracted because she was engaging in "the prohibited activity of horseplay." As previously discussed, the plaintiff said "yes" when the defendant's attorney asked if throwing the splash ball at Dennis constituted "horseplay," and the defendant had posted a sign in the pool area that stated "no horseplay."

¶ 23 We find the defendant's "horseplay" argument particularly unpersuasive. What constitutes "horseplay" is open to interpretation. We do not believe that an affirmative response to a leading question is sufficient to allow a court to conclude as a matter of law that the plaintiff's conduct amounted to a violation of a posted rule, particularly where the rule does not prohibit a specific activity.

¶ 24 The defendant, however, correctly notes that a defendant in a premises liability case is not expected to anticipate that its invitees will be injured due to their own negligence. *Ward*, 136 Ill. 2d at 152, 554 N.E.2d at 232. The defendant argues that the plaintiff was distracted because she acted negligently in focusing on Dennis and engaging in "horseplay." We do not believe the record allows the court to reach this conclusion as a matter of law. Indeed, there are cases that specifically find that it is

reasonably foreseeable that pedestrians will focus on something other than the ground beneath their feet while walking. See, e.g., *Buchaklian*, 314 Ill. App. 3d at 202-03, 732 N.E.2d at 601 (need to watch for other pedestrians); *Zumbahlen v. Morris Community High School, District No. 101*, 205 Ill. App. 3d 601, 602-04, 563 N.E.2d 1228, 1228-29 (1990) (same); but see *Sandoval v. City of Chicago*, 357 Ill. App. 3d 1023, 1029-30, 830 N.E.2d 722, 728-29 (2005) (reaching the opposite conclusion).

¶ 25 The defendant further argues, however, that the distraction exception does not apply as a matter of law because the plaintiff "created her own distraction." In support of this contention, the defendant cites this court's decision in *Whittleman v. Olin Corp.*, 358 Ill. App. 3d 813, 832 N.E.2d 932 (2005). There, we noted that most cases applying the distraction exception involve distractions that are caused by the defendant or some third party rather than the plaintiff. *Whittleman*, 358 Ill. App. 3d at 817, 832 N.E.2d at 935-36. We explained that this was not surprising because in most cases, courts "would likely find it difficult" to conclude that a distraction that is "solely within the control" of a plaintiff was foreseeable. *Whittleman*, 358 Ill. App. 3d at 817-18, 832 N.E.2d at 936. However, we also stated that "there is no clear-cut rule that the distraction must be caused by someone other than the plaintiff in order to be deemed foreseeable." *Whittleman*, 358 Ill. App. 3d at 817, 832 N.E.2d at 936. We emphasized that our inquiry focuses on whether the distraction is foreseeable from the defendant's perspective. *Whittleman*, 358 Ill. App. 3d at 816, 832 N.E.2d at 935.

¶ 26 It is also worth noting that the relevant question is not whether the *precise* distraction was foreseeable. *Clifford v. Wharton Business Group, L.L.C.*, 353 Ill. App. 3d 34, 47, 817 N.E.2d 1207, 1217 (2004). Rather, the question is whether it was foreseeable to the defendant that invitees in the vicinity were "likely to become

distracted in some way and forget about the presence of the hazard." *Clifford*, 353 Ill. App. 3d at 47, 817 N.E.2d at 1218.

¶ 27 In this case, for reasons we have already discussed, we find that genuine issues of material fact remain concerning whether it was reasonably foreseeable to the defendant that a guest using its pool area might be distracted from looking down and noticing the raised concrete while walking. As previously noted, a pedestrian generally needs to look ahead while she is walking to avoid running into other pedestrians and cannot be expected to look down at the ground constantly. In addition, the plaintiff here testified that she had previously failed to notice the raised concrete because she was carrying things. Although the plaintiff also specifically testified that she was looking at Dennis when the accident occurred because she was aiming the splash ball at him, she did not testify that she would otherwise have been looking down or that she would otherwise have noticed the "hump." Moreover, we agree with the plaintiff that the record in this case presents a question of fact as to whether the defendant could reasonably have foreseen that an invitee would be distracted by playing with a pool toy in its pool area. She notes that she was using the splash ball for its intended purpose. We emphasize that the plaintiff does not need to prove her case in order to survive a motion for summary judgment. She need only raise genuine issues of material fact. For the reasons we have already given, we find that the plaintiff here has met this burden as to both of the issues involved in this case.

¶ 28 For the foregoing reasons, we reverse the order of the court.

¶ 29 Reversed.