2019 IL App (1st) 172936-U

No. 1-17-2936

Order filed March 1, 2019

Fifth Division

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

SUE BOHM,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 15 L 009744
	)	
PLANNED PROPERTY MANAGEMENT, INC., 1111	)	
NORTH DEARBORN, LLC, PLANNED REALTY	)	
GROUP, INC., and PLANNED REALTY	)	
MANAGEMENT, INC.,	)	Honorable
	)	John P. Callahan, Jr.,
Defendants-Appellees.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford specially concurred in the judgment.
Justice Hoffman specially concurred in the judgment.

ORDER

¶ 1 *Held*: Where the plaintiff tenant alleged that she was injured when she tripped and fell due to a chipped and cracked area of the concrete floor of the defendants' parking garage, the trial court erroneously granted summary judgment in favor of defendants, who asserted they did not owe a duty of reasonable care to protect plaintiff against the potentially dangerous condition because it was open and obvious, the deliberate encounter exception did not apply, and the condition was *de minimis*.

¶ 2 Plaintiff Sue Bohm, who was a resident in a high-rise apartment building owned, managed or maintained by defendants, sued them for negligence after she tripped and fell on the chipped and cracked concrete floor of the building's adjoining garage. The trial court granted defendants' motion for summary judgment on the basis that defendants did not owe a duty to protect plaintiff from the defect she encountered because it was an open and obvious hazard as a matter of law and no exception to the open and obvious rule applied in this case.

¶ 3 On appeal, plaintiff argues that the trial court erred by granting summary judgment in favor of defendants because they owed her a duty of reasonable care where the chipped and cracked area of the concrete floor upon which she tripped was not an open and obvious hazard or, in the alternative, the deliberate encounter exception to the open and obvious rule applied in this case.

¶ 4 For the reasons that follow, we reverse the judgment of the trial court and remand for further proceedings.[1]

¶ 5 I. BACKGROUND

¶ 6 In September 2015, plaintiff brought a four-count complaint against defendants, Planned Property Management, Inc., 1111 N. Dearborn, LLC, Planned Realty Group, Inc., and Planned Realty Management, Inc., seeking to recover damages she suffered as a result of her fall in 2013 when she tripped on the chipped concrete floor of defendants' property, the garage adjoining the high-rise apartment building at 1111 N. Dearborn Street in Chicago. Plaintiff alleged that defendants negligently failed to discover, remedy, repair or maintain the walkway surface and

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

warn persons of the condition, and negligently owned, managed, operated and maintained the premises.

¶ 7 In their affirmative defenses, defendants alleged that plaintiff was comparatively negligent and that the condition was open and obvious. Thereafter, defendants filed a motion for summary judgment, arguing that they did not owe plaintiff a duty to exercise reasonable care to protect her from the defective condition of the garage floor because it was both open and obvious and *de minimis*. Plaintiff's response disputed defendants' arguments and also argued that the deliberate encounter exception applied. Defendants replied that the deliberate encounter exception could not apply because plaintiff had alternate routes to get to her car.

¶ 8 According to the evidence submitted in support of and in opposition to summary judgment, plaintiff rented an apartment at 1111 N. Dearborn and a parking space in the connected garage. She had lived in the building about five or six years prior to her fall and paid $225 each month to rent her parking space in the garage. She left her apartment on the morning of September 25, 2013, to go to her car and drive to work. To reach her car, she had to take an elevator down from her apartment floor, walk through a hallway to another elevator bank, and take an elevator up to her parking space on the fourth floor of the garage. Then she had to walk about one-half of a block from the elevator to her parking space. While doing so, she caught her toe on a chipped area of concrete that was several feet from her vehicle and between three-fourths of an inch to one inch deep. She fell and injured her right hip.

¶ 9 At the time of the incident, she was neither distracted nor using her cell phone. She was carrying only her purse, a thin calendar, and a newspaper. Her vision was not blocked, and no

parked cars blocked her path. While she walked, she looked at the ground and at her destination, periodically switching her vision between the two.

¶ 10 There were only two paths that led from the garage elevator to plaintiff's parking space, and she chose the shorter path. Each time she took that path, it varied slightly depending on whether vehicles were parked in their spots. The area where she fell was a walkway that tenants used to access their vehicles. It was not a parking area and vehicles could not drive on it. Plaintiff testified that regardless of whether she took the longer or shorter path, she would encounter degraded areas of the floor because there were hundreds of cracked, chipped and degraded areas on each floor of the garage. There was no way to get to her car without walking over chipped and cracked areas, which varied in size and length. The floors had been in this condition for about five or six years prior to her fall.

¶ 11 Defendants owned and operated the garage, and its parking spaces were rented exclusively to the residents of the building. The garage had four floors, the first of which was primarily a ramp, while the other three floors each had about 50 parking spaces. The garage was enclosed with partial openings along two sides, which allowed the weather inside. Defendants were generally aware of the chipped concrete, *i.e.*, spalling, throughout the garage, which resulted from the exposure of the concrete to the elements and salt brought into the garage on the tires of cars during the winter. Some of defendants' employees testified that they were aware the garage concrete floor needed repairs since 2012. Maintenance staff walked through the different floors of the garage daily to clean the crumbling concrete off the floor and notify management about the need to make spot repairs. Since 2013, defendants would hire a contractor to spot patch those crumbling and cracked areas.

¶ 12 In May of 2013 (four months prior to plaintiff's fall), the garage failed an inspection by the city, which cited defendants for an ordinance violation based, *inter alia*, on the condition of the concrete floor. The violation, which was still open and pending as late as April 22, 2014, cited defendants for the loose and missing concrete throughout the garage floor. According to the city inspector, the degraded concrete floor was a safety issue that posed a greater risk than a single hole because people were forced to walk over multiple tripping hazards that were much more difficult to avoid.

¶ 13 Defendants' employees did not agree on whether the spalling concrete of the garage floor posed a safety issue or tripping hazard. One employee who was on the garage fourth floor almost daily testified that he never noticed the degraded condition of the floor, and the senior maintenance manager testified that he believed the degraded floor was not a tripping hazard because the holes were so shallow. However, other employees testified that the garage floor defects were the type of tripping hazards they were trained to alert management or their supervisor about. The garage floors were eventually repaired in 2014.

¶ 14 The record includes photographs taken by the parties of the fourth floor of the parking garage, areas where plaintiff walked, and the area where she tripped and fell. The degraded condition of areas of the concrete floor is clearly visible in the photographs. One photograph provides perspective of the area where plaintiff tripped because a purse, a thin document that appears to be a calendar, and a newspaper are placed at the scene.

¶ 15 In July 2017, the trial court granted summary judgment in favor of defendants, stating that plaintiff had lived in the building about five years, the defect she encountered was open and

obvious, and no exception to the rule applied. The trial court did not address defendants' argument that the defect was *de minimis*.

¶ 16 Plaintiff filed a motion to reconsider, arguing that the trial court's award of summary judgment was based on an erroneous application of Illinois law and the record presented questions of material fact about whether the risk inherent in the condition was apparent and whether the deliberate encounter exception to the open and obvious condition rule applied in this case. The trial court denied plaintiff's motion, and plaintiff timely appealed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, plaintiff argues that summary judgment was improper because there are genuine issues of material fact as to whether the area of the concrete floor where she tripped was an open and obvious hazard and whether the deliberate encounter exception applies in this case.

¶ 19 Summary judgment is a drastic means of disposing of litigation and should be entered only when the right of the moving party is clear and free from doubt. *Gilbert v. Sycamore Municipal Hospital,* 156 Ill. 2d 511, 518 (1993). A defendant moving for summary judgment may meet the initial burden of production by either affirmatively showing that some element of the case must be resolved in defendant's favor, or by showing the absence of evidence supporting the plaintiff's position on one or more elements of the cause of action. *Hutchcraft v. Independent Mechanical Industries, Inc.*, 312 Ill App. 3d 351, 355 (2000). The plaintiff is not required to prove her case at the summary judgment stage; in order to survive a motion for summary judgment, she must present a factual basis that would arguably entitle her to a judgment. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002).

¶ 20 Summary judgment is only appropriate "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(c) (West 2014). The court must construe these documents and exhibits strictly against the moving party and liberally in favor of the nonmoving party. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004). The court may draw reasonable inferences from the undisputed facts, but where reasonable persons could draw divergent inferences from the undisputed facts, the issue should be decided by a trier of fact and the motion for summary judgment denied. *Siegel v. Village of Wilmette*, 324 Ill. App. 3d 903, 907 (2001); *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 271-272 (1992). We review a trial court's grant of summary judgment *de novo*. *Home Insurance Co.*, 213 Ill. 2d at 315. That is, we perform the same analysis as a trial court and may make our decision on any basis in the record, regardless of whether the trial court relied on that basis. *Guterman Partners Energy, LLC v. Bridgeview Bank Group*, 2018 IL App (1st) 172196, ¶¶ 48-49.

¶ 21 "In a negligence action, the plaintiff must plead and prove the existence of a duty owed by the defendant, a breach of that duty, and injury proximately resulting from that breach." *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. The issues in this appeal are limited to the element of the imposition of a legal duty. Unless a duty is owed, there is no negligence, and whether a duty exists is a question of law for the court to decide. *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14, 26 (1992). In deciding whether a duty exists, courts balance four 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 that burden on the defendant. *Bogenberger v. Pi Kappa Alpha Corp.*,

Inc., 2018 IL 120951, ¶ 22. "The weight to be accorded these factors depends upon the circumstances of a given case." *Bruns*, 2014 IL 116998, ¶ 14.

¶ 22 "Illinois has adopted the rules set forth in sections 343 and 343A of the Restatement (Second) of Torts regarding the duty of possessors of land to their invitees." *Deibert v. Bauer Brothers Construction Co., Inc.*, 141 Ill. 2d 430, 434 (1990). Section 343 provides:

> "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, at 215-16 (1965).

Section 343A provides the following exception to section 343:

> "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(1), at 218 (1965).

¶ 23 The common law construct of this provision, known as the open and obvious rule, provides that "a party who owns or controls land is not required to foresee and protect against an

injury if the potentially dangerous condition is open and obvious." (Internal quotation marks omitted.) *Bruns*, 2014 IL 116998, ¶ 16. " ' "Obvious" means that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment.' " *Id.* (quoting Restatement (Second) or Torts § 343A, Comment *b*, at 219 (1965)). The open and obvious rule is not limited to common and apparent conditions, such as fire, height, or bodies of water, but may also apply to less-common conditions, such as sidewalk defects. *Burns v. City of Chicago*, 2016 IL App (1st) 151925, ¶ 45.

¶ 24 The existence of an open and obvious condition, however, is not an automatic or *per se* bar to the finding of a legal duty on the part of a defendant. *Id.* at ¶ 46. "In assessing whether a duty is owed, the court must still apply traditional duty analysis to the particular facts of the case." *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 425 (1998). The application of the open and obvious rule affects the first two factors of the duty analysis: the foreseeability and likelihood of the injury. *Van Gelderen v. Hokin*, 2011 IL App (1st) 093151, ¶ 27. When the condition is open and obvious, the foreseeability of harm and likelihood of injury will be slight, thus weighing against the imposition of a duty. *Bruns*, 2014 IL 116998, ¶ 19. The open and obvious nature of the condition itself gives caution and therefore the risk of harm is considered slight; people are expected to appreciate and avoid obvious risks. *Van Gelderen*, 2011 IL App (1st) 093151, ¶ 27.

¶ 25 A. Open and Obvious Condition

¶ 26 The parties do not dispute that plaintiff tripped and fell on a chipped area of concrete that was several feet from her vehicle, which was parked in her rented parking space. Where no

dispute exists as to the physical nature of the condition, whether the dangerous condition is open and obvious is a question of law. *Choate v. Indiana Harbor Belt R.R. Co.*, 2012 IL 112948, ¶ 34; see also *American National Bank & Trust Co. of Chicago*, 149 Ill. 2d at 27 (even though some workers averred that they were unaware of the presence of a high-voltage power line hanging near the billboard, photographs of the accident site revealed that the wire was clearly visible and thus the danger was arguably open and obvious). Whether a condition is open and obvious depends on the objective knowledge of a reasonable person, not the plaintiff's subjective knowledge. *Wreglesworth ex rel. Wreglesworth v. Arctco*, Inc, 317 Ill. App. 3d 628, 635-36 (2000); *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 457 (1996).

¶ 27 Defendants argue that the physical nature of the chipped pavement is amply documented by the photographs in the record and not in dispute. According to the record, plaintiff testified that the defect was between three-quarters of an inch to one inch deep, and she was looking at both the floor and her parking space as she approached her car. Moreover, her walking path and view of the area was not obstructed by any parked cars or other objects. Photographs of the area where she tripped and fell show that the degraded area of concrete was clearly visible.

¶ 28 Plaintiff, however, does not concede that the danger of the visibly cracked and chipped concrete area where she tripped and fell was open and obvious; she argues that even though the condition was visible, a question of fact exists regarding whether the *risk* presented by the defect was apparent. She averred that she had previously encountered the degraded floor numerous times without incident, was generally aware of the condition of the degraded floor, and likely perceived the portion of the floor that she tripped on but did not attempt to avoid it because it did not register as something she needed to avoid. She also argues that some of defendants' employees stated in their depositions that they did not believe the floor posed any hazard.

¶ 29 Plaintiff cites *Simmons v. American Drug Stores, Inc.*, 329 Ill. App. 3d 38 (2002), to support her argument that a question of fact exists regarding whether the risk inherent in the visible condition was open and obvious. In *Simmons*, the plaintiff exited a store carrying one bag in each hand down at his sides while he walked through a "cart-nabber" barrier, *i.e.*, several sections of iron fencing with gaps intended to be wide enough for shoppers to pass through but narrow enough to prevent shopping carts from leaving the premises. *Id.* at 41. As he walked through the cart-nabber, he got stuck, lost his balance, fell off the four and three-fourth inch concrete curb onto the asphalt parking lot, and injured his foot. *Id.* The plaintiff had passed through that cart-nabber on previous occasions without incident. *Id.* The plaintiff's expert testified that the 15 to 17 inch gaps between the protrusions at the top of the barriers were far less than any minimum egress width allowed by the city's building code. *Id.* Although the defendants had argued before the trial court that the barriers were not dangerous to anyone that was paying even a modicum of attention to what they were doing, the defendants conceded on appeal that the barriers presented a dangerous condition but argued that it was an open and obvious condition. *Id.* at 43-44.

¶ 30 On appeal, the court held that summary judgment in favor of the defendants was improper because the plaintiff raised a genuine issue of material fact as to whether the barriers presented an open and obvious condition. *Id.* at 44. Specifically, the court found that even though a reasonable person in the plaintiff's position would appreciate the *condition* because the barriers were readily visible, a question of fact existed as to whether that reasonable person would appreciate the *risk* presented by the barriers where the defendants had failed to realize the risk and the plaintiff had encountered the barriers before without incident. *Id.* at 44.

¶ 31 The viability of *Simmons* is questionable; its holding that whether a condition is open and obvious is a question of fact is counter to the supreme court's position as discussed in *Choate*, 2012 IL 112948, ¶ 34. See *Ballog v. City of Chicago*, 2012 IL App (1st) 112429, ¶ 29. Notwithstanding this deficiency in *Simmons*' analysis, that case is distinguishable from the instant case. In *Simmons*, the danger was not posed by a clearly visible object, like the barrier fencing itself, but rather by the too-narrow gaps between that barrier fencing, which posed a risk that would not be obvious to shoppers leaving the store and carrying their shopping bags through the barrier fence gaps. Here, in contrast, there is no question that the cracked and crumbling concrete area was clearly visible as plaintiff walked toward her parking space and a reasonable person in her position would appreciate the risk of tripping over that defect and falling. The testimony of defendants' senior maintenance manager and other employees established that they also were aware of the visible concrete spalling, cleaned it up on a daily basis, notified management of the need to repair various areas that presented tripping hazards, and hired a contractor to make spot repairs. In addition, the city inspector averred that the loose and missing concrete throughout the garage floor was a safety issue because people were forced to walk over numerous tripping hazards. Thus, the cracked floor area on which plaintiff tripped was an open and obvious hazard as a matter of law.

¶ 32 B. The Deliberate Encounter Exception

¶ 33 Plaintiff argues that even if the cracked and crumbling concrete floor presented an open and obvious danger, there is an issue of material fact regarding whether defendants should have anticipated the harm under the deliberate encounter exception.

¶ 34 Two exceptions may apply to the open and obvious rule: the distraction and the deliberate encounter exceptions. *LaFever v. Kemlite Co., a Division of Dyrotech Industries, Inc.*, 185 Ill. 2d 380, 391 (1998). Plaintiff invokes the deliberate encounter exception, whereby a duty of reasonable care is imposed where a possessor of land "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." *Id.* (quoting Restatement (Second) of Torts § 343A, Comment *f*, at 220 (1965)). The application of this exception affects the foreseeablity and likelihood factors of the duty analysis; unlike the operation of the open and obvious rule, which negatively impacts those factors, the application of the deliberate encounter exception positively impacts those factors. *Bruns*, 2014 116998, ¶ 20.

¶ 35 Under the deliberate encounter exception, liability "stems from the landowner's knowledge of the premises and what the landowner had reason to expect the invitee would do in the face of the dangerous condition." *Morrissey v. Arlington Park Racecourse, LLC*, 404 Ill. App. 3d 711, 725 (2010). The deliberate encounter exception is not limited to circumstances involving some economic compulsion, such as workers compelled to encounter dangerous conditions as part of their employment obligations. *Id.* at 725-26 (citing *LaFever*, 185 Ill. 2d at 393). Nor is this exception limited to instances where the plaintiff had no reasonable alternative other than encountering the dangerous condition. *Id.* at 726 (citing *LaFever*, 185 Ill. 2d at 393).

¶ 36 Defendants had reason to expect that tenants like plaintiff would proceed to encounter the known and obvious danger of the degraded concrete floor because a reasonable person in plaintiff's position would decide that the advantages of doing so would outweigh the apparent risk. Defendants intended the garage to benefit the residents of their building, and it is reasonable

to presume plaintiff would take advantage of using the garage and the walking area near her car despite the condition of the floor. The garage was connected to the apartment building where she resided and she paid $225 per month to rent her covered parking space. Elsewhere in the neighborhood, parking was scarce, expensive, less convenient, and less safe. It is reasonable to expect that people will take the shortest route to their cars, and the path plaintiff took was an area designated for walking. Furthermore, the degraded condition of the entire garage floor forced people to walk over multiple hazards, and plaintiff would have encountered tripping hazards whichever way she walked to her vehicle.

¶ 37 The deliberate encounter exception to the open and obvious rule does apply under the facts of this case. The evidence established that plaintiff's encounter with the degraded floor was foreseeable to defendants, who rented parking spaces to tenants despite the dangerous condition of the garage floor, and the advantages of walking upon a walkway provided by defendants for the intended use of accessing tenant vehicles outweighed the risk to a reasonable person in plaintiff's position.

¶ 38 C. Traditional Duty Analysis

¶ 39 This court's review of the trial court's order granting summary judgment in favor of defendants continues with an analysis of the four factors that courts consider regarding duty in a negligence case: (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 defendants. *Bruns*, 2014 IL 116998, ¶ 35.

¶ 40 The first two factors carry weight in favor of imposing a duty of care on defendants because the deliberate encounter exception applies even though the dangerous condition was

open and obvious. *Id.* ¶ 20. As to the third and fourth factors, defendants were aware of the spalling concrete floor, had received a citation from the city requiring them to correct this safety hazard, and were engaged in the ongoing process of cleaning up the spalling concrete and using a contractor to do spot repairs. In addition, defendants, who had about 150 parking spaces in their garage, were engaged in the business of charging tenants to rent those parking spots. The imposition of this burden is justified given the forseeability and likelihood of injury and the minimal consequences of imposing that burden on the entities engaged in the for-profit business of operating and managing a parking garage. Accordingly, based on the deliberate encounter exception to the open and obvious rule, defendants owed plaintiff a duty to exercise reasonable care to protect her from the degraded area of the garage floor where she tripped and fell, and the trial court erred by granting summary judgment in favor of defendants.

¶ 41 D. *De Minimis* Defect

¶ 42 Finally, defendants argue that they are entitled to summary judgment in their favor because Illinois courts have held that similar level variances of less than two inches in walking surfaces were *de minimis* as a matter of law and thus not actionable. See *Putnam v. Village of Bensenville*, 337 Ill. App. 3d 197, 202-03 (2003) (one inch defect of a ramp was *de minimis* and not actionable); *Hartung v. Maple Investments & Development Corp.*, 243 Ill. App. 3d 811, 815 (1993) (holding that an outdoor sidewalk defect of only one-half to three-fourths of an inch high could not be the basis of a negligence action as a matter of law); *Birck v. City of Quincy*, 241 Ill. App. 3d 119, 122 (1993) (sidewalk variation of one and seven-eighths inches was *de minimis* and too slight to be actionable as a matter of law; the actionable "stumbling point" seemed to be where the defect approached two inches). Defendants cite *Hartung*, 243 Ill. App. 3d at 815

(extending the *de minimis* rule, which previously applied to municipalities concerning walkway defects, to the private owners of a shopping center), and *Hartung's* progeny (*St. Martin v. First Hospitality Group, Inc.*, 2014 IL App (2d) 130505, ¶ 13, and *Morris v. Ingersoll Cutting Tool Co.*, 2013 IL App (2d) 120760, ¶ 12) to support the proposition that the *de minimis* rule applies to private owners and possessors of land.

¶ 43 Defendants' argument lacks merit. Even assuming that the negligence analysis concerning walkway defects should be the same for municipalities and private landowners, defendants misconstrue and misapply the law; there is no valid basis to support the notion that some two-inch "*de minimis* rule" invariably overrides an exception to the open and obvious rule and the court's traditional duty analysis. The application of the so-called *de minimis* rule urged by defendants is inconsistent with the Illinois rule—*i.e.*, the reasonably-prudent-person test that must be applied to the facts and circumstances of the particular case involving a municipality's liability for uneven sidewalks.

¶ 44 The Illinois Supreme Court discussed this issue in the context of a municipality's liability in *Arvidson v. City of Elmhurst*, 11 Ill. 2d 601, 602 (1957), where the plaintiff had parked her vehicle at the curb to go to a store, inserted a coin in the parking meter, walked back toward her car to speak to the children inside it, and took about three steps on the sidewalk. Then she stepped onto two slanted and uneven adjoining sidewalk slabs so that the heel of her foot was on one slab while the sole of that foot was on the lower slab. As a result, her ankle turned, and she fell and was injured. The height difference between the two slabs was about two inches. *Id*. at 603. The jury awarded the plaintiff damages, but the appellate court entered judgment notwithstanding the verdict on the ground that the municipality was not negligent as a matter of

law. *Id.* at 602. On appeal, the Illinois Supreme Court reversed the appellate court and held that the cause was properly submitted to the jury.

¶ 45 Specifically, the Illinois Supreme Court in *Arvidson* made the observation that a survey of the decisions of various jurisdictions (the survey decisions) indicated that the law did not impose on municipalities "the duty of keeping all sidewalks in perfect condition at all times, and that slight inequalities in level, or other minor defects frequently found in traversed areas, are not actionable." *Id.* at 604. Further, *Arvidson* observed that the survey decisions disagreed as to when a sidewalk defect was so slight that the issue of whether the inequality between adjoining sidewalk slabs constituted a question of fact for the jury or a question of law for the court. *Arvidson* also observed, however, that the survey decisions recognized "that no mathematical standard can be adopted in fixing the line of demarcation, and that each case must be determined upon its own particular facts and circumstances. [Citation.] In fact, courts have criticized and rejected the fixing of arbitrary standards with mathematical precision as to what constitutes minor defects." *Id.*

¶ 46 Notwithstanding those survey decisions, *Arvidson* emphasized that "[t]he rule in Illinois, reiterated in the case law, is that a jury question of the issue of the city's negligence is presented only when the defect in the sidewalk is such that a reasonably prudent man should anticipate some danger to persons walking upon it." *Id.* at 605. Applying this Illinois rule, *i.e.*, the reasonably-prudent-person test, to the particular facts presented, *Arvidson* held that the question of whether the city was negligent was for the jury, stating that "it cannot be found that all reasonable minds would agree that the 2-inch variation and the height of the adjoining slabs of the sidewalk near the curb was so slight a defect that no danger to pedestrians could reasonably

be foreseen. *Id.* at 609. In *Warner v. City of Chicago*, 72 Ill. 2d 100, 103-04 (1978), the court reaffirmed the Illinois rule notwithstanding the "numerous and diverse authorities involving the difficult issue of whether height differences between adjoining sidewalk slabs constitute questions of fact for the jury or of law for the court."

¶ 47 However, despite the Illinois Supreme Court's emphasis in *Arvidson* and *Warner* regarding the Illinois rule, decisions of this court have misconstrued *Arvidson* as adopting from the survey decisions the proposition that "slight defects frequently found in traversed areas are not actionable as a matter of law." *Gleason v. City of Chicago*, 190 Ill. App. 3d 1068, 1070 (1989); see also *St. Martin*, 2014 IL App (2d) 130505, ¶ 19 (where the sidewalk was privately owned, a height variation of less than two inches from one concrete slab to the adjoining concrete slab generally was not actionable); *Morris*, 2013 IL App (2d) 120760 (the defendant premises owners were entitled to summary judgment where the one and one-half inch crack in an asphalt loading bay where semitrailers made deliveries was a minor defect that triggered application of the *de minimis* rule).

¶ 48 It is well-settled that there is no bright line test for determining the point at which a defect becomes actionable; rather, each case must be examined on its particular facts. *Warner*, 72 Ill. 2d at 104. Consequently, no magic words in our court decisions have established that a height variation in walkways of about two inches is necessary to create a question of fact for the jury. Even assuming that the reasonably-prudent-person analysis applicable to municipalities for sidewalk defects should apply to the defendants here, who are entities responsible for a privately-owned and covered parking garage that was cited for a municipal ordinance violation due to the defective condition of the garage's floors, the spalling concrete floor that caused plaintiff to trip

and fall was such that a reasonably prudent person should anticipate some danger to persons walking upon it. As discussed above, the risk of harm was reasonably foreseeable and the economic burden to defendants to repair the defect was not great. The evidence established that defendants' employees daily walked the four floors of the garage to clean degraded areas of concrete pavement and report tripping hazards to management, and that defendants hired independent contractors to make spot repairs until defendants finally repaired the garage floors in 2014.

¶ 49 The applicable law and facts of this case refute defendants' claim that the alleged defective condition of the garage floor was *de minimis* and nonactionable as a matter of law.

¶ 50 III. CONCLUSION

¶ 51 The judgment of the trial court, which granted summary judgment in favor of defendants, is reversed and this matter is remanded for further proceedings.

¶ 52 Reversed and remanded.

¶ 53 PRESIDING JUSTICE ROCHFORD, specially concurring:

¶ 54 I concur only in the result that the grant of summary judgment in favor of defendants should be reversed and the matter remanded to the circuit court.

¶ 55 When reviewing an appeal from the grant of summary judgment, the function of the court is limited to "determining whether the trial court correctly concluded that no genuine issue of material fact was raised and, if none was raised, whether judgment as a matter of law was correctly entered." *American Family Mutual Insurance Co. v. Page*, 366 Ill. App. 3d 1112, 1115 (2006) (citing *State Farm Insurance Co. v. American Service Insurance Co.,* 332 Ill. App. 3d 31, 36 (2002)). A court cannot weigh evidence, decide facts, and make credibility determinations at

the summary judgment stage. *Gulino v. Economy Fire and Casualty Co.*, 2012 IL App (1st) 102429, ¶ 25.

¶ 56 Accordingly, plaintiff on appeal argues that there are material issues of fact as to whether the risk posed by the condition at issue was open and obvious and as to whether the deliberate encounter exception would apply under the circumstances if the condition was open and obvious. She maintains that the circuit court's entry of summary judgment in favor of defendants should be reversed based on those issues of fact.

¶ 57 Whether a condition presents an open and obvious danger is generally a question of fact. *Atchley v. University of Chicago Medical Center*, 2016 IL App (1st) 152481, ¶ 34. Only where there is no dispute as to the physical nature of the condition may the question be considered one of law. *Id.*; *Ballog v. City of Chicago,*2012 IL App (1st) 112429, ¶ 23.

¶ 58 First, plaintiff and defendants disagreed below and now on appeal as to the "condition" which is at issue. Plaintiff takes the position that the condition at issue is the overall degradation of the garage floor. Her complaint alleged that the "walkway surface in the parking area" was a dangerous and hazardous condition. Defendants argue that the condition is the specific defect or area where plaintiff fell. In their affirmative defense, defendants did not allege facts to support their conclusion that the "condition" was open and obvious.

¶ 59 On appeal, plaintiff argues that it is for the jury to decide whether the entire floor is the hazardous condition, or only the area where she fell. Therefore, plaintiff has not taken the position that she has proven at this time, as a matter of law, that the condition which controls her case is the degradation of the garage floor. The issue is significant because it impacts the analysis as to the open and obvious, deliberate encounter exception, and duty issues. Compare

Wilfong v. L.J. Dodd Construction, 401 Ill. App. 3d 1044 (2010) (where condition was ruts at construction site and not the single rut where plaintiff fell), and *Nida v. Spurgeon*, 2013 IL App (4th) 130136, ¶ 52 (where the condition was determined to be the visibly broken inclined driveway and not the "single, unbroken piece of asphalt" where plaintiff fell), with *Garcia v. Young*, 408 Ill. App. 3d 614 (2011) (where court said the condition was not the street with potholes, but the specific pothole where plaintiff was injured).

¶ 60 The trial court, in granting summary judgment, did not specify whether the condition which was open and obvious was the general condition of the garage floor. If the relevant condition is the general degradation of the garage floor, there is differing evidence as to the nature and extent of the condition of the garage floor. Many of the photographs in the record are of a poor quality. I believe that a determination of whether the condition of the garage floor is open and obvious, as a matter of law, requires a weighing of the evidence and assessing the credibility of the witnesses.

¶ 61 Accepting defendants' position as to the "condition," there are questions of fact as to the obviousness of the danger posed by the area where plaintiff fell. Plaintiff testified that the specific defect which caused her fall was a "chip," which she estimated to be ¾ of an inch to 1 inch deep where her toe was caught. Her complaint described the defect as a "divot." There were no measurements taken of the defect and defendant below argued that the photographs depicted the depth of the defect as less than the estimate given by plaintiff. Even if a reasonable person in plaintiff's position could recognize that there was a defect, it does not necessarily follow that a reasonable person could recognize the risk involved. It is not unreasonable that a person could believe that the chip or divot could be walked across without her toe catching.

¶ 62 It is my conclusion that genuine issues of material fact exist as to whether the relevant condition—either the garage floor in general, or the specific place where plaintiff fell—was open and obvious, if not to its nature, at least to its risk. See *Alqadhi v. Standard Parking, Inc.*, 405 Ill. App. 3d 14, 15 (2010).

¶ 63 Plaintiff argues that it is for the jury to decide as to the application of the deliberate encounter exception, including determining whether the condition which she encountered was the degradation of the garage floor or the specific defect. I also believe that, at this stage, even if the relevant condition was open and obvious, the evidence is sufficient to raise an issue of material fact as to whether defendants could have anticipated that plaintiff would deliberately encounter the condition in order to reach her parked car, and the issue should be left to the trier of fact. *Simmons v. American Drug Stores, Inc.*, 329 Ill. App. 3d 38, 45 (2002); *Morrissey v. Arlington Park Racecourse, LLC*, 404 Ill. App. 3d 711, 729 (2010).

¶ 64 Finally, I conclude that, whether the condition which caused plaintiff to fall is *de minimus*, is a question of fact which should be decided by the trier of fact. See *Monson v. City of Danville*, 2018 IL 122486, ¶ 47. It turns, first of all, on a determination of the condition which must be examined.

¶ 65 Plaintiff did not move in the circuit court for summary judgment on any of the issues of this case including the issue of whether a duty exists. Plaintiff did not argue in this court for a finding that defendants owed her a duty of care. Defendants, in moving for summary judgment, argued only that the alleged condition was open and obvious, and that they could not be found liable under the *de minimus* rule. The circuit court, in granting summary judgment, found that the condition was open and obvious and that the deliberate encounter exception did not apply.

The circuit court did not analyze whether defendants owed plaintiff a duty of care under a traditional duty analysis. Although the existence of a duty of care is a question of law, we are not required to determine that issue in order to reverse the summary judgment which was entered for defendants. I do not believe the issue of duty should be decided as a matter of law at this time under the circumstances and procedural posture of this appeal.

¶ 66 JUSTICE HOFFMAN, specially concurring:

¶ 67 I too conclude that the circuit court's summary judgment in favor of the defendants must be reversed and the matter remanded for further proceedings. I write separately to distance myself from the notions that the condition of the garage floor was an open and obvious hazard as a matter of law (see ¶¶ 29-31) or that the deliberate encounter exception to the open and obvious rule is inapplicable in this case as a matter of law (see ¶¶ 36, 37).

¶ 68 Conditions which can be said to be open and obvious as a matter of law are those which present a danger so obvious that any child could be expected to appreciate the risk of harm such as fire, drowning in water, or falling from a height. *Choate v. Indiana Harbor Belt R.R. Co.*, 2012 IL 112948, ¶ 32 (quoting *Mt. Zion State Bank & Trust v. Consolidated Communications, Inc.*, 169 Ill. 2d 110, 118 (1995)). This is not such a case. The question of whether the condition of the garage floor in this case presented an open and obvious danger is one of fact, not law. *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14, 29-30 (1992) (quoting *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 156 (1990)).

¶ 69 I also reject the notion that whether the defendants had reason to believe that a reasonable person in the plaintiff's position would elect to walk in the area near her car despite the condition of the garage floor can be decided as a matter of law. See ¶ 36. What a reasonable person would,

or would not, do in a given circumstance is a question of fact to be decided by the trier of fact. The determination of whether the deliberate encounter exception to the open and obvious rule applies rests upon the factual determination of what a reasonable person would have done under the same circumstances.

¶ 70 Finally, I do not believe that a discussion of a traditional duty analysis has any particular relevance to the issues in this case. The owner or possessor of land owes a duty to its invitees to maintain its property in a reasonably safe condition to avoid the risk of harm. *Ward*, 136 Ill. 2d at 141; Restatement (Second) of Torts § 343 (1965). An exception to that generalized duty is the open and obvious rule. See *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 44 (2003) ("[A] party who owns or controls land is not required to foresee and protect against an injury if the potentially dangerous condition is open and obvious."). The question in this case is not whether the defendants owed a duty to the plaintiff to maintain the garage floor in a reasonably safe condition; the issue is whether the condition of the floor was open and obvious. Whether the condition of the floor was open and obvious is a factual question which must be resolved by the trier of fact before any determination of duty can be made.

¶ 71 As a reviewing court engaged in a *de novo* review of summary judgment, we must be mindful that our function is to determine whether a genuine issue of material fact exists, not to decide factual issues. *Illinois State Bar Ass'n Mutual Insurance Co. v. Law Office of Tuzzolino & Terpinas*, 2015 IL 117096, ¶ 14. The evidentiary material of record in this case establishes that a genuine issue of fact exists on the question of whether the condition of the garage floor upon which the plaintiff tripped was open and obvious. It is for this reason that I concur only in this

court’s judgment that the summary judgment entered by the circuit court in favor of the defendants is reversed and the matter remanded for further proceedings.