



Ready for the Defense

Local government: not babysitter—no duty to protect invitees from open & obvious dangers

THIS MONTH'S COLUMN will discuss two recent Appellate Court decisions dealing with the liability, or lack of liability, of landowners, including local government, to invitees coming onto the premises and sustaining injuries by encountering an "open and obvious danger."

One case involved an electrician running conduit, contacting high-voltage lines with the conduit (*Whittleman*). The other involved a 5 ft. by 6 ft. section of city sidewalk in front of plaintiff's house with concrete missing except a 3" to 4" piece sticking up, over which plaintiff tripped (*Sandoval*).

Both cases discuss and illustrate factual settings where the so-called "open and obvious danger" rule and one of the exceptions to the "open and obvious danger" rule; namely, the "distraction exception," comes into consideration in determining whether a premises owner is liable for injuries sustained by a person/invitee coming onto the premises.

Local government, charged with a duty to maintain its premises and facilities reasonably safe for intended and permitted users and usually faced with limited resources to accomplish such task, can allocate scarce resources by having an awareness and understanding of the "open and obvious danger" (no duty to protect invitees from) rule and its "distraction exception."

The Open & Obvious Danger / No Duty Rule

In Illinois, a landowner or possessor owes no duty to persons coming onto the land or premises (persons invited to come onto the land) to warn them of or protect them from an "open and obvious danger." Therefore, a landowner/possessor cannot be liable to such person injured while encountering an "open and obvious danger."

This "open and obvious danger"/no duty to protect against rule is illustrated by two cases:

- (1) *Bucheleres v. Chicago Park District*, 171 Ill.2d 435, 665 N.E.2d 826 (1996) (Chicago Park District owed no duty to warn or protect swimmer from "open and obvious danger" of diving into Lake Michigan and hitting head on bottom of lake, sustaining paralyzing injuries); and

- (2) *Bonner v. City of Chicago*, 384 Ill.App.3d 481, 778 N.E.2d 285 (1st Dist. 2002) (City had no duty to warn pedestrian on sidewalk crossing alley of open and obvious danger of walking through construction and falling on rocks therein).

What is an "open and obvious danger" of which there is no duty to warn or protect against? The Appellate Court in the *Sandoval* case, to be discussed herein, defined "open and obvious" as follows:

'Open and obvious' conditions include those wherein the condition and risk are apparent to and would be recognized by a reasonable person exercising ordinary perception, intelligence and judgment in visiting an area. (830 N.E.2d at 727).

The "Distraction Exception" To The No Duty Rule

Local government will not be liable for injuries to intended and permitted users on its property for "open and obvious dangers." But, there is an exception to the no liability rule. The exception, which imposes a duty on a landowner or possessor to protect a person coming onto the property from, is called the "distraction exception."

That is, if there is an "open and obvious danger," but if it is reasonably foreseeable that the person coming onto the property will be distracted and not discover the danger, the landowner will have a duty to warn of or guard against such danger.

Two cases will illustrate the distraction exception:

- (1) *Ward v. Kmart Corp.*, 136 Ill.2d 132, 554 N.E.2d 223 (1990) (Store liable under momentary distraction rule where it placed concreted bollard post in front of outside exit door and patron carrying large package purchased could not see post and collided into it, sustaining injuries).
- (2) *Deibert v. Bauer Brothers Construction Co.*, 141 Ill.2d 430, 566 N.E.2d 239 (1990) ("where common practice was for workers to throw debris from balcony under which portable toilet was located, defendant-contractor owed

duty to worker despite open and obvious condition of rut in ground where worker was distracted by looking up for debris when exiting toilet because reasonably foreseeable that injury could occur”) (830 N.E.2d at 729).

Having illustrated the “open and obvious danger” rule (no duty) and the “distraction exception” rule (a duty owed), we look at the two recent Appellate Court cases discussing these two rules for guidance in determining under what fact-settings they may apply.

Whittleman—Self-Created Distraction Not Within “Distraction Exception”

The First District Appellate Court decision of *Whittleman v. Olin Corp.*, 358 Ill.App.3d 813, 832 N.E.2d 932 (5th Dist. 2005), explaining the “distraction exception,” suggests that for the “distraction exception” to apply, the distraction must be caused by someone or something other than the plaintiff’s own self-created distraction.

In *Whittleman*, electrician Lloyd Whittleman, employed by Wegman Electric Co. and working at Olin Corporation installing aluminum conduit piping, sustained injuries when a length of conduit he was holding came into contact with high-voltage lines. The contract did not require the high-voltage electrical lines be de-energized or shielded.

Whittleman sued Olin contending the electrical lines should have been de-energized or shielded or covered. Olin sought and obtained dismissal of the Whittleman Complaint based upon the “open and obvious danger” of the electrical lines. Whittleman amended his Complaint (Fourth Amended Complaint) and pleaded he was distracted. He pleaded Olin should have expected he might “momentarily forget the danger or be distracted by the work” being done. But, he pleaded only that he was distracted and not how or why he was distracted and that Olin or someone else caused his distraction.

The Appellate Court held that Whittleman’s own self-created distraction would not trigger the “distraction exception” so as to render Olin liable and dismissed the Fourth Amended Complaint with prejudice—no right to file a Fifth Amended Complaint.

Although the case law on the developing “distraction exception” rule is not totally clear, the Appellate Court held that the distraction must be not of a plaintiff’s own making to trigger the “distraction exception.” The Court explained:

The fact that Whittleman cites to no case in which the plaintiff creates his own distraction is telling. Courts would likely find it difficult to reach such a conclusion. 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. Based upon the facts of this case, we will not carve out an exception that would be akin to strict liability owed to all business invitees in self-created distraction situations. (358 Ill.App.3d at 817-18, 832 N.E.2d at 936).

Sandoval & Distraction Must Not Be Plaintiff’s Own Personal Inattentiveness

The second case wherein the First District Appellate Court dealt with the “open and obvious danger” rule and its “distraction exception” is *Sandoval v. City of Chicago*, 357 Ill.App.3d 1023, 830 N.E.2d 722 (1st Dist. 2005), which held that a “crater-like defect” in a city sidewalk in front of plaintiff’s house was an “open and obvious danger” and the plaintiff’s claim of a “momentary distraction” of her own making (walking to find the child she was babysitting for who went out of sight) did not fall within the “distraction exception.”

The sidewalk existed for four years such that all the concrete in a 5 ft. by 6 ft. section was missing and only dirt was present, except for a 3” to 4” high elevated piece of sidewalk concrete. Plaintiff Sandoval knew of the “open and obvious danger,” testifying in her deposition she walked by it “millions of times” before the accident.

While walking over the sidewalk to find the neighbor’s young son she was babysitting for, who had been playing in plaintiff’s yard while she raked leaves and disappeared around the back of her house, she tripped on the defective sidewalk. She fractured her ankle and sued the City of Chicago who filed a motion for summary judgment, contending the sidewalk was an “open and obvious danger” for which it could not be liable.

Plaintiff Sandoval countered by contending she was “momentarily distracted” in looking for the young boy and, therefore, fell within the “distraction exception.”

The trial court granted the City’s motion for summary judgment, finding the “distraction exception” did not apply and the Appellate Court affirmed.

The Appellate Court held that when a plaintiff’s distraction is caused by plaintiff’s own acts, not the

acts or omissions of the defendant or someone else or something else, the “distraction exception” does not apply and imposes a duty on the landowner.

The Appellate Court in *Sandoval* explained why the “distraction exception” did not apply:

Here, plaintiff admitted that her attention became diverted from the sidewalk only by her concern for the child she was supposed to be watching who walked out of her line of sight, and by her fear that he may approach a set of stairs in her yard. She testified that she was not looking at the ground where she was walking but, rather, at her gate and yard. Defendant in no way was responsible for, contributed to, or created this situation, which began when plaintiff brought the child outside to the parkway. Accordingly, we find that defendant owed no duty to plaintiff to warn or otherwise safeguard her from potential harm posed by the open and obvi-

ous sidewalk defect in front of her home, where her injury resulted not from a distraction that could be reasonably anticipated by defendant but, instead, was the result of her own inattentiveness in not looking forward where she was walking. (357 Ill. App.3d at 1031, 830 N.E.2d at 730).

Conclusion

Local government has no duty to “babysit” or “hold the hand” of every person coming onto its property. It owes a duty to maintain its property “reasonably safe” (not perfectly) for intended and permitted users. It owes no duty to protect against “open and obvious dangers” and the “distraction exception” does not apply to plaintiff’s own self-created distraction.

However, a word of caution as to the *Sandoval* case—the sidewalk was in front of plaintiff’s house, she knew about it and passed over it “millions of times.” The rule of *Sandoval* will be less likely to apply to infrequent users of the sidewalk.



Frank Snow of Calumet Park, elected trustee of Calumet Township, has filed for the post of Employee Trustee of the Illinois Municipal Retirement Fund (IMRF).



The election will be conducted by mail in the November 2005 IMRF mailing. Watch for your mailing to vote for Frank Snow...

“If elected, with your help, I will be the only representative from Illinois townships on the board. My main reason for seeking this position is to preserve the independence of the Retirement Fund. Too many governmental agencies look at our Retirement Fund as an easy way to solve their budget deficits. Look at what is happening to Social Security. We cannot let that happen to our retirement benefits,” said Snow.

Snow is a former union official with the Teamsters Union, a position he held for 24 years. He represented approximately 5,000 members, including United Parcel Service. He also served on the Teamsters National Negotiating Committee for five of those years.

Snow also served as a Calumet Park trustee for 10 years, Tax Collector for eight years and served as president of the Cook County Collectors Association. He is currently a member of the Calumet Park Police Pension Board and Director of the Calumet Park Recreation Department.

“I am very grateful for all the help that township officials have extended to me in this quest. If elected, you can be certain that I will do all in my power to keep IMRF independent and strong.”