

¶ 3

FACTS

¶ 4 The circuit court issued an order granting defendant's motion for summary judgment. The body of the court's order contained the following findings and conclusions:

"1. That the condition (air hose) which caused the plaintiff to fall was open, obvious and visible to plaintiff. In fact, plaintiff stepped over the air hose only a minute or so earlier as he entered defendant's business.

2. That plaintiff has failed to present any evidence that the hose was not in the same condition when plaintiff fell as it was when he stepped over it moments before.

3. That the risk of harm was not unreasonable. An air hose in a tire store is common and this particular air hose was in plain sight and seen by plaintiff.

4. That defendant could not expect that a reasonable person would fail to protect themselves [from] such an open and obvious condition such as an air hose on the floor of a tire store shop especially when plaintiff had stepped over it only moments before he fell.

5. That defendant did not fail to exercise reasonable care to protect customers from danger. Plaintiff asserts that defendant should have wound up the air hose when not in use. While such a practice may be preferable, it is not practical. In a tire store shop, an air hose is a necessary tool. By its nature, the hose runs from the compressor to where ever the tire is located. Whether or not the air hose was actually being used at the time is irrelevant. Having an air hose on the floor of a tire shop during business hours is not unreasonable. Common sense indicates that such a condition is expected. It is further hard to understand what defendant could have done to protect a reasonable person from falling over a hose that they had already seen and stepped over.

6. That the distraction exception does not apply in this case. Counsel's

argument that plaintiff should not have been talking to defendant's employee at the same time that he was walking out of the building is unsustainable. Plaintiff seeks to place a burden on defendant to keep patrons from walking and talking at the same time. That is unreasonable.

7. That when all the evidence presented is viewed in a light most favor [*sic*] to the plaintiff, there is no genuine issue of material fact to be determined by the trier of fact."

Plaintiff timely appeals.

¶ 5

ANALYSIS

¶ 6 The starting point of our analysis is our Illinois Supreme Court's opinion in *Ward v. K Mart*, 136 Ill. 2d 132, 554 N.E.2d 223 (1990). In *Ward*, the court indicated that while determination of the existence of a duty is for the court, it is a question of fact whether, in fact, that duty was breached. Considerations in determining the duty involve reasonable foreseeability of the injury. *Ward*, 136 Ill. 2d at 140, 554 N.E.2d at 226; *Grant v. South Roxana Dad's Club*, 381 Ill. App. 3d 665, 669, 886 N.E.2d 543, 547 (2008). Determination of this is left to the trier of fact (see *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14, 26-30, 594 N.E.2d 313, 318-20 (1992)). Specific to this case at hand, the question of a condition being open and obvious is a question of fact. *Alqadhi v. Standard Parking, Inc.*, 405 Ill. App. 3d 14, 17-18, 938 N.E.2d 584, 587-88 (2010). As both parties note, there are exceptions to the open-and-obvious rule such as a foreseeable distraction (see *Ward*, 136 Ill. 2d 132, 554 N.E.2d 223) and the deliberate-encounter exception (see *Simmons v. American Drug Stores, Inc.*, 329 Ill. App. 3d 38, 44-45, 768 N.E.2d 46, 52-53 (2002)).

¶ 7 As determination of existence of a duty is a question of law to be resolved by the trial court as noted in *Ward*, we review the circuit court's determination of this question *de novo*.

See *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102, 607 N.E.2d 1204, 1209 (1992). We conclude that defendant did owe a duty to plaintiff as a business invitee to premises containing a condition, the open hoses, which presented a reasonable foreseeability of injury. Determination of whether this condition was open and obvious, as noted above, is a question of fact, as is the question of whether either of the exceptions to the open-and-obvious rule would apply if the trier of fact determined that the condition was actually open and obvious. See *Alqadhi*, 405 Ill. App. 3d at 17-18, 938 N.E.2d at 587-88. Upon analysis of the circuit court's order reproduced above, we conclude that the circuit court overstepped its bounds. In its determination the circuit court made a factual finding that the condition was open and obvious to plaintiff, and it concluded that there was a failure to present evidence as to a changed condition of the hose, that the risk of harm was not unreasonable, and that defendant "could not expect that a reasonable person would fail to protect themselves [from] such an open and obvious condition" and that defendant exercised reasonable care to protect its customers. The circuit court also determined that defendant's distraction argument that plaintiff was talking to one of defendant's employees at the time of this incident was "unsustainable." All of these findings of the trial court are determinations of fact and indicate genuine issues of material fact.

¶ 8 In the instant case, the circuit court's order, as well as the conflicting narratives presented by the parties in their statements of fact in briefs to this court, clearly shows genuine issues of material fact. Accordingly, the judgment of the circuit court granting defendant's motion for summary judgment must be reversed, and this cause is remanded to the circuit court for further proceedings not inconsistent with this order.

¶ 9 For the reasons stated above, the order of the circuit court of Saline County is reversed and this cause is remanded.

¶ 10 Reversed and remanded.