2015 IL App (2d) 140596-U
No. 2-14-0596
Order filed February 19, 2015
Modified Upon Denial of Rehearing April 13, 2015

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BRIAN delaTORRE,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 10-L-487
	)	
LAKE EFFECT DEVELOPMENT III, LLC,	)	
	)	
Defendant	)	
	)	
(DJW-Ridgeway Building Consultants,	)	Honorable
Inc., and Jason the Mason, Inc.,	)	Margaret J. Mullen,
Defendants-Appellees).	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: On plaintiff's negligence claims, the trial court erred in granting summary judgment to the general contractor, as the deliberate-encounter exception to the open-and-obvious rule applied and the magnitude and consequences of the burden were slight, but properly granted summary judgment to the subcontractor that created the dangerous condition, as the subcontractor could not have reasonably foreseen plaintiff's injury and would have faced a high burden to prevent it.

¶ 2 Plaintiff, Brian delaTorre, sued defendants, Lake Effect Development III, LLC (Lake Effect), DJW-Ridgeway Building Consultants, Inc. (Ridgeway), and Jason the Mason, Inc.

(Jason the Mason), for damages sustained when he stepped into a rut on a construction site and injured his knee.[1] The trial court granted Ridgeway's and Jason the Mason's motions for summary judgment, finding that neither defendant owed a duty to plaintiff. Plaintiff timely appealed. As to Jason the Mason, we affirm. As to Ridgeway, we reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff's second amended complaint alleged that Ridgeway was a general contractor hired by Lake Effect to oversee construction of a building called "the Village Commons." Ridgeway hired Jason the Mason to perform masonry work on the exterior of the Village Commons building. Ridgeway hired Lakeland Larsen Elevator Corporation (Lakeland) to install elevators inside the Village Commons building. Plaintiff worked as an elevator constructor for Lakeland. On April 22, 2008, plaintiff was present on the site and was injured when he stepped into a rut created by machinery operated by an employee of Jason the Mason.

¶ 5 Plaintiff's second amended complaint pleaded one negligence count against Jason the Mason and three counts against Ridgeway. As to Jason the Mason, plaintiff alleged that Jason the Mason was negligent in creating the ruts, failing to grade the rutted ground, failing to place gravel over the rutted ground, operating heavy machinery in the area where plaintiff was carrying materials, failing to clear the area around its workspace, and failing to conform with federal and industry safety regulations. As to Ridgeway, plaintiff alleged (1) negligence based on Ridgeway's duties as general contractor; (2) negligence based on a premises-liability theory; and (3) negligence based on a retained-control theory.

[1] The trial court granted plaintiff's motion to voluntarily dismiss Lake Effect, and Lake Effect is not a party to this appeal.

¶ 6 The following relevant facts are taken from the deposition testimony. Plaintiff testified that, in 2008, he was employed by Lakeland, which was owned by John Frecking, Sr. Plaintiff's immediate supervisor was John Frecking, Jr. Plaintiff had been working at the Village Commons site for two to three weeks prior to the accident and had been familiar with the conditions. At approximately 11 a.m. on April 22, 2008, he was working in an elevator pit in the building with his coworker, Colin Lawther, when he was told by Ridgeway's on-site project manager, Frank D. McBride,[2] that the masons were going to be moving scaffolding to the front (or south side) of the building. Plaintiff testified that, once the scaffolding was assembled, plaintiff and Lawther would not be able to bring their materials, which included 20-foot-long pieces of pipe, through the front of the building. According to plaintiff, although he could climb through the cross-bracing of the scaffolding, he would not have attempted to carry the pipes through. The only other access point, located on the north side of the building, had already been blocked by the masons' scaffolding. Plaintiff had not planned on bringing the pipes into the building for a couple more days because he had more work to do in the elevator pit. When plaintiff told McBride that the materials were not at the site, McBride told him that he needed to bring the materials in before the scaffolding went up. Plaintiff testified: "We asked for more time. He said the scaffolding was going up. Period. Get it here." Lawther called the shop and reported back to plaintiff that "Tim," the truck driver, would be bringing the materials to the site.

¶ 7 Plaintiff testified that Tim arrived with the materials at the site at about 12:20 p.m. At that time, the masons were in the process of assembling the scaffolding at the front of the building. The process involved using a "[L]ull" to transport the scaffolding components. The

[2] Plaintiff acknowledged in his brief that he erroneously identified this person as Dave Wardeberg at his deposition.

Lull was a large machine with four wheels, an engine, and an "extendable arm fork." The arm could be raised and lowered and was used to lift the scaffolding components during the assembly process. Before the masons began using the Lull, the ground in the area "had been graded, but it wasn't finished grading." The ground was a "[c]ombination of dirt and stone." It was "flat but not perfect." "It wasn't real firm. It was soft." As the Lull went back and forth, it altered the surface of the ground, creating ruts that were about 6 to 8 inches deep and 8 to 10 inches wide. With each pass of the Lull, new grooves were made and old grooves were removed. Plaintiff did not feel that the ground surface was difficult to traverse, and he did not complain to anyone.

¶ 8 Plaintiff testified that he and Lawther first carried in baskets of connectors and a cutter machine. They then began to carry in the pieces of pipe. Plaintiff carried each pipe by balancing the pipe's center on his shoulder. After carrying in two or three pipes and successfully navigating his way over the ruts, plaintiff was in the process of carrying in another pipe when he hit the edge of a rut with his left foot and injured his knee. Plaintiff testified that, while he was walking, he was "keeping an eye out for what [he] had to watch." He stated that he had to watch for Lawther, so that he did not hit him with the pipe, and for the Lull, which "was constantly moving." The Lull was "10 or 15 feet" away from him. It was in "reverse towards [him]." The driver was facing away from plaintiff and could not see him. Plaintiff stated that he also had to look down to watch for the ruts.

¶ 9 Plaintiff further testified that he carried the materials into the building because he "had no choice." He "needed the material there to keep working." He believed that, if he had told McBride that he was not going to load the materials that day and that the scaffolding should not go up, the scaffolding would have gone up anyway. McBride was the only person the Lakeland employees reported to on the site, because McBride was the person running the site. Plaintiff

and Lawther both testified that there was no way to get the materials into the building other than the front entrance. Plaintiff stated that he "[h]ad no choice" but to walk over the ruts. If plaintiff had told McBride that he was not going to do what McBride had told him to do, he "wouldn't have had any work." If McBride had given plaintiff three or four hours to get the work done, plaintiff could have gotten it done safely. Plaintiff stated that they were "racing the scaffolding."

¶ 10 McBride testified that he was not informed of plaintiff's injury when it happened, so he had no specific recollection as to what occurred on that day. He agreed that, if he had told the masons to stop working until plaintiff loaded his materials into the building, the overall project would not have been delayed. He testified that a Lull was present at the site the entire time that the masons were there—about four to five months. He stated that "a lull leaves ruts." He continued: "And you work around it. You step over it. And you use your own common sense to come in and out across those ruts." He stated: "It's part of the job." McBride testified that there were ways that plaintiff could have brought his materials into the building other than the front entrance. He stated: "If I told them to put it in there that day as you were speculating that I did, then I did that to make it easier for them because the elevator is in the front of the building. Otherwise, they would have been carrying those 30-foot pieces of steel from the back to the front." He also testified that "when [he] told people to do something, [he] would expect them to do that because it was being done for a reason."

¶ 11 Lawther testified that McBride was the general contractor at the Village Commons site. According to Lawther, the site was small and it was "a mess." He testified that there were a lot of ruts. He never saw anyone put gravel down. He stated: "Even if it was it wouldn't have lasted long because of the Lull would be churning it up." Lawther testified that McBride never

told him how to do his job. Lawther would have preferred to have brought the materials in through the north side of the building, but it was blocked by scaffolding.

¶ 12 Jason Schwan, owner of Jason the Mason, and his employee, Jesus Morales, testified that they did not know plaintiff and had no recollection of the day plaintiff was injured. Schwan testified that he did not learn of plaintiff's injury until 2012. He did not know John Frecking, Jr., or John Frecking, Sr., and did not recall ever speaking with them.

¶ 13 On February 24, 2014, Jason the Mason moved for summary judgment. Jason the Mason argued that it stood in no relationship to plaintiff whereby it owed him a duty of care. It argued that it was not the owner, occupier, or possessor of the premises and that it had no control over the Village Common site. It also argued that plaintiff could not prove that the rut he stepped into was created by its Lull. Finally, it argued that, even if it had created the rut, the only duty it would have had toward plaintiff would have been to warn plaintiff of the allegedly dangerous condition. However, it maintained that it had no duty to warn in the present case, because the rut was open and obvious.

¶ 14 In response, plaintiff argued that Jason the Mason, as a subcontractor, owed plaintiff a duty of care as a fellow worker on the site, just as all people owe others a general duty of ordinary care. Plaintiff argued that, if Jason the Mason maintained that it was not the possessor of the premises, then it could not rely on the open-and-obvious defense. Further, plaintiff argued that, even if Jason the Mason could properly rely on the open-and-obvious defense, Jason the Mason failed to recognize the distraction exception and the deliberate-encounter exception to the open-and-obvious rule.

¶ 15 On March 11, 2014, Ridgeway moved for summary judgment. Ridgeway argued that, even if it arguably owed plaintiff a duty as one in control of the premises to maintain the

premises in a reasonably safe condition, the rut at issue was open and obvious and thus fell under the "recognized exception" to the duty of care. In addition, Ridgeway argued that the rut was a condition and not the "legal cause" of plaintiff's injury. Finally, Ridgeway argued that plaintiff's "retained control" theory must fail, because Ridgeway did not retain control of the means and methods of plaintiff's work.

¶ 16 In response, plaintiff argued that, even if the rut was open and obvious, Ridgeway was liable under the distraction exception and the deliberate-encounter exception. Plaintiff also argued that whether plaintiff was contributorily negligent did not eliminate Ridgeway's duty. Finally, plaintiff argued that Ridgeway controlled the "means and methods used by [plaintiff] to haul [the] materials."

¶ 17 On May 20, 2014, the trial court granted summary judgment for defendants. With respect to Jason the Mason, the court found:

> "Jason the Mason per contract does not have any duty for the safety of the other workers of the other subs on the site. He may not create a condition—affirmative creation of the condition that is dangerous to people. Operating the lull doesn't appear to be the cause of the fall itself. I don't think the way the lull was operated according to the testimony of Jason [the Mason] or the closest in proximity to Jason [the Mason] was really the cause of the problem."

The court found that there was "no duty on Jason the Mason to do anything with respect to the ruts that were created by the lull. Jason the Mason *** was doing its job operating accordingly, appropriately, and therefore there is no duty." With respect to Ridgeway, the court found that the rut was "an open and obvious condition, *** and plaintiff saw it and traversed it beforehand.

He knew it was there. *** In reading the plaintiff's deposition, I think it was open and obvious to him, too."

¶ 18 Plaintiff timely appealed.

¶ 19 II. ANALYSIS

¶ 20 Preliminarily, we note that Jason the Mason moved in its brief to strike plaintiff's statement of facts for failing to state the facts "accurately and fairly," in violation of Illinois Supreme Court Rule 341(h)(6) (eff. Feb. 6, 2013). Plaintiff concedes that he "limit[ed] his recitation of the facts to those favorable to him." While we admonish plaintiff to comply with the rule in the future, we decline to strike his statement of facts, as his violation does not hinder or preclude review. See *Cottrill v. Russell*, 253 Ill. App. 3d 934, 938 (1993) ("Where violations of supreme court rules are not so flagrant as to hinder or preclude review, the striking of a brief in whole or in part may be unwarranted.").

¶ 21 We turn to the merits. 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." 735 ILCS 5/2-1005(c) (West 2012). However, it is a drastic means of resolving litigation and should be allowed only when the right of the moving party to judgment is clear and free from doubt. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). This court reviews *de novo* an order granting summary judgment. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 22 To prevail in a negligence action, the plaintiff must prove that the defendant owed a duty to him, that the defendant breached that duty, and that the plaintiff's injury proximately resulted from that breach. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. A legal duty is a

prerequisite to liability, and therefore, where there is no legal duty, there can be no liability. *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 447 (1996). Whether a duty exists is a question of law. *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280 (2007). At issue here is whether defendants owed a duty to plaintiff.

¶ 23 The supreme court's decision in *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, sets forth the legal principles that guide our analysis. We restate those principles here:

> " '[T]he touchstone of this court's duty analysis is to ask whether a plaintiff and a defendant stood in such a *relationship* to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff.' (Emphasis added.) [Citations.] The 'relationship' referred to in this context acts as a shorthand description for the sum of 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. [Citations.] The determination of such a 'relationship,' as sufficient to establish a duty of care, requires considerations of policy inherent in the consideration of these four factors and the weight accorded each of these factors in any given analysis depends on the circumstances of the case at hand. [Citation.]" *Id.* ¶ 18.

¶ 24 We these principles in mind, we first consider whether Ridgeway owed a duty to plaintiff. The trial court found that Ridgeway owed no duty to plaintiff, because the rut was an open and obvious condition. The parties do not dispute that the rut was open and obvious. However, the existence of an open and obvious danger is not a *per se* bar to the finding of a legal duty. See *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 425 (1998). We must still apply the traditional duty analysis to the facts of the case. *Id.* "Application of the open and obvious rule

affects the first two factors of the duty analysis ***. [Citation.] Where the condition is open and obvious, the foreseeability of harm and the likelihood of injury will be slight, thus weighing against the imposition of a duty." *Bruns*, 2014 IL 116998 ¶ 19. But, "[w]here an exception to the open and obvious rule applies, the outcome of the duty analysis with respect to the first two factors is 'reversed.' " *Id*. ¶ 20 (quoting *Belluomini v. Stratford Green Condominium Ass'n*, 346 Ill. App. 3d 687, 692 (2004)). Here, as plaintiff notes, the trial court erroneously failed to consider whether either of the exceptions to the open-and-obvious rule applies. We do so now.

¶ 25 Under the open-and-obvious rule, which is reflected in section 343A of the Restatement (Second) of Torts, a possessor of land cannot be liable for an invitee's injury if the condition on the land that caused the injury was known or obvious to the invitee. Restatement (Second) of Torts §343A(1), at 218 (1965); see *Bruns*, 2014 IL 116998, ¶ 16. Nevertheless, even if the condition on the land was obvious to the invitee, a possessor of land can be liable if the possessor should have anticipated the harm. Restatement (Second) of Torts § 343A(1), at 218 (1965); see *Belluomini*, 346 Ill. App. 3d at 691. There are two instances in which a possessor of land should anticipate harm. One instance, known as the deliberate-encounter exception, is when the possessor "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." Restatement (Second) of Torts § 343A(1), cmt. f, at 220 (1965); see *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 391 (1998). The second instance, known as the distraction exception, is "where the possessor has 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, or fail to protect himself against it." Restatement (Second) of Torts § 343A(1), cmt. f, at 220 (1965); see *Ward v. K mart Corp.*, 136 Ill. 2d 132, 156 (1990).

¶ 26 Plaintiff argues that the deliberate-encounter exception to the open-and-obvious rule applies here. Liability under this exception stems from the possessor's knowledge of the premises and what he had reason to expect the invitee would do in the face of the dangerous condition. *LaFever*, 185 Ill. 2d at 392. This exception has most often been applied in cases involving some economic compulsion, as where workers are compelled to encounter dangerous conditions as part of their employment obligations. See, *e.g.*, *id*.; *Ralls v. Village of Glendale Heights*, 233 Ill. App. 3d 147, 155-56 (1992). Ridgeway argues that the exception does not apply, because plaintiff "was not being forced to do what he was doing" and because plaintiff could have entered "from the other side of the building."

¶ 27 In *LaFever*, the plaintiff was injured when he was picking up a compactor container on the defendant's premises and slipped on some "edge trim" waste located on the ground around the container. *LaFever*, 185 Ill. 2d at 386. The trim regularly became wet from condensation in the area and the wetness made the trim particularly slippery. *Id*. at 390-91. The supreme court found that the defendant could have reasonably foreseen that the plaintiff would risk walking through the edge trim, because it was necessary for the plaintiff to fulfill his employment obligations. *Id*. at 392. In coming to this conclusion, the court specifically rejected the argument that a deliberate encounter could not give rise to liability unless there is no reasonable alternative available to the plaintiff other than encountering the dangerous condition and the plaintiff's continued employment is at stake if he does not encounter the condition. *Id*. at 393. The court found that the existence of a duty is determined not by the presence or lack of alternative avenues by which to avoid an open and obvious danger but, rather, by whether the possessor could foresee that, despite the open and obvious nature of the condition, the plaintiff (with or without alternative means) would nevertheless choose to encounter that condition. *Id.* at 391-92.

¶ 28 Similarly, in *People v. Ralls*, 233 Ill. App. 3d 147, 150 (1992), the plaintiff was injured when he slipped and fell on a snow-covered incline at a construction site. The trial court held that the condition was open and obvious and granted summary judgment in favor of the defendant, the construction-site owner. *Id*. at 151. The appellate court reversed, noting that the trial court had erroneously failed to apply the deliberate-encounter exception. *Id*. at 156. The appellate court found that it was reasonably foreseeable that a worker at the site would use the snow-covered incline to reach the south door of the blower building rather than use "the longer and inconvenient perimeter path." *Id*. at 155.

¶ 29 Here, the testimony supports the application of the deliberate-encounter exception, as it was reasonably foreseeable to Ridgeway that plaintiff would choose to encounter the rut. The testimony indicated that plaintiff was required to encounter the rut to enter the building with his materials. Plaintiff testified that McBride told him that the masons would be moving scaffolding to the front of the building and that he needed to get his materials to the site before the scaffolding went up. Plaintiff also testified that the only other access point to the building was blocked by scaffolding. In addition, according to plaintiff, if he had told McBride that he was not going to do what McBride told him to, he "wouldn't have had any work." McBride was the only person the Lakeland employees reported to on the site, because McBride was the person running the site. McBride testified that he expected people to do what he told them to do. Even if there was another entrance available to plaintiff, it seems clear that McBride instructed them to enter through the front entrance. He stated: "If I told them to put it in there that day as you were speculating that I did, then I did that to make it easier for them." In any event, as noted above, the lack of an alternate entrance is not required for the deliberate-encounter exception to apply.

¶ 30 Based on the above, we find that the deliberate-encounter exception to the open-and-obvious rule applies as to Ridgeway.[3] As a result, the first two factors in the duty analysis weigh in favor of plaintiff. See *Bruns*, 2014 IL 116998, ¶ 20 ("[A]pplication of an exception to the [open-and-obvious] rule positively impacts the foreseeability and likelihood of injury.").

¶ 31 We must next consider the third and fourth factors in the duty analysis—namely, the magnitude of the burden of guarding against the injury and the consequences of placing that burden on the defendant. On this issue, we find *Diebert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430 (1990), instructive.

¶ 32 In *Diebert*, the plaintiff was injured when he stepped in a rut on a construction site while exiting a portable bathroom. *Id.* The plaintiff testified that he would have seen the rut if he had watched where he was walking (essentially conceding that it was open and obvious), but he maintained that he was distracted by having to watch for debris that was being thrown off of a balcony above him by workers at the site. *Id*. at 438. The supreme court agreed and thus found that the first two factors in the duty analysis favored the plaintiff. *Id*. at 438-40. As for the remaining factors, the court stated as follows:

> "We additionally conclude that the magnitude of the burden of guarding against the injury and the consequences of placing the burden on defendant would be minimal. Defendant contends it could not remove all of the ruts from the construction site. Defendant also contends it could not adequately warn of the ruts because, if plaintiff did not see the ruts, he would not have seen any warning either. There was an absence of any evidence, however, that defendant would suffer an intolerable burden if it had to move

[3] We note that, given this conclusion, we need not consider plaintiff's argument as to the applicability of the distraction exception.

> the portable bathroom to a location where it would not be near falling debris or to an area where a machine would be less likely to drive in front of it and make ruts only a few feet from the door. Moreover, we note that defendant only needs to exercise reasonable care. Reasonable care does not necessarily mean defendant would have to eliminate all of the ruts on the construction site; defendant may only need to eliminate or prevent those ruts in the area of the bathroom. In addition, contrary to defendant's contention, a warning may fulfill defendant's duty of reasonable care depending on the type of warning used. The burden on defendant to undertake either of these two activities would not be great." *Id.* at 440.

¶ 33 Like the defendant in *Diebert*, Ridgeway contends that eliminating plaintiff's exposure to the ruts would require "regrading all rutted areas" and that such a burden would be overwhelming. However, as plaintiff points out, regrading the area was not the sole alternative. Indeed, Ridgeway could have merely delayed the masons' work for three hours. McBride testified that he could have done so and that it would not have caused a delay for the overall project.

¶ 34 The present case is distinguishable from *Wilfong v. L.J. Dodd Construction*, 401 Ill. App. 3d 1044 (2010), where we found that the third and fourth factors weighed against imposing a duty. In *Wilfong*, the plaintiff was walking over a much larger area, on a site that was very mudded and covered with ruts, to get from a trailer to a building. *Id.* at 1046-47. The testimony established that it would have been impractical to regrade the ruts, that regrading was rarely done on a daily or weekly basis, and that it was a " 'never-ending battle for ruts' " because anything with rubber tires, especially Lulls, would rip up the ground from November until April. *Id*. at 1056. We also noted testimony that the only way to avoid ruts was to put down stone but that no

contractor would likely do that because it was expensive and the stone would later have to be removed. *Id*. It addition, there was testimony that, even if the ground were leveled, it probably would return to its previous condition within a few hours. *Id.* The magnitude of the burden present in *Wilfong* is simply not present here. As noted, it was not necessary for Ridgeway to eliminate all the ruts present on the site. This was not a large site with ruts everywhere as in *Wilfong*. Testimony established that the area in front of the building was small. Moreover, Ridgeway merely had to instruct the masons to wait a few hours before assembling the scaffolding so that plaintiff could load his materials. We cannot say that the magnitude of the burden or the consequence of imposing that burden on Ridgeway is high.

¶ 35 Thus, after considering all four of the factors related to whether a duty exists, we conclude that, under the circumstances present here, the trial court erred in applying the open-and-obvious rule to conclude that Ridgeway owed no duty to plaintiff. Accordingly, we reverse the grant of summary judgment in favor of Ridgeway and remand for further proceedings.

¶ 36 In a petition for rehearing, Ridgeway notes that this holding "does not resolve [the] question of Ridgeway's retained control of the work of Plaintiff's employer" for purposes of plaintiff's retained-control count. Ridgeway asks that we affirm summary judgment on that count, if we have concluded "that there is insufficient evidence of Ridgeway's retained control," or otherwise that we provide a basis "for the reinstatement" of that count.

¶ 37 As Ridgeway seems to surmise, we have not evaluated the evidence of Ridgeway's retained control. Although Ridgeway briefly asserted that it did not retain control,[4] it did not specifically argue that we should affirm summary judgment on that count even if the open-and-

[4] In fairness to Ridgeway, plaintiff's argument that Ridgeway *did* retain control, to which Ridgeway was responding, was itself very brief.

obvious rule does not apply. Indeed, Ridgeway argued its lack of retained control merely on the way to arguing that, "even if it did, the open and obvious rule applies to these facts so as to relieve it from any duty." Further, in its conclusion, it specifically argued only that we should affirm summary judgment "on all three counts" because "this case falls well within those that find the hazard open and obvious and the defendant with no duty to protect the Plaintiff." Thus, for our purposes here, the parties have sufficiently developed only the open-and-obvious issue, and it is only on that issue that we have ruled in plaintiff's favor. On remand, Ridgeway may seek summary judgment, as to any of plaintiff's counts, on any other appropriate basis. Of course, we do not imply an opinion on the validity of any such basis.

¶ 38 We now consider whether Jason the Mason owed a duty to plaintiff. In support of his argument that Jason the Mason owed him a duty, plaintiff relies on *Melchers v. Total Electric Construction*, 311 Ill. App. 3d 224 (1999). In *Melchers*, the first district held that a subcontractor that knew that its tools and equipment were used by other subcontractors had a duty to protect the other subcontractors against injury. *Id*. at 230. There, the plaintiff was an employee of an electrical subcontractor responsible for installing conduit and wire. *Id*. at 226. The plaintiff's employer entered into an oral subcontract with an excavation company to dig the necessary trenches. *Id*. The plaintiff then worked in the trenches to dig around piping material in the ground while installing conduit. *Id*. at 227. The plaintiff was injured when an unevenly loaded wheelbarrow fell on him. *Id*. In finding that the excavation subcontractor had a duty to protect the plaintiff, the court noted that a person " 'engaged in the construction of a building owes to another not in his employ, engaged in the same work and exercising due care for his own safety, the duty of using reasonable care to avoid injuring him.' " *Id*. at 229 (quoting *Ziraldo v. W.J. Lynch Co*., 365 Ill. 197, 201 (1936)). The court then noted that the evidence showed that

the excavation subcontractor furnished all the tools used to dig the trenches, including the wheelbarrow that injured the plaintiff, and allowed the plaintiff to use the same tools when further digging became necessary. *Id.* at 230. This evidence led the court to conclude that the excavating subcontractor had a duty to protect the plaintiff against injury from its equipment. *Id.* at 230-31.

¶ 39 According to plaintiff, the same reasoning applies here, because the Lull operator created a dangerous condition with its Lull when it knew that other subcontractors' employees would have to walk in that same area. We disagree. As the first district subsequently noted in *Preze v. Borden Chemical, Inc.*, 336 Ill. App. 3d 52, 61 (2002), the duty in *Melchers* was based on the "extensive interaction" between the subcontractors. In *Preze*, even though the defendant contractor allowed the plaintiff to use its ladder, the court noted that the contractors were hired separately to perform different work and did not work together or in the same area. *Id.* Here, as Jason the Mason argues, unlike in *Melchers*, there was no contract or any interaction between Jason the Mason and plaintiff or between Jason the Mason and Lakeland, plaintiff's employer. Schwan, the owner of Jason the Mason, and his employee each testified that they did not know plaintiff and had no recollection of the day plaintiff was injured. Schwan also testified that he did not know John Frecking, Jr., or John Frecking, Sr. In addition, Jason the Mason and Lakeland were not performing the same type of work or working in the same area. Jason the Mason was performing masonry work on the outside of the building, while Lakeland was installing elevators inside the building. Nor was plaintiff using Jason the Mason's equipment.

¶ 40 Moreover, unlike the situation with Ridgeway, it simply was not reasonably foreseeable to Jason the Mason that plaintiff would be injured. Jason the Mason had no reason to know that plaintiff would deliberately encounter the obvious ruts. There is no evidence that Jason the

Mason knew that McBride instructed plaintiff to load his materials into the building through the front entrance or that plaintiff needed to do so while Jason the Mason was assembling the scaffolding. Even if the Lull's driver did see plaintiff, the driver had no reason to know what plaintiff was doing or why he was doing it.

¶ 41 Furthermore, the magnitude of the burden of guarding against the injury and the consequences of placing that burden on Jason the Mason would be too great. Jason the Mason needed to transfer its materials from the back of the building to the front of the building and it needed to use the Lull to do so. As the masonry subcontractor, Jason the Mason did not agree to grade the jobsite and did not undertake any obligation to coordinate or schedule the work of the subcontractors. Plaintiff's argument would require any subcontractor that uses heavy machinery on a jobsite to check with other subcontractors to determine whether they would be moving materials in the area of the heavy equipment and to constantly monitor the ground area around the heavy machinery while in the process of working. This is the job of the general contractor.

¶ 42 Accordingly, we find that Jason the Mason owed no duty to plaintiff and thus we affirm summary judgment in Jason the Mason's favor.

¶ 43 III. CONCLUSION

¶ 44 For the reasons stated, we affirm the judgment of the circuit court of Lake County granting summary judgment to Jason the Mason, and we reverse the judgment of the circuit court of Lake County granting summary judgment to Ridgeway.

¶ 45 Affirmed in part and reversed in part; cause remanded.