FIFTH DIVISION
May 13, 2016

No. 1-15-0774

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

REBECCA HILL, as Administrator of the Estate of Billy Hill, Deceased, Plaintiff-Appellant, v. SPEEDWAY, LLC d/b/a Speedway Super America Truckstop, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Cook County. No. 12 L 2457 Honorable Kathy M. Flanagan, Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Gordon concurred in the judgment.

O R D E R

¶ 1 *Held:* Summary judgment was properly granted for defendant where puddle of liquid on the ground at defendant's gas station was an open and obvious condition, and plaintiff could not establish either the distraction or the deliberate encounter exceptions applied.

¶ 2 Ten months following Billy Hill's slip-and-fall accident at a gas station owned by defendant Speedway, LLC, he passed away. Plaintiff, Rebecca Hill, as Administrator of the

Estate of Billy Hill, filed a lawsuit against defendant alleging premises liability negligence. Defendant moved for summary judgment, and the circuit court granted the motion. Plaintiff appeals, arguing the court erred in finding that (1) the open and obvious doctrine applied, thus precluding liability as a matter of law and (2) neither the distraction exception nor the deliberate encounter exception to the doctrine applied. We affirm.

¶ 3 On the morning of May 2, 2011, Billy Hill and his wife Rebecca Hill were in his truck at defendant's gas station, waiting in line to fill his truck with diesel fuel. When a diesel fuel pump became available, Billy pulled his truck up to the pump, exited the vehicle and slipped on a puddle of liquid on the ground, hitting his head as a result of the fall. Approximately 10 months later, Billy passed away as a result of his injuries. While he was alive, Billy and Rebecca filed a lawsuit against defendant. After his death, Rebecca amended the complaint and substituted herself, as administrator of Billy's estate, as plaintiff. She alleged that defendant failed to clean up or warn of the liquid on the ground near the diesel fuel pump, which caused Billy's fall and subsequent death.

¶ 4 On March 7, 2014, plaintiff filed her third amended complaint, which frames the instant action, and comprised two counts. Count 1 alleged a survival action based on the theory of premises liability while Count 2 alleged a wrongful death based on the theory of premises liability. Both counts alleged that on May 2, 2011, defendant owned, operated and managed a gas station located at 3401 South California Avenue in Chicago. Plaintiff alleged that, while Billy was on defendant's premises that day, he slipped on an accumulation of liquid that existed on the ground, about which defendant knew or should have known. She alleged, *inter alia*, that

defendant failed to clean up the liquid, properly maintain the area where the liquid was located, adequately warn of the liquid and make reasonable inspections of the premises to discover the liquid. Both counts asserted that Billy died as a result of defendant's acts and/or omissions, and each count requested damages in excess of $50,000.

¶ 5 On March 17, 2014, defendant filed an answer to plaintiff's third amended complaint denying any negligence on its part. Defendant also raised an affirmative defense based on comparative negligence, which plaintiff denied in her reply.

¶ 6 On November 5, 2014, defendant moved for summary judgment. In its motion, defendant argued it was entitled to judgment as a matter of law because there was no material dispute that the liquid on the ground that caused Billy's fall was an open and obvious condition, and thus it owed no duty to Billy. Further, it argued that the two exceptions to the open and obvious doctrine, the distraction exception and the deliberate encounter exception, did not apply in the instant case because there was no evidence supporting either. In support of its motion, defendant attached depositions from plaintiff, an eyewitness and defendant's employees, as well as photographs of the puddle of liquid.

¶ 7 Plaintiff filed a response in which she contended that there was a question of fact "whether the physical nature of the condition *and* risk associated with the condition" (emphasis in original) were open and obvious. Further, she argued, assuming *arguendo* that the condition was open and obvious, both the distraction and deliberate encounter exceptions applied. Plaintiff attached depositions, photographs, video from defendant's security camera on the morning of the accident, as well as her affidavit.

¶ 8 Plaintiff gave two depositions. In her first deposition, she testified that Billy spent most of his adult life working as a commercial truck driver. On May 1, 2011, Billy and plaintiff, who had accompanied him on the work trip, were in Hayti, Missouri. At some point, Billy and plaintiff left Hayti and started driving toward Chicago so Billy could deliver air conditioning units to Mount Sinai Hospital. They arrived at defendant's gas station around 7 a.m. on May 2. There, they waited third in line to fill up at the diesel fuel pumps. Billy planned to pull into the first diesel fuel pump that became available when it was his turn. After waiting 45 to 60 minutes, Billy pulled his truck up to diesel fuel pump 11, with the fuel pump on the driver's side of the truck. Near the pump and on the ground, plaintiff observed a puddle of liquid comprising "about the entire area from the handle of the pump back."

¶ 9 Plaintiff said she and Billy had "seen the puddle before [they] pulled up, but [they] could not back up." The puddle had been there since they arrived at the gas station, but they did not report it to anyone. As far as plaintiff could tell, the puddle was not caused by the two trucks ahead of Billy "[b]ecause [she and Billy] could see," and the fuel pump did not appear to be malfunctioning. Although she agreed that the liquid came from someone who had overfilled his truck prior to plaintiff and Billy arriving, she also stated she did not actually see how the liquid came to be on the ground. She also agreed that Billy would have been aware of the "diesel" fuel on the ground prior to stepping out of his truck.[1]

[1] It is clear from the context of plaintiff's deposition when making this statement, she did not mean that Billy knew the puddle of liquid was, in fact, diesel. Rather, he only knew that there was a puddle of liquid on the ground.

¶ 10 Plaintiff exited the truck, walked around it and obtained Billy's credit card so she could pay for the diesel fuel inside defendant's store and use the restroom. At the pump, she and Billy interacted, but Billy did not exit the truck. As plaintiff began to walk toward the store, Billy "hollered" something at her. She turned around and saw Billy out of the truck, but continued walking toward the store. While inside the store, a man entered and said someone had fallen at pump 11. Plaintiff stated the man told her that, after Billy finished checking his load, "he was walking back to fuel," slipped and fell. The man further told her that Billy got up again, but then fell again. Plaintiff exited the store and observed Billy lying on his left side on the ground with his legs and feet in the "fuel substance" and his head toward his truck's front wheel. After Billy's fall, plaintiff took photographs of the liquid on the ground while standing up in the truck. She identified two such photographs at her deposition.

¶ 11 In plaintiff's second deposition, she said she never placed her hand in the liquid on the ground, but noted it smelled like diesel fuel. After Billy fell, plaintiff did not remember him ever becoming unconscious and only recalled him saying he did not want to go to the hospital. Approximately 10 minutes after Billy's fall, the paramedics arrived. Plaintiff told the paramedics that she and Billy were only 22 blocks from their intended destination, and Billy had been fine up until his fall. She also told the paramedics that Billy smelled like diesel fuel and that a witness told her that Billy slipped and fell in diesel fuel.

¶ 12 Juvenal Salto, a truck driver, testified in his deposition that he witnessed Billy's fall. On the morning in question, the sun was out, and Salto was at defendant's gas station. Salto had pulled into pump 11 sometime before Billy in order to park and go inside the store. Salto stated

he observed diesel fuel on the ground, which he determined by its "greenish" color. He described the puddle as a "pretty big amount of fuel," four or five feet large. When he exited his truck, he stepped on the fuel pump's island, rather than the ground, "so [he] wouldn't slip," because diesel fuel, as an oily substance, was easy to slip on. Salto said "when you see diesel spill on the floor, you know somebody's going to fall off." Diesel fuel spills were common at defendant's gas station, according to Salto, because some of the fuel pumps did not stop in time, but he did not know what caused the puddle. He also did not report the puddle to defendant's employees. Salto noted that gas stations sometimes have "Dri-Sand" by the diesel fuel pumps to put on any spills, but defendant did not have it.

¶ 13 While sitting in his truck, Salto observed Billy "on the fuel pump waiting like to put fuel." Then, while standing, Billy's feet start to slip on the ground. Billy tried to grab something, but fell and hit his head against the concrete island. Billy was only outside his truck a "couple seconds" before falling. Salto agreed that he had not included the fact that he witnessed Billy slip and fall in the statement he gave to defendant's manager shortly after the incident. When Salto noticed that Billy did not get up, he went inside the store to obtain help. Salto, a manager and plaintiff came outside, but Billy was unconscious. Salto waited for the paramedics to arrive and moved Billy's truck away from his body. After the paramedics arrived, Billy regained consciousness but was "dizzy." Salto overheard Billy tell plaintiff that he slipped on "diesel" fuel but later acknowledged that he might not have heard Billy say this.

¶ 14 Defendant's employees Tabitha Marie Zawadski and Juan Gonzalez were working at the gas station on the morning of the accident.

¶ 15 Zawadski testified in her deposition that she was a customer service representative and was inside the gas station store when Billy fell. Although she was not a maintenance employee, if a spill was reported outside and a maintenance employee was not available, she would clean the spill up using "Diesel Dry." Zawadski said that defendant had procedures for an employee to check the premises for spills and inspect the pumps. Specifically, a maintenance employee was required to check the fuel pumps for spills two or three times per day and initial a checklist. Zawadski recalled Gonzalez, who worked mornings, generally checking the pumps for spills when he arrived and prior to leaving, and had observed him initial the checklist on occasions. Zawadski initialed the checklist when she performed maintenance duties. There was a monthly meeting where her manager would review each employee's job responsibilities, and in that meeting, she received instructions on how to fill out the checklist. However, she could not recall a procedure for noting when an employee cleaned up a diesel fuel spill.

¶ 16 Plaintiff's counsel showed Zawadski a maintenance checklist, which she identified as defendant's and remarked that "[o]utside presentation" on the checklist was the category for checking for spills. She further noted that there were three columns on the checklist, representing the first shift, the second shift and the third shift. Defendant's expectation was for someone to check for spills during the first shift and the second shift, but the third shift was optional because of security concerns with fewer employees working.

¶ 17 According to Zawadski, diesel fuel spills would occur once or twice a week, usually due to someone not paying attention to their fuel pump and overfilling their diesel fuel tank as a

result. Defendant would become aware of spills either during the shift inspection or if someone told them a spill occurred. Spills were not visible on defendant's security cameras.

¶ 18 Shown photographs of the "spill" on which Billy slipped, Zawadski could not tell whether the liquid was water or diesel fuel. Sometimes, she said, truck drivers would pour their "garbage" on the ground, and the liquid could have been a result of that. She agreed that the puddle was large, and it should have been cleaned up immediately. The size of the puddle, though, was atypical for a diesel fuel spill, which usually were "about the size of your hand."

¶ 19 Gonzalez testified by deposition that he worked at Speedway since 2000, performing maintenance work. His duties included sweeping the premises of the gas station and cleaning the five diesel fuel pumps, the latter which he did once or twice a day. When gas spills occurred, he would clean them up using a "[s]and absorbent." However, Gonzalez did not check for spills on a daily basis and did not know of any procedure requiring him to check for them. He would only learn of a spill if a customer alerted him or if he was cleaning the fuel pumps. Shown photographs of the ground around pump 11 from the morning of the accident, Gonzalez observed that it was a "liquid that is spilled" but could not determine whether the liquid was water or diesel fuel. Gonzalez agreed that he would have been required to clean up the spill immediately if he had known about it. Diesel fuel spills around the pumps occurred approximately once a week, sometimes the result of truck drivers overfilling their gas tanks. Gonzalez had not cleaned the diesel fuel pumps on the morning in question prior to Billy's fall.

¶ 20 Defendant's security camera footage, which is grainy and indistinct, shows at approximately 8:46 a.m. on the morning in question Billy's truck pulling into pump 11 when the

truck already at the pump pulls away. A shiny, lighter area of indeterminate size can be seen on the ground between the pump and the truck. Plaintiff is seen walking around the front of the truck to Billy's driver side door. Billy opens the door and exits the truck. Plaintiff remains with Billy for approximately 30 seconds before walking toward the store and eventually out of the camera's view. Billy's figure can be seen outside the truck on the driver's side as she leaves. While plaintiff walks toward the store, Billy's figure disappears from the screen. Approximately two minutes later, two people come to help Billy. Plaintiff exits the store about a minute later and walks toward Billy. Three minutes later, the paramedics arrive.

¶ 21 The color photographs taken by plaintiff shortly after Billy's fall show the area next to the truck where Billy fell. The photographs depict a fairly large puddle of liquid on the ground, extending from in front of the diesel fuel pump's island to nearly the edge of the back of the island. The liquid is most heavily concentrated at the base of the front left portion of the pump's island. There is no space between the front left portion of the pump's island and the liquid, and the puddle extends beneath Billy's truck. The liquid's color is indiscernible, although it appears shiny.

¶ 22 In plaintiff's affidavit, she stated that Billy was paid by his employer, CRST Malone, by the load delivered to the destination point. On the day of the accident, Billy was delivering air handling units to Mount Sinai Hospital in Chicago, which, upon delivery, would have paid him $1,350. After a completed delivery, Billy would contact CRST Malone to find out what loads were available to pick up, select a load and travel to the point of origin to pick up the selected load.

¶ 23 On February 13, 2015, the circuit court entered a written order granting defendant's motion for summary judgment. The court observed that there was no dispute as to the physical nature of the liquid. It found the testimony and photographs consistent and undisputed as to the size, nature and visibility of the liquid, including that it appeared to be diesel fuel. The court noted that, even if it was not clear the liquid was "diesel, water, or soda," it was indisputably "a 4 to 5 foot puddle of liquid which was clearly visible and which presented a recognizable risk of slipping." As such, the court found the open and obvious doctrine barred plaintiff's claim as a matter of law. It further held that neither the distraction nor deliberate encounter exceptions applied because there was no evidence in the record supporting either. This appeal followed.

¶ 24 Plaintiff first contends that the circuit court erred in granting summary judgment to defendant where the open and obvious doctrine did not apply because Billy Hill did not know the liquid on the ground was diesel fuel.

¶ 25 Summary judgment is appropriate only when the pleadings, depositions, and admissions and affidavits on file demonstrate there is no genuine issue of any material fact, and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014); *Gurba v. Community High School District No. 155,* 2015 IL 118332, ¶ 10. The pleadings, depositions, and admissions and affidavits on file must be viewed in the light most favorable to the nonmoving party, here plaintiff. *Gurba*, 2015 IL 118332, ¶ 10. Any evidence that would not be admissible at trial cannot be considered when deciding a summary judgment motion. *Watkins v. Schmitt*, 172 Ill. 2d 193, 203-04 (1996). We review the circuit court's grant of a summary judgment motion *de novo*. *Gurba,* 2015 IL 118332, ¶ 10.

¶ 26 In an action for premises liability negligence, the plaintiff must prove the existence of a duty of care owed by the defendant to the plaintiff, a breach of that duty of care and an injury proximately resulting from that breach. *Keating v. 68th & Paxton, L.L.C.*, 401 Ill. App. 3d 456, 470 (2010). The existence of a duty is a question of law. *Sameer v. Butt*, 343 Ill. App. 3d 78, 85 (2003). To determine whether a duty exists, the court must consider whether a relationship existed between the parties that imposed a legal obligation upon one party for the benefit of the other party. *Id.*

¶ 27 In this case, the relationship between Billy and defendant at the time Billy was injured was that of business invitee and landowner. In *Ward v. K mart Corp.*, 136 Ill. 2d 132, 145-46 (1990), our supreme court held that section 343 of the Restatement (Second) of Torts accurately sets forth the law regarding the liability of landowners to invitees. Section 343 states:

"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 (1965).

¶ 28 The *Ward* court also adopted section 343A of the Restatement (Second) of Torts concerning a landowner's duty when a danger can be considered open and obvious. *Ward*, 136

Ill. 2d at 149-51. Section 343A provides: "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 (1965). Thus, when a condition is open and obvious, generally the landowner owes no duty of care to invitees "because the landowner 'could not reasonably be expected to anticipate that people will fail to protect themselves from any danger posed by the condition.' " *Ballog v. City of Chicago*, 2012 IL App (1st) 112429, ¶ 21 (quoting *Ward*, 136 Ill. 2d at 148).

¶ 29 The term " '[o]bvious' 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.' " *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 16 (quoting Restatement (Second) of Torts § 343A cmt. b (1965)). "Whether a condition is open and obvious depends on the objective knowledge of a reasonable person, not the plaintiff's subjective knowledge." *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 86 (2004). Where there is no dispute regarding the physical nature of the condition, the question of whether a condition is open and obvious is one of law. *Bruns*, 2014 IL 116998, ¶ 18; *Choate v. Indiana Harbor Belt R.R. Co.*, 2012 IL 112948, ¶ 34. Conversely, if a dispute exists over the physical nature of the condition, *i.e.*, its visibility, the question is one of fact. *Olson v. Williams All Seasons Co.*, 2012 IL App (2d) 110818, ¶ 42.

¶ 30 Plaintiff argues that, because the liquid on the ground's identity was unknown at the time of Billy's fall, Billy could not appreciate the "special risk that diesel fuel poses to anyone

stepping on it." She asserts, therefore, that the question of whether an objective person would have appreciated the risk of stepping on the unknown liquid is a question of fact that cannot be reached by summary judgment. Defendant responds that, regardless of whether Billy knew the liquid to be diesel fuel before his fall, a reasonable person would have appreciated the risk posed by the liquid, especially because it was large, greenish in color, oily and adjacent to a diesel fuel pump.

¶ 31 There is no question here that the puddle of liquid was large enough in size to be apparent to a reasonable person in the position of Billy. Plaintiff testified in a deposition that she and Billy had seen the "puddle" before they pulled up to the fuel pump and that "[i]t had been there awhile," as the puddle did not come from the two trucks ahead of them. Salto saw the puddle and made efforts to avoid stepping in it, fearing he could slip in the puddle. The photographic evidence also shows the liquid's ostensibly visible appearance. Thus, a reasonable person would have seen the puddle. As such, the question then becomes whether a reasonable person would have appreciated the risk associated with stepping on the liquid.

¶ 32 Two Speedway employees, Zawadski and Gonzalez, did not see the liquid before Billy fell, but viewed photographs of it during their depositions. According to Zawadski, the puddle of liquid was larger than the typical diesel fuel spill, and she could not tell from the photographs whether the liquid was diesel fuel or water. She stated, however, that once or twice a week, diesel fuel spills would occur, usually due to truck drivers not paying attention and overfilling their tanks. She added that occasionally truck drivers would pour their "garbage" on the ground by the pumps. Gonzalez also could not be sure from the photographs whether the liquid was

diesel fuel or water, and he said occasionally truck drivers would overfill their gas tanks, resulting in spills. However, Salto described the puddle of liquid as a "pretty big amount of fuel," approximately four or five feet large. He determined the liquid was fuel by its "greenish" color. Additionally, no evidence was presented that it had rained at any time close to the accident. Critically, the puddle of liquid was adjacent to the diesel fuel pumps and most heavily concentrated directly at the base of the front left portion of the pump's island, from which one could infer the liquid was diesel fuel.

¶ 33 In light of the evidence, the puddle on the ground would not only have been apparent to a reasonable person based on its sheer size and visibility, but a reasonable person would appreciate that the liquid might be diesel fuel. Any reasonable patron of a gas station, in particular a truck driver using diesel fuel pumps, should reasonably expect that a large, "greenish" puddle of liquid adjacent to diesel fuel pumps may be diesel fuel and thus appreciate the risk of slipping on that liquid. Therefore, as both the condition and the risk were apparent to a reasonable person, the puddle of liquid on the ground was open and obvious.

¶ 34 Plaintiff's attempt to create an issue of fact regarding the open and obvious condition of the puddle because the precise identity of the liquid was unknown to Billy is unpersuasive. She asserts that "[t]o the extent the circuit court meant that as a matter of law, Billy had to recognize *any* liquid on the ground as a slipping hazard so that the risk of slipping would always be obvious, that was said without citation and runs contrary to common sense." (Emphasis in original.) Plaintiff, however, fails to cite any authority to support her claim that where the identity of a liquid is unknown, this alone creates a question of fact even if the visibility, relative

size and appearance of the puddle were indisputable. Therefore, there was no dispute regarding the physical nature of the liquid, *i.e.* its visibility, to create a question of fact. See *Olson*, 2012 IL App (2d) 110818, ¶ 42. Whether the liquid was, in fact, diesel fuel is irrelevant in finding the open and obvious doctrine applied. As discussed, a patron of a gas station, in particular truck drivers at diesel fuel pumps, should reasonably expect that a large puddle of liquid adjacent to fuel pumps may be diesel fuel and thus appreciate the risk of the condition, even if the liquid ultimately is not diesel fuel.

¶ 35 In reaching our conclusion, we reject plaintiff's reliance on *Alqadhi v. Standard Parking, Inc.*, 405 Ill. App. 3d 14 (2010), *Nickon v. City of Princeton*, 376 Ill. App. 3d 1095 (2007) and *Buchaklian v. Lake County Family Young Men's Christian Ass'n*, 314 Ill. App. 3d 195 (2000). These three cases all present factual scenarios clearly distinguishable from the instant set of facts.

¶ 36 In *Alqadhi*, 405 Ill. App. 3d at 15, the plaintiff tripped and fell over a three-quarter-inch-high rise in concrete on a wheel-chair accessible ramp while leaving the defendant's parking garage. *Id.* The plaintiff argued the evidence demonstrated the garage had poor lighting and a lack of contrast of the surfaces forming the change in elevation gave the illusion that the surface was flat, whereas the defendant argued the evidence demonstrated the garage was well lit and the pavement was smooth and lacked defects. *Id.* at 18. The appellate court found the physical nature of the pavement, namely its visibility, was in dispute and therefore reversed the entry of summary judgment in favor of the defendant. *Id.*

¶ 37 In *Nickon*, 376 Ill. App. 3d at 1097, 1106, after a jury verdict in the plaintiff's favor, the appellate court found the defendant was not entitled to a judgment notwithstanding the verdict on the question of whether a depression in the sidewalk was open and obvious where the depression was "small" and "similar in color to the sidewalk, but partially covered by weeds." The appellate court found based on the condition's physical nature, "it was reasonable for the jury to conclude that a person walking on the sidewalk would not discover or realize the danger of the depression." *Id.* at 1106.

¶ 38 In *Buchaklian*, 314 Ill. App. 3d at 198, the plaintiff tripped and fell on a black mat near the shower area in the women's locker room of a YMCA. After the plaintiff's fall, she observed that part of the mat was an inch or two higher than the rest of the mat. *Id.* In reversing an entry of summary judgment for the defendant, the appellate court found a question of fact existed as to whether the mat was an open and obvious condition because the evidence in the record supported a "reasonable inference that the defect in the mat was difficult to discover because of its size, the lack of significant color contrast between the defect and the surrounding mat, or merely the short time that a person has in which to discover the defect as he or she takes a few steps toward the mat." *Id.* at 202.

¶ 39 In contrast to all three aforementioned cases where the plaintiffs were not even aware the hazardous condition existed, the large puddle of liquid was clearly visible to everyone at the scene, including plaintiff and Billy, by plaintiff's own admission. Thus, unlike *Alqadhi*, *Nickon* and *Buchaklian*, here, the visibility of the puddle was not in dispute despite the liquid's precise identity being unknown.

¶ 40 Next, plaintiff contends that, even if this court were to find the open and obvious doctrine applicable, both the distraction exception and the deliberate encounter exception to the doctrine applied to preclude the entry of summary judgment against her. If either exception applies, a landowner may still be held liable for dangerous conditions existing on their land despite the condition's obviousness. *Bruns*, 2014 IL 116998, ¶ 20. We discuss each exception in turn.

¶ 41 The distraction exception to the open and obvious doctrine refers to situations " 'where the possessor [of land] 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.' " *Sollami v. Eaton*, 201 Ill. 2d 1, 15 (2002) (quoting Restatement (Second) of Torts § 343A(1) cmt. f, at 220 (1965)). Critically, the exception only applies when "evidence exists from which a court can infer that plaintiff was actually distracted." *Bruns*, 2014 IL 116998, ¶ 22.

¶ 42 Here, plaintiff argues that Billy fell while "distracted by the process of purchasing fuel," citing to the security camera footage which shows a grainy image of Billy standing near the gas pump and then disappearing from view.

¶ 43 However, plaintiff's argument is entirely speculative as there is no evidence in the record that Billy was distracted by anything when he fell. Salto testified that he observed Billy " on the fuel pump *waiting* like to put fuel " although he never expounded on this detail. Then, Salto testified he observed Billy slip and fall after standing on the ground for only a few seconds after exiting his truck. Plaintiff testified she never saw Billy fall and the security camera footage confirms this, showing that Billy appears to fall while plaintiff was walking toward the store with

her back to him. A photograph attached to defendant's motion for summary judgment shows that the most recent diesel fuel fill-up at pump 11 was for $235.02. Plaintiff and Salto's testimony shows this could not have been for Billy's truck. Lastly, the video evidence merely showed that Billy exited his truck, shut his door and a few seconds later fell.

¶ 44 In the light of the foregoing, there is no evidence that Billy's attention was actually distracted. In fact, there is no evidence regarding what Billy was doing or where his attention was when he fell. As there is no evidence in the record from which the circuit court could infer that Billy was actually distracted, plaintiff cannot invoke the distraction exception. See *Sollami*, 201 Ill. 2d at 16 (distraction exception inapplicable where "no evidence presented to the circuit court tend[ing] to show that [the plaintiff] was distracted while jumping on the trampoline"); *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 452-53 (1996) (distraction exception inapplicable where "[t]he record does not indicate that plaintiffs in the instant cases were distracted or forgetful of the lake's existence when they decided to dive off the seawalls"). Plaintiff's argument is based on mere speculation and is therefore insufficient to raise a question of fact regarding the distraction exception. See *Cabrera v. ESI Consultants, Ltd.*, 2015 IL App (1st) 140933, ¶ 91.

¶ 45 In reaching this conclusion, we reject plaintiff's reliance on *Rexroad v. City of Springfield*, 207 Ill. 2d 33 (2003), *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14 (1992), *Ward*, 136 Ill. 2d 132, *Deibert v. Bauer Brothers Construction Co., Inc.*, 141 Ill. 2d 430 (1990), *Clifford v. Wharton Business Group, L.L.C.*, 353 Ill. App. 3d 34 (2004) and *Green v. Jewel Food Stores, Inc.*, 343 Ill. App. 3d 830 (2003). In all

of these cases, the circuit court could infer from the evidence that the plaintiff was actually distracted by something. *Rexroad*, 207 Ill. 2d at 37, 46 (the plaintiff, a manager for a high school football team, stated he was distracted from a hole in the parking lot because his focus was on bringing a football helmet to a player); *American National Bank*, 149 Ill. 2d at 17-18, 29 (court could infer that a billboard painter could have been distracted by having to watch where to place his feet on the walkrail he stood on to paint a billboard and momentarily forget about the presence of a power line only four to five feet above him); *Ward*, 136 Ill. 2d at 138 (the plaintiff stated that he was distracted from carrying a large mirror out of the defendant's store when he walked into a post located just outside the store's exit); *Deibert*, 141 Ill. 2d at 433 (the plaintiff stated he was distracted from a tire rut on the ground because he had to protect himself from construction debris being thrown off a balcony above him); *Clifford*, 353 Ill. App. 3d at 37 (the plaintiff, a construction worker, stated he was distracted by a wall collapsing above him and attempting to stop it by putting his hands up when he fell into a stairway opening in the floor); *Green*, 343 Ill. App. 3d at 831 (the plaintiff stated she was distracted by a shopping cart pushed in front of her in a parking lot when she fell on irregular pavement).

¶ 46 In contrast, here, there is nothing in the record from which a court could infer that Billy was actually distracted at the time of his fall. Necessarily, as Billy died and never testified about his fall, evidence of distraction is difficult to adduce. Nevertheless, plaintiff's invocation of the distraction exception is not supported by any evidence and instead relies entirely on speculation. It is therefore insufficient to withstand summary judgment. See *Cabrera*, 2015 IL App (1st) 140933, ¶ 91.

¶ 47 Plaintiff next argues that the deliberate encounter exception to the open and obvious doctrine applies. This exception arises " 'where the 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.' " *Sollami*, 201 Ill. 2d at 15 (quoting Restatement (Second) of Torts § 343A(1) cmt. f, at 220 (1965)). Essentially, "[t]he focus with the deliberate encounter analysis is on what the possessor of land anticipates or should anticipate the entrant will do." *Grillo v. Yeager Construction*, 387 Ill. App. 3d 577, 596 (2008); see also *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 392 (1998) (stating "liability stems from the knowledge of the possessor of the premises, and what the possessor 'ha[d] reason to expect' the invitee would do in the face of the hazard") (quoting Restatement (Second) of Torts § 343A cmt. f, at 220 (1965)).

¶ 48 The deliberate encounter exception most often applies "in cases involving some economic compulsion" (*Sollami*, 201 Ill. 2d at 16), such as where workers are compelled to encounter dangerous conditions as part of their jobs. See *LaFever*, 185 Ill. 2d at 384-85, 392 (the defendant could have reasonably foreseen that the plaintiff would deliberately walk on "very slippery" edge trim which often was on the ground at the defendant's facility in the course of performing his job which required him to haul away edge trim in containers); *Ralls v. Village of Glendale Heights*, 233 Ill. App. 3d 147, 155-56 (1992) (the defendant could have reasonably foreseen that construction workers would use the shortest path to door of building on work site rather than the longer and more inconvenient perimeter path despite the shorter path being covered in snow and built on an incline). Although the exception is not limited to these economic

compulsion situations (*Sollami*, 201 Ill. 2d at 16), plaintiff casts her argument in the economic compulsion vein.

¶ 49 Plaintiff argues the deliberate encounter exception applies here because Billy had an "economic incentive" to encounter the hazardous condition due to his compensation being tied to delivering his truck load. Thus, she argues, Billy was compelled to complete his delivery as quickly as possible, so that he could obtain a new trucking assignment and make more money. Defendant responds that plaintiff failed to support her argument with evidence that Billy was actually under an economic compulsion so that it would have reasonably anticipated Billy would have encountered the condition despite the risk.

¶ 50 Plaintiff's characterization of the deliberate encounter exception doctrine's applicability demonstrates why it actually does not apply here. She argues that Billy had an "economic incentive" to knowingly encounter the risk. However, an "economic incentive," is different than an "economic compulsion." Billy was under no compulsion to use pump 11 at defendant's gas station, as there is no evidence that he was required to use this gas station or this pump. He could have done any number of things rather than encounter the puddle of liquid at pump 11. He could have gone to an entirely different gas station. He could have returned to the line and waited for a diesel fuel pump that did not have a puddle. He could have avoided the puddle by stepping on the island as Salto did. Plaintiff asserts "it is not correct to say that [Billy] had an alternative" because of various obstacles associated with maneuvering to another diesel fuel pump in his large truck and because Billy was "trying to expedite the end of his trip." We disagree. The

aforementioned options were, indeed, alternatives for Billy. While they may have been more inconvenient for him than using pump 11, they were alternatives nonetheless.

¶ 51 Section 343A of the Restatement (Second) of Torts provides the quintessence of the deliberate encounter exception:

"A owns an office building, in which he rents an office for business purposes to B. The only approach to the office is over a slippery waxed stairway, whose condition is visible and quite obvious. C, employed by B in the office, uses the stairway on her way to work, slips on it, and is injured. *Her only alternative to taking the risk was to forgo her employment*. A is subject to liability to C." (Emphasis added.) Restatement (Second) of Torts § 343A illus. 5 (1965).

¶ 52 This example illustrates when economic compulsion under the deliberate encounter exception exists, where an individual is forced to choose between encountering the hazard or suffering detrimental employment consequences. Billy was not forced to encounter the hazardous condition. There was no evidence that he was at defendant's gas station as a requirement of his employment. In fact, plaintiff testified in her deposition that Billy's fuel card was not a Speedway-specific card. He was there because he needed fuel, which he could have acquired at another gas station with diesel fuel pumps. See *Kleiber v. Freeport Farm & Fleet, Inc.*, 406 Ill. App. 3d 249, 259 (2010) (finding the deliberate encounter exception inapplicable where the "plaintiff had another option available"); *Prostran*, 349 Ill. App. 3d at 83-84, 88, 90 (finding the deliberate encounter exception inapplicable where the visually-impaired plaintiff's testimony revealed a "preference for walking on the east side of" the street where construction on the sidewalk was occurring, but failed to "demonstrate that she was compelled to do so");

Bonavia v. Rockford Flotilla 6-1, Inc., 348 Ill. App. 3d 286, 289, 295 (2004) (finding the deliberate encounter exception inapplicable because the plaintiff, who fell when he stepped on a concrete step partially covered by vegetation, "could have crossed the side of the approach that was not covered by vegetation," thus showing "he had an alternative route for reaching the pier"). Defendant could not have reasonably foreseen that Billy would deliberately use a pump with a large puddle of liquid in front of it when defendant did not require his presence at its gas station and Billy had alternatives to using pump 11. Therefore, the deliberate encounter exception does not apply.

¶ 53 In reaching this conclusion, we reject plaintiff's reliance on *LaFever*, 185 Ill. 2d 380, *Grillo*, 387 Ill. App. 3d 577 and *Preze v. Borden Chemical, Inc.*, 336 Ill. App. 3d 52 (2002).

¶ 54 In *LaFever*, 185 Ill. 2d at 384-85, the plaintiff, a driver for a disposal company, had to walk over a "very slippery" waste product of the defendant's manufacturing process, "edge trim" as part of his job to haul out containers from the defendant's facility. The defendant was aware of the hazardous condition. *Id.* at 385-86. Our supreme court found the deliberate encounter exception applied because the defendant "had reason to know that these same drivers would deliberately encounter the hazard in order to fulfill their obligations and, consequently, keep their jobs." *Id.* at 395.

¶ 55 In *Grillo*, 387 Ill. App. 3d at 581, the plaintiff, a mason worker, was working at a residential construction site and complained nearly every day about open holes and trenches at the construction site and requested they be backfilled. Because of the open holes and trenches, the two back legs of the scaffolding that he needed to use to reach the upper portions of the

house were placed on cinder blocks. *Id.* at 581-82. When the plaintiff climbed the scaffolding to take measurements of a window, the scaffolding flipped upside down and he fell into an open hole. *Id.* at 582. The appellate court found the deliberate encounter exception applied because "plaintiff informed defendant of the dangerous condition where he was working, and defendant had reason to expect that plaintiff would continue working despite the dangerous condition in order to complete his work in a timely manner." *Id.* at 596.

¶ 56 In *Preze*, 336 Ill. App. 3d at 54, the plaintiff, a pipe fitter who was repairing a roof in the pump room of the defendant's resin-manufacturing plant, fell from a resin-coated ladder. The plaintiff testified that the slipperiness of the ladder was to be expected because " 'if it was in the building, it had resin on it.' " *Id.* at 55. The appellate court found the deliberate encounter exception applied because the plaintiff was required to perform a specific job at the defendant's plant, which "had to be undertaken despite the presence of resin throughout the plant." *Id.* at 59.

¶ 57 In contrast to *LaFever*, *Grillo* and *Preze*, where the defendants caused and were aware of the hazardous condition that the plaintiffs deliberately encountered, here, there was no evidence presented that defendant caused, or was aware of, the hazardous condition. Furthermore, in *LaFever*, *Grillo* and *Preze*, the economic compulsion came from the same defendant who created the hazardous condition. Here, on the other hand, the alleged compulsion came not from defendant, but from Billy himself, allegedly trying to deliver a truck load as quickly as possible.

¶ 58 Where a danger is open and obvious, and no exception applies, for all practical purposes, there is no duty. *Suchy v. City of Geneva*, 2014 IL App (2d) 130367, ¶ 24. Nevertheless, our supreme court had held that the existence of an open and obvious condition is not a *per se* bar to

finding a legal duty. *Bruns*, 2014 IL 116998, ¶ 19. As such, we must still apply the traditional factors in the duty analysis: "(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." *Id.* ¶ 34.

¶ 59 Our supreme court has found that when a dangerous condition is open and obvious, the first two factors will generally weigh against the imposition of a duty. See *id.* ¶ 19 ("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."); see also *Sollami*, 201 Ill. 2d at 17; *Bucheleres*, 171 Ill. 2d at 456-57. Thus, we confine our duty analysis to the final two factors. See *LaFever*, 185 Ill. 2d at 388.

¶ 60 As to the third and fourth factors, the burden of guarding against diesel fuel spills is rather onerous, as are the consequences of placing the burden on defendant alone. The evidence from Zawadski and Gonzalez's depositions suggests that diesel fuel spills occur once or twice a week, and are not an everyday occurrence. Although the financial burden for a gas station to be checking for spills at all times of the day is not contained in the record before us, it is unreasonable to expect that defendant should essentially have an employee stationed at the pumps or viewing security camera footage of the pumps as his or her sole job. Instead, it seems reasonable that checking for spills a few times a day would be sufficient, which the evidence shows is the procedure employed by defendant. Beyond several checks per day, the awareness of spills would have to come from customers alerting defendant's employees. While defendant certainly should be checking for diesel fuel spills regularly, due to their infrequency, the

imposition of guarding against spills is an onerous burden that is not justified given the open and obvious nature of potential diesel fuel spills. Therefore, defendant owed plaintiff no legal duty. Moreover, we note that "[n]o published premises-liability negligence case that we have found held both (1) that the open-and-obvious rule applied without exception and (2) that the defendant nonetheless owed the plaintiff a duty." *Bujnowski v. Birchland, Inc.*, 2015 IL App (2d) 140578, ¶ 55.

¶ 61 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County granting summary judgment to defendant.

¶ 62 Affirmed.