2018 IL App (1st) 172332 -U
No. 1-17-2332

SECOND DIVISION
December 4, 2018

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DOROTHEA BARCLAY,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 2015 L 10441
	)	
CLUB FOODS, LLC., d/b/a	)	
SUPER FRESH MARKET	)	The Honorable
	)	John H. Ehrlich,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Mason and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* circuit court's judgment granting defendant grocery store's motion for summary judgment on plaintiff's negligence action affirmed where the court's rulings on the admissibility of summary judgment affidavits did not constitute error and where the post with which plaintiff came in contact while leaving the store was an open and obvious condition and neither the distraction exception nor the deliberate encounter exception to the open and obvious rule applied.

¶ 2 Plaintiff Dorothea Barclay sustained injuries when she fell while shopping at Super Fresh Market, a grocery store owned and operated by defendant Club Foods, LLC. (Club Foods). Barclay subsequently filed a negligence action against Club Foods seeking to recover damages

for her injuries. Club Foods responded with a motion for summary judgment, which the circuit court granted. On appeal, Barclay contests the propriety of the circuit court's judgment, arguing that genuine issues of material fact exist rendering summary judgment inappropriate. For the reasons set forth herein, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 On August 7, 2015, Barclay was a patron of Super Fresh Market, a grocery store located at 1700 N. Lewis Avenue, Waukegan, Illinois. After buying some groceries, Barclay stopped to purchase a lottery ticket from a machine located near the front of the store. After retrieving her ticket, Barclay made contact with a cast-iron post,[1] fell, and sustained injuries. She subsequently filed a complaint sounding in negligence against Club Foods, the owner and operator of Super Fresh Market. In her complaint, Barclay alleged that Club Foods had a "duty to use reasonable care in the placement and control of the subject premises, including the condition of the walkways, flooring, aisles, entrances, exits and common areas." She further alleged that Club Foods breached its duty of care when it "committed one or more of the following negligent act and omissions:

a. Allowing a dangerous trip hazard to exist in the area surrounding the lottery machine;

b. Failing to furnish a safe walking path from the lottery machine to the exit free of dangerous trip hazards;

c. Failing to warn those coming to or leaving from the lottery machine of the dangerous trip hazard;

d. Failing to adequately inspect the premises in order to discover the trip hazard;

[1] We note that throughout the circuit court proceedings, the parties use the terms "pole" and "post" interchangeably to refer to the item with which Barclay came into contact. For the sake of consistency and clarity, we will refer to the item as a post.

e. Failing to relocate the metal post or lottery machine that Defendant knew or should have known was unreasonably dangerous to those using the premises;

f. Failing to place protective padding on the metal post;

g. Failing to place conspicu[ous] tape or other material on the post that would put customers on alert of its presence;

h. Was otherwise careless and/or negligent in maintaining the premises."

¶ 5 Finally, Barclay alleged that the injuries she sustained during her fall were "a direct, proximate, and foreseeable result of one of more that the foregoing negligent acts or omissions of Defendant."

¶ 6 In its answer, Club Foods denied the material allegations of negligence contained in Barclay's complaint, and as an affirmative defense, alleged that Barclay was guilty of contributory negligence because she: "(a) Failed to keep a proper lookout for her safety; (b) Failed to properly watch where she was going; (c) Failed to observe the open and obvious condition complained of; (d) Otherwise proceeded in a careless manner such that she lost h[er] balance and fell."

¶ 7 After the relevant pleadings had been filed, the parties commenced discovery. Plaintiff and the president of Club Foods were deposed.

¶ 8 In her deposition, Barclay testified that she went to Super Fresh Market at approximately 8:30 a.m. on August 7, 2015, to purchase groceries. After gathering and paying for a small amount of groceries, she decided to purchase a lottery scratch-off ticket from a machine located at the front of the store because she was "feel[ing] a little lucky." After Barclay purchased her scratch-off ticket, she "turned" and came into contact with a 3-foot tall cast iron post. She explained that one of her feet became "entrapped" by the post or possibly by the space between

the post and the lottery machine. She then fell to the ground and "passed out" because she "hit so hard." The next thing she remembered was someone standing over her and inquiring whether she was okay. Because Barclay was disoriented and seeing stars, she requested someone to call an ambulance.

¶ 9 Barclay explained that the post with which she came into contact was part of the store's electronic security system and was located "right next to" the lottery machine. She did not recall observing the post before she made contact with it and fell to the ground, explaining: "You just don't notice things like that when you're moving about in a normal way." At the time she made contact with the post, she recalled that she was "trying to decide [whether] to put [the ticket] in her pocket or just glance to see if what [she] got is what [she] got." She stated, however, that "of course [she] was paying attention" to what she was doing and specifically denied that she was distracted. Because she was "paying attention," Barclay speculated that she probably did not notice the post because "it may have been that it was the same color as the side of the machine."

¶ 10 Barclay estimated that she had been to Super Fresh Market "[h]undreds of times" prior to the incident. She never tripped over the post on any of those prior occasions, explaining that she "[n]ever noticed [the post] because [she] never went over there in that direct area."

¶ 11 Eli Akiva, the president of Club Foods, testified that he opened Super Fresh Market in 2007. The building he purchased was already being utilized as a grocery store. At the time of the purchase, electronic security devices were located near the entrance/exit of the store. In addition, three-foot-tall posts were bolted to the ground in front of the security devices. The posts, are made of hard material, like "steel," and are shaped like "half-moon[s]." They are painted black. According to Akiva, the posts are designed to prevent customers from hitting the security devices with their carts. Akiva testified that he did not alter the security devices or the

posts after he purchased the building. He did, however, install a lottery machine in the store after purchasing the building. Akiva explained that the lottery machine was installed at the request of his customers. He testified that he did not own the machine; rather, it is owned by the State of Illinois. His general manager, Menashe Cohen, decided to have the machine placed near the front of the store. The lottery machine was placed next to the coin and ATM machines that were already located at the front of the store. Akiva testified that he typically visits Super Fresh Market four times per week and that he has never observed customers making contact with the cast iron posts while exiting the store.

¶ 12 Upon completion of the aforementioned discovery, Club Foods filed a motion for summary judgment. In its motion, defendant argued that the post with which Barclay came into contact "was open and obvious to anyone walking near it" and that plaintiff's "own negligent act of failing to watch where she was walking" was the proximate cause of her fall and resulting injuries. Given these facts, Club Foods argued that Barclay was unable to prevail on the issue of liability and that it was thus entitled to summary judgment as a matter of law. Club Foods supported its motion for summary judgment with an affidavit completed by Akiva. In his affidavit, Akiva described the post at issue as approximately 3 feet tall and made of "black solid material," which he believed to be cast iron. According to Akiva the post is "securely" bolted to the floor and has been located in the same place since he had purchased the property 10 years earlier. It is located approximately three feet away from the lottery machine. Its purpose is to "prevent customers from striking the security apparatus located behind the post with their carts or from physically running into it." Akiva classified the post and its positioning in the store as a "safety measure." Akiva averred that he was unaware of any prior incidents of store patrons coming into contact with the post and opined that "[i]n order for the plaintiff or any other person

to walk into the po[st] at issue that person would have to not be looking where they are walking" because the post is "open and obvious to anyone who is watching where they are walking."

¶ 13 In response to Club Foods's motion, Barclay disputed defendant's characterization of the post at issue as an open and obvious dangerous condition. Alternatively, she argued that even if the post posed an open and obvious danger, Club Foods should have "foreseen that placing a short black post, directly in the path of egress, surrounded by distractive advertisements and machines would cause injury" to reasonable patrons who would understandably "be distracted by the advertisements and the opportunity to win money." She further argued that Club Foods should have foreseen that patrons would deliberately encounter the post given its location at the front of the store. As such, Barclay urged the circuit court to deny Club Foods's motion for summary judgment. Barclay also urged the court to strike Akiva's affidavit, arguing that it contained conclusory statements unsupported by facts, and thus did not meet the requirements set forth in Illinois Supreme Court Rule 191.

¶ 14 Barclay, in turn, supported her response to defendant's motion for summary judgment with an affidavit completed by Daniel Robinson, "an expert in the practice of architecture, design errors and omissions and premises safety." In his affidavit, Robinson concluded that "the po[st] with which the Plaintiff interacted created an unreasonably dangerous fall hazard unanticipated by Plaintiff and other customers." Robinson categorized the lottery machine as a "distraction[]" that "hindered the Plaintiff from recognizing the dangerous impediment in the foreseeable path of egress" out of the store. His conclusion was based on his "investigat[ion of] the ingress/egress doorway of the property and site in which the incident" at issue occurred, as well as his review of Barclay's deposition testimony. Robinson's conclusion was also informed by his review of various studies and articles detailing the manner in which human beings observe their

surroundings and the reasons why they "bump into things." Although Robinson quoted passages from the publications in his affidavit, he did not attach copies of the publications themselves to his affidavit.

¶ 15 Club Foods, in turn, challenged Robinson's expertise and lack of foundation for his opinions and urged the circuit court not to consider his affidavit.

¶ 16 After presiding over a hearing on Club Foods's motion for summary judgment, the transcripts of which do not appear in the record on appeal, the court granted defendant's motion. In doing so, the court denied Barclay's request to strike Akiva's affidavit. It did, however, strike the affidavit completed by plaintiff's expert, Daniel Robinson.[2]

¶ 17 Plaintiff responded with a motion to reconsider, which the circuit court denied. This appeal followed.

¶ 18 ANALYSIS

¶ 19 On appeal, plaintiff argues that the circuit court's denial of her request to strike Eli Akiva's affidavit and its decision to strike the affidavit completed by her retained expert constituted an abuse of discretion.[3]

¶ 20 Affidavits submitted in connection with summary judgment proceedings are governed by Illinois Supreme Court Rule 191 (Ill. S. Ct. R. 191 (eff. Jan. 4, 2013)). *Cabrera v. ESI Consultants, Ltd.*, 2015 IL App (1st) 140933, ¶ 128; *U.S. Bank National Association v. Sauer*, 392 Ill. App. 3d 942, 946-47 (2009). Rule 191(a), in pertinent part, provides:

[2] The written order does not detail the reasons behind the court's decision to grant Club Foods's motion for summary judgment or the decisions it made with respect to the parties' competing affidavits. Based on Barclay's motion to reconsider and the court's ruling thereon, the court evidently found that the pole that caused her injury was an open and obvious condition and that neither the distraction exception nor the deliberate encounter exception to the open and obvious rule applied.

[3] For the sake of clarity and to avoid confusion, we note that we are addressing the issues raised by plaintiff in a different order than they are discussed in her appellate brief.

> "Affidavits in support of or in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure * * * shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013) .

¶ 21 In order to be considered by the trial court, an affidavit cannot contain unsupported assertions or conclusory statements. *Madden v. F.H. Paschen*, 395 Ill. App. 3d 362, 387 (2009). Although affidavits submitted by a party in opposition to a motion for summary should be liberally construed (*Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008)), the affidavits must nonetheless strictly comply with the requirements of Rule 191 to be considered by the court (*Robidoux v. Oliphant*, 201 Ill. 2d 324, 336 (2002)). Strict compliance with the rule's requirements is essential because affidavits submitted in the context of summary judgment proceedings serve as a substitute for trial testimony, and the rule is designed " 'to insure that trial judges are presented with valid evidentiary facts upon which to base a decision.' " *Robidoux*, 201 Ill. 2d at 336 (quoting *Solon v. Godbole*, 163 Ill. App. 3d 845, 851 (1987)). Reviewing courts have analyzed a circuit court's decision whether to strike a Rule 191 affidavit under both an abuse of discretion standard and a *de novo* standard. *Cabrera v. ESI Consultants, Ltd.*, 2015 IL App (1st) 140933, ¶ 129; *D'Attomo v. Baumbeck*, 2015 IL App (2d) 140865, ¶ 71.[4] Given that our result would be the same under either standard of review, we need not resolve this dispute. *Cabrera*, 2015 IL App (1st) 140933, ¶ 129; *D'Attomo*, 2015 IL App (2d) 140865, ¶ 71.

[4] We note that Barclay cites the abuse of discretion standard in her brief.

¶ 22 Barclay contends that several statements included in Akiva's affidavit were conclusory and not based on facts. For example, she takes issue with Akiva's statements that the post at issue was a safety measure, that the post is obvious to anyone watching where they are walking, and that the lottery machine was behind plaintiff when she collided with the post, and thus not a distraction at the time of the incident. Construing Akiva's affidavit liberally and in its entirety, we find the statements contained therein are based on his personal knowledge and contain sufficient factual support necessary to satisfy the requirements of Rule 191. See *US Bank, National Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 22 (quoting *Doria v. Village of Downers Grove*, 397 Ill. App. 3d 752, 756 (2009), quoting *Kugler v. Southmark Realty Partners III*, 309 Ill. App. 3d 790, 795 (1999) (" ' "If, from the document as a whole, it appears that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents at trial, Rule 191 is satisfied." ' "). Even if some of the statements contained in Akiva's affidavit could be construed as somewhat conclusory, we do not find that the affidavit is so devoid of factual support that it warrants the striking of all, or a portion, of the document. See *Robidoux*, 201 Ill. 2d at 343 (although affidavit was "somewhat conclusory," it was not devoid of factual support such that striking the document was warranted).

¶ 23 We also find no error with respect to the court's decision to strike the affidavit completed by plaintiff's expert, Daniel Robinson. In his affidavit, Robinson offered his expert opinion that the post with which plaintiff made contact was an unreasonable hazard and that the lottery machine from which she purchased her ticket was a distraction. His opinion was based in part, on published materials detailing the manner in which people observe their surroundings and explaining the reasons why they "bump into things." Although Robinson included selected quotations from the publications in his affidavit, he did not attach copies of those documents to

his affidavit in contravention of the express mandates of Rule 191(a). See Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013) (mandating that the affiant "shall have attached thereto sworn or certified copies of all papers upon which the affiant relies"). Although plaintiff suggests that Robinson's affidavit satisfied the "spirit" of the rule, the "attached-papers requirement" of Rule 191 is "not a mere technical requirement;" rather, it "is inextricably linked to the provisions requiring specific factual support in the affidavit itself." *Robidoux*, 201 Ill. 2d at 344; see also *Doe by Doe v. Coe*, 2017 IL App (1st) 160875, ¶ 18 (the attached-papers requirement is a "rigid" requirement that may be not be satisfied with substantial compliance). The failure to include the papers upon which Robinson relied, warranted the striking of his affidavit. *Robidoux*, 201 Ill. 2d at 345. Although Barclay included excerpts of the publications cited by Robinson in her motion to reconsider, her actions did not cure the original defects of Robinson's affidavit. Moreover, the materials did not constitute newly discovered evidence that the circuit court was obligated to consider. See *Landeros v. Equity Property and Development*, 321 Ill. App. 3d 57, 65-67 (2001); *Wilfong v. L.J. Dodd Construction*, 401 Ill. App. 3d 1044, 1063 (2010).

¶ 24 Having found that the circuit court's rulings concerning the propriety of the parties' summary judgment affidavits did not constitute error, we now address Barclay's claim that the court's order granting Club Foods's motion for summary judgment was improvidently granted due to the existence of genuine issues of material fact in this case. Specifically, she argues that genuine issues of material fact exist as to whether the danger posed by the post that caused her injury was open and obvious and whether any exceptions to the open and obvious doctrine apply.

¶ 25 Summary judgment is appropriate when "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 judgment as a matter of law." 735 ILCS 5/2-1005(c)

(West 2014). In reviewing a motion for summary judgment, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the moving party to determine whether a genuine issue of material fact exists. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). A genuine issue of fact exists where the material relevant facts in the case are disputed, or where reasonable persons could draw different inferences and conclusions from undisputed facts. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). To survive a motion for summary judgment, the nonmoving party need not prove her case at this preliminary stage of litigation; however, the plaintiff must present some evidentiary facts, not mere speculation or conjecture, to support each element of her cause of action, which would arguably entitle her to a judgment. *Garcia v. Nelson*, 326 Ill. 2d 33, 38 (2001); *Peters v. R. Carlson & Sons, Inc.*, 2016 IL App (1st) 153539, ¶ 13; *Richardson v. Bond Drug Co. of Illinois*, 387 Ill. App. 3d 881 (2009). Although summary judgment has been deemed a "drastic means of disposing of litigation" (*Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986)), it is nonetheless an appropriate mechanism to employ to expeditiously dispose of a lawsuit when the moving party's right to a judgment in its favor is clear and free from doubt (*Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001)). The circuit court's ruling on a motion for summary judgment is subject to *de novo* review. *Weather-Tite, Inc. v. University of St. Francis*, 233 Ill. 2d 385, 389 (2009).

¶ 26 To prevail on a negligence claim, a plaintiff must establish that the defendant owed her a duty of care, that the defendant breached that duty, and that the breach of that duty caused the plaintiff's injury. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12; *Reed v. Galaxy Holdings, Inc.*, 394 Ill. App. 3d 39, 42 (2009); *Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1063 (2001). The existence of a duty of care depends upon "whether defendant and plaintiff stood in such a relationship to one another that the law imposed upon defendant an obligation of

reasonable conduct for the benefit of plaintiff." *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 140 (1990). Generally, to determine whether a duty exits in a negligence case, courts consider several factors, including: (1) the reasonable foreseeability of the injury; (2) the reasonable likelihood of injury; (3) the magnitude of the burden that guarding against injury places on the defendant; and (4) the consequences of placing that burden on the defendant. *Sollami v. Eaton*, 201 Ill. 2d 1, 17 (2002). Ultimately, if a plaintiff cannot establish an element to support her negligence action, summary judgment in favor of the defendant is proper. *Pavlik*, 323 Ill. App. 3d at 1063.

¶ 27 As a general rule, business operators owe their customers a duty to maintain their premises in a safe condition. *Ward*, 136 Ill. 2d at 141; *Green v. Jewel Stores, Inc.*, 343 Ill. App. 3d 830, 832 (2003). Pursuant to the open and obvious doctrine, however, "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." Restatement (Second) of Torts § 343A, at 218 (1965); *Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430, 434-36 (1990); *Wade v. Wal-Mart Stores, Inc.*, 2015 IL App (4th) 141067, ¶ 14. "The term 'obvious' denotes that 'both the condition and the risk are apparent to and would be recognized by a reasonable [person], in the position of the visitor, exercising ordinary perception, intelligence, and judgment.' " *Diebert*, 141 Ill. 2d at 435 (quoting Restatement (Second) of Torts § 343A, Cmt. b at 219 (1965)). "The issue of whether a condition is obvious is determined by the objective knowledge of a reasonable person, not the plaintiff's subjective knowledge." *Menough v. Woodfield Gardens*, 296 Ill. App. 3d 244, 248-49 (1998) (citing *Deibert*, 141 Ill. 2d at 435); see also *Bonner v. City of Chicago*, 334 Ill. App. 3d 481, 485 (2002).

¶ 28 The rationale behind the open and obvious rule has been explained as follows: "In cases involving obvious and common conditions, such as fire, height, and bodies of water, the law generally assumes that persons who encounter these conditions will take care to avoid any danger inherent in such conditions. The open and obvious nature of the condition itself gives caution and therefore the risk of harm is considered slight; people are expected to appreciate and avoid obvious risks." *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 448 (1996); see also *Grillo v. Yeager Construction*, 387 Ill. App. 3d 577, 595 (2008) (explaining that open and obvious doctrine reflects the belief that "it is not foreseeable that an invitee will be injured when the condition is obvious or known"). The open and obvious doctrine, however, is not confined to fire, heights, and bodies of water (*Bruns*, 2014 IL 116998, ¶ 17); rather, it has been applied to other conditions that reasonable persons would recognize as dangerous, including parking lot defects (*Rexroad v. City of Springfield*, 207 Ill. 2d 33 (2003)), cracked sidewalks (*Bruns*, 2014 IL 116998), grocery store pallets (*Peterson v. Aldi*, 288 Ill. App. 3d 57 (1997)), and concrete posts (*Ward*, 136 Ill. 2d at 152). Whether a condition is open and obvious may present a question of fact; however, where no dispute exists as to the physical nature of the condition, the open and obvious nature of the condition is a question of law. *Bruns*, 2014 IL 116998, ¶ 18; *Peters*, 2016 IL App (1st) 153539, ¶ 16.

¶ 29 Here, the pleadings, depositions, and photo exhibits included in the record objectively show that the post at issue, and the danger it poses, are open and obvious. The post is clearly visible and not concealed or hidden in any way. Notwithstanding Barclay's subjective failure to observe the post, any person who is paying attention while approaching the store's exit, can observe the electronic security system devices and the posts affixed to the floor that are located in front of those devices. See *Menough*, 296 Ill. App. 3d at 249 (a plaintiff's subjective failure to

notice a condition does not obviate the objective open and obvious nature of a condition that is neither hidden nor concealed). Indeed, upon being shown pictures of the store's exit during her deposition, Barclay acknowledged the visibility of the posts. We note that on appeal, Barclay suggests that the cause of her fall was not the post itself, but a gap between the floor and the post. Barclay, however, never described such a gap in her deposition testimony or included mention of the purported gap in response to Club Foods's motion for summary judgment. In addition, the pictures of the store that are included in the record depict no such gap. Given our review of what the record does reflect, we conclude that the three-foot-tall cast iron post with which Barclay came into contact is an open and obvious condition. See, *e.g.*, *Ward*, 136 Ill. 2d at 152-53 (five-foot-tall concrete post located outside of the entrance of a store was open and obvious).

¶ 30 The existence of an open and obvious condition, however is not a *per se* bar to the finding of a legal duty. *Bruns*, 2014 IL 116998, ¶ 18; *Bucheleres*, 171 Ill. 2d at 449. Indeed, the distraction exception, invoked by Barclay, is a limited exception to the rule that a defendant has no duty to protect a plaintiff from an open and obvious condition. *Ward*, 136 Ill. 2d at 147. Pursuant to the distraction exception, a property owner will owe an invitee a duty of care if there is a reason to expect that the plaintiff's attention might be distracted and that she would not discover the open and obvious condition. *Id*. at 149-50. The relevant inquiry when analyzing the distraction exception is "whether a defendant should reasonably anticipate injury to those entrants on his premises who are generally exercising reasonable care for their own safety, but may reasonably be expected to be distracted, as when carrying large bundles, or forgetful of the condition after having momentarily encountered it." *Id.* at 152.

¶ 31 The distraction exception, however, does not apply to " 'self-created distractions' " *Bruns*, 2014 IL 116998, ¶ 31 (quoting *Whittleman v. Olin Corp.*, 358 Ill. App. 3d 813-817-18

(2005)). That is because the law does not require a defendant to anticipate a plaintiff's own negligence. *Ward*, 136 Ill. 2d at 152; *Bonner*, 334 Ill. App. 3d at 485. Rather, in cases in which the distraction exception has been applied, "some circumstance was present that *required* the plaintiff to divert his or her attention from the open and obvious danger, or otherwise prevented him or her from avoiding the risk." (Emphasis added.) *Bruns*, 2014 IL 116998, ¶ 28. Moreover, there is generally clear evidence that the property owner "created, contributed to, or was responsible in some way for the distraction which diverted the plaintiff's attention from the open and obvious condition and, thus, was charged with reasonable foreseeability that an injury might occur." *Sandoval v. City of Chicago*, 357 Ill App. 3d 1023, 1030 (2005).

¶ 32 For example, in *Ward*, the plaintiff was injured when he collided with a five-foot-tall concrete post located just outside of the entrance to the defendant's retail store. At the time of the collision, the plaintiff was carrying a large mirror that he had purchased from the defendant's store, which obstructed his view of the post. Although the post posed an open and obvious danger, our supreme court held that the distraction exception applied because "it was reasonably foreseeable that a customer would collide with the post while exiting defendant's store carrying merchandise which could obscure view of the post." *Ward*, 136 Ill. 2d at 153-54. The court reasoned that "[d]efendant had reason to anticipate that customers shopping in the store would, even in the exercise of reasonable care, momentarily forget the presence of the posts which they may have previously encountered by entering through the customer entrance door. It was also reasonably foreseeable that a customer carrying a large item which he had purchased in the store might be distracted and fail to see the post upon exiting through the door." *Id*. at 154. The court noted, however, that a different conclusion could be warranted had the plaintiff not been carrying "a vision-obscuring bundle." *Id*. at 153.

¶ 33 Barclay asserts that the machines located near the front of the store, including the lottery machine from which she purchased her ticket, "created a reasonable distraction to one walking to the exit door." There is no evidence, however, that Barclay was distracted by the lottery machine at the time of the incident. During her discovery deposition, Barclay testified that she made contact with the post after she purchased her lottery ticket, turned, and began walking *away* from the lottery machine. Based on the record, the post with which she came into contact is located approximately three feet away from the lottery machine. Although Barclay expressly denied being distracted, she explained that at the time she made contact with the post, she had her lottery ticket in hand and "was either trying to put it in [her] pocket or [she] was putting it in [her] purse." It is thus clear from Barclay's deposition testimony that she was not distracted by the lottery machine, itself, at the time of her injury; rather, it appears that she was focused on where to put her newly purchased lottery ticket, a self-created distraction. See *Sandoval*, 357 Ill. App. 3d at 1030-31 (recognizing that "when a plaintiff's attention is diverted by her own independent acts for which the defendant has no responsibility, the distraction exception does not apply").

¶ 34 Although plaintiff suggests that the circumstances of her fall parallel those present in *Ward*, we note that unlike the patron in *Ward*, the groceries and lottery ticket that plaintiff purchased on defendant's premises did not physically obstruct her view of the post and prevent her from appreciating the danger it posed. Indeed, Barclay, unlike the plaintiff in *Ward*, could have observed the condition that caused her injury had she been paying attention. Instead, she failed to exercise reasonable care for her own safety by paying attention to her surroundings. The mere fact that Barclay was looking elsewhere does not constitute a legal distraction encompassed by the distraction exception to the open and obvious rule. See, *Bruns*, 2014 IL

116998, ¶ 34 (recognizing that to accept the plaintiff's argument that "simply looking elsewhere constitutes a legal distraction, then the open and obvious rule would be upended and the distraction exception would swallow the rule"); see also *Wade*, 2015 IL App (4th) 141067, ¶ 40 (rejecting the plaintiff's reliance on the distraction exception where the record simply showed that the plaintiff was looking elsewhere and was failing to exercise reasonable care for her own safety by paying attention to her surroundings when she tripped over a pothole in the defendant's parking lot); *Sandoval*, 357 Ill. App. 3d at 1031 (distraction exception did not apply where the plaintiff's injury was the "result of her own inattentiveness in not looking forward where she was walking"). We thus find the distraction exception inapplicable to the case at bar.

¶ 35 Barclay, however, also invokes another exception to the open and obvious rule: the deliberate encounter exception. Pursuant to the deliberate encounter exception, a duty will be imposed "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." Restatement (Second) of Torts § 343A cmt. f, at 220 (1965); *Bruns*, 2014 IL 116998, ¶ 20. 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*, 387 Ill. App. 3d at 596. This exception is most often applied in cases involving "economic compulsion" (*Sollami*, 201 Ill. 2d at 16 (2002) where employees knowingly and deliberately confront a dangerous condition to fulfill requirements of their jobs. See, *e.g.*, *Ralls v. Village of Glendale Heights*, 147 Ill. App. 3d 155-56 (1992) (finding that it was reasonably foreseeable that a construction foreman would use the shortest path on the worksite even though the he was expressly aware that the path was snow-covered and slippery and posed and open and obvious danger rather than a "longer and inconvenient perimeter path" free of a

dangerous condition in order to complete his job responsibilities); *Grillo*, 287 Ill. App. 3d at 596 (finding the deliberate encounter exception applicable where the plaintiff construction worker was injured by an open and obvious condition on the job site that he had previously discussed with a supervisor because "the defendant had reason to expect that plaintiff would continue working despite the dangerous condition in order to complete his work in a timely manner"). In this case, however, Barclay expressly denied noticing the post prior to colliding with it. Given that the record is devoid of any evidence that she deliberately and knowingly encountered the dangerous condition, Barclay's reliance on the deliberate encounter exception is unavailing.

¶ 36 Our conclusion that neither the distraction exception nor the deliberate encounter exception to the open and obvious rule applies in the instant case does not, however, end our inquiry because the existence of an open and obvious danger, by itself, does not preclude the imposition of a duty of care. *Bruns*, 2014 IL 116998, ¶ 16; *Sollami*, 201 Ill. 2d at 15. That is because " '[i]n assessing whether a duty is owed, [notwithstanding the existence of an open and obvious danger], the court must still apply traditional duty analysis to the particular facts of the case.' " *Bruns*, 2014 IL 116998, ¶ 19 (quoting *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 425 (1998)). As set forth above, the traditional duty analysis involves consideration of the following four factors: (1) the reasonable foreseeability of the injury; (2) the reasonable likelihood of injury; (3) the magnitude of the burden that guarding against injury places on the defendant; and (4) the consequences of placing that burden on the defendant. *Sollami*, 201 Ill. 2d at 17; *Bulduk.*, 2015 IL App (1st) 150166, ¶ 12. Courts have held that an open and obvious condition necessarily impacts the first two factors of the traditional duty analysis: the foreseeability and likelihood of plaintiff's injury. See *Bruns*, 2014 IL 116998, ¶ 19; *Henderson v. Lofts at Lake Arlington Towne Condominium Ass'n*, 2018 IL App (1st) 162744, ¶ 41.

Specifically, courts have explained that "[w]here the condition is open and obvious, the foreseeability of harm and likelihood of injury will be slight, thus weighing against the imposition of a duty" of care. *Bruns*, 2014 IL 116998, ¶ 19. Accordingly, given the open and obvious nature of the post, the first two factors weigh against the imposition of a duty of care in this case. *Id*. With respect to the final two factors, we note that the record does not contain any evidence as to the financial or any other burden on Club Foods to replace the posts at issue or to otherwise protect pedestrians from the condition and is thus insufficient to support the finding of a duty of care in this case. *Id*. at ¶ 37 (finding that the defendant owed no duty to protect the plaintiff from an open and obvious sidewalk, based in part, on the fact that the record did not contain any evidence as to the financial or other burden that would be placed on the defendant to remedy that condition). Moreover, even if the calculus on the final two factors favors Barclay, we are unable to conclude that they outweigh the first two factors in the duty analysis given the open and obvious nature of the hazard. See *Bujnowski v. Birchland Inc.*, 2015 IL App (2d) 140578, ¶ 55 (recognizing that no published premises liability case has held that a defendant owed a duty to a plaintiff where an open and obvious condition was involved and no exception applied).

¶ 37 We reiterate that to withstand Club Foods's summary judgment motion, Barclay was not required to fully prove her case; rather, it was her burden to present a sufficient factual basis that would arguably entitle her to a judgment. *Bruns*, 2014 IL 11699, ¶ 12. After reviewing the record and the arguments of the parties, we find that Barclay has failed to satisfy this burden and that no genuine issues of material fact exist in this case. As such, we affirm the judgment of the circuit court.

¶ 38 CONCLUSION

¶ 39 The judgment of the circuit court is affirmed.

¶ 40 Affirmed.