2019 IL App (2d) 180578-U
No. 2-18-0578
Order filed February 1, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ELIZABETH PASCHKE, Plaintiff-Appellant, v. HOBBY LOBBY STORES, INC., a foreign corporation, individually and d/b/a Hobby Lobby, Defendant-Appellee.	)))))))))))	Appeal from the Circuit Court of McHenry County. No. 16-LA-250 Honorable Thomas A. Meyer, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Zenoff and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting summary judgment for defendant, because defendant did not owe plaintiff a duty of care regarding how wide defendant's automatic store entrance doors would open. Therefore, we affirmed.

¶ 2 Plaintiff, Elizabeth Paschke, appeals the trial court's grant of summary judgment in favor of defendant, Hobby Lobby Stores, Inc., a foreign corporation, individually and d/b/a Hobby Lobby. Plaintiff was allegedly injured when automatic doors in one of defendant's stores did not open fully, resulting in her bumping her shoulder on the side of the door. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff filed a two-count complaint on July 13, 2016, alleging as follows. On December 17, 2015, she and her husband went to a Hobby Lobby store in McHenry. They walked from the parking lot toward the outside automatic sliding glass doors. As plaintiff approached, the doors began to slide open, and she began to walk through. At the same time, other customers were exiting the doors. However, without any warning, the doors failed to completely open, and plaintiff's right shoulder struck the outside doors. Later, the assistant store manager informed plaintiff that the manager had set the door controls to not open completely "due to concerns about wind." The assistant manager also said that another time when the outside doors were set to reduced opening, a customer walked into the doors and injured his head and face. Plaintiff alleged that defendant was negligent (count I) and had violated the Premises Liability Act (740 ILCS 130/1 *et seq.* (West 2014)) (count II) in that it set the outside doors to not completely open; failed to provide a safe entrance for customers; failed to warn customers or place any warning signs at the entrance; and violated its own policies and procedures by failing to provide a safe entrance into the store. Plaintiff alleged that, as a proximate result, she injured her right shoulder. Plaintiff alleged that she required shoulder surgery and had also suffered scarring.

¶ 5 Depositions were taken of plaintiff; her husband, Brian Paschke; the store manager on duty at the time of the incident, Morgan Horner; and a cashier on duty at the time of the incident.

¶ 6 Defendant filed a motion for summary judgment on December 22, 2017. Defendant highlighted the following undisputed facts from the depositions. It was a windy day when plaintiff and Brian visited the store. The store's sliding glass doors were sometimes changed to a manufacturer setting of reduced opening because weather conditions such as wind could cause them to not function properly if they were set to a full opening position. Plaintiff had full view of the doors when she approached the store, and she was not distracted. She and Brian walked

side-by-side as they entered the store, at the same time two other people were exiting, so there were four people abreast when plaintiff's right shoulder made contact with the side of the door. Plaintiff testified that the incident would not have occurred if she and Brian had entered single-file. Plaintiff would have been able to pass through if there was an additional two or three inches of clearance.

¶ 7 Defendant argued that plaintiff could not prove negligence or premises liability because the actual width of the door opening when she was passing through was open and obvious, so defendant did not owe her a duty. Defendant argued that although plaintiff testified that she thought the doors would open wider than they did when she stepped through them, the size of the opening was objectively open and obvious to a reasonable person. Defendant also noted that plaintiff testified that she could see the door with her peripheral vision at the time she entered, and it argued that she therefore should have been expected to visually perceive the actual width of the door opening when walking through it.

¶ 8 Plaintiff filed a response to defendant's motion on March 14, 2018, arguing as follows. Plaintiff did not have any warning that the doors were set to not fully open when she entered the store. Plaintiff was two or three feet from the doors when they began to slide open, and they stopped suddenly while she attempted to cross the threshold into the store, leaving her no time to avoid the impact. Plaintiff had never previously seen the doors stop after only partially opening. Plaintiff argued that defendant created a dangerous condition by changing the setting of the doors to prevent them from opening completely, and that defendant should have expected that customers would not discover or realize the danger. Plaintiff argued that by failing to provide warning signs on the doors or at the entrance, defendant concealed the defect and significantly increased the likelihood of injury.

¶ 9 The trial court granted defendant's motion for summary judgment on June 19, 2018; we summarize its reasoning. Plaintiff knew that in order for her to enter the store, the door frame had to move out of the way. Plaintiff was not distracted. To rule in her favor would result in unreasonably shifting the burden to any store to make sure that its doors operated in a way that was consistent with a customer's subjective assumptions. Plaintiff did not show that there was a duty to have the doors operate a particular way, at a particular speed, or open to a particular width. To rule to the contrary would relieve plaintiff of the duty to be aware of her surroundings, even when she was not distracted. The doors were open and obvious, and the accident was ultimately the result of plaintiff's inattention and her presumption about how the doors would operate.

¶ 10 Plaintiff timely appealed.

¶ 11 II. ANALYSIS

¶ 12 On appeal, plaintiff contests the trial court's grant of summary judgment for defendant. Summary judgment is appropriate only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016); *Perry v. Department of Financial & Professional Regulation*, 2018 IL 122349, ¶ 30. We review *de novo* an order granting summary judgment. *Gurba v. Community High School District No. 155*, 2015 IL 118332, ¶ 10.

¶ 13 In this case, plaintiff alleged claims of both negligence and violation of the Premises Liability Act. A common law negligence action contains the following elements: (1) the existence of a duty owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) an injury proximately caused by the breach. *Ward v. K mart Corp.*, 136 Ill. 2d 132, 140 (1990).

Under section 2 of the Premises Liability Act (Act) (740 ILCS 130/2 (West 2014)), a landowner owes entrants to his or her land a duty of "reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them." Section 2 also abolished the common law distinction between the duty owed to invitees and licensees (*id.*), but the duty owed by a landowner under the Act is otherwise similar to the duty owed under common law (*Ward*, 136 Ill. 2d at 142). Accordingly, we consider the counts together. See *Icenogle v. Myers*, 167 Ill. App. 3d 239, 243 (1988). Here, defendant and plaintiff are in the positions of landowner and entrant, respectively.

¶ 14 Whether a duty exists is a question of law. *Bogenberger v. Pi Kappa Alpha Corp.*, 2018 IL 120951, ¶ 21. Factors relevant to determining whether the defendant owed the plaintiff a duty are the (1) reasonable foreseeabilty of the injury; (2) reasonable likelihood of the injury; (3) extent of the burden of guarding against the injury; and (4) consequences of placing that burden on the defendant. *Buchaklian v. Lake County Family YMCA*, 314 Ill. App. 3d 195, 200 (2000).

¶ 15 In general, a landowner is not required to foresee and protect against an injury if the potentially dangerous condition is open and obvious. *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 44 (2003). Section 343A of the Restatement (Second) of Torts addresses this subject, stating in relevant part:

> "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(1) (1965); see also *Ward*, 136 Ill. 2d at 150-51 (adopting section 343A).

The term "obvious" means that a reasonable person would recognize both the condition and the

risk involved. *Rozowicz v. C3 Presents, LLC*, 2017 IL App (1st) 161177, ¶ 16. Whether a condition is open and obvious depends on the objective knowledge of a reasonable person rather than the plaintiff's subjective knowledge. *Id.* Furthermore, it presents a question of law where, as here, there is no dispute about the physical nature of the condition. *Id.* When a condition is open and obvious, the foreseeablity of harm and likelihood of injury are low, thereby weighing against the imposition of a duty, though all of the factors of the duty analysis must still be considered. *Snow v. Power Construction*, 2017 IL App (1st) 151226, ¶ 73.

¶ 16 Even if the condition is open and obvious, the landowner may also still be liable if he should anticipate the harm despite the condition's obviousness. Restatement (Second) of Torts §343A(1); *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 20. The two exceptions to the open and obvious doctrine are the "distraction exception" and the "deliberate encounter" exception. *Id.* The former exception refers to a situation where the landowner "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), Comment *f*, at 220 (1965). The latter exception arises when the landowner "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." *Id.*

¶ 17 Plaintiff first argues that the trial court erred in ruling that she did not have a reasonable expectation that the automatic doors would fully open. Plaintiff points to her deposition testimony that she visited the store a few times per month for years before she was injured, and that the doors had always opened fully. Plaintiff cites *Kaminsky v. Arthur Rubloff & Co.*, 72 Ill. App. 2d 68, 73-75 (1966), where the court analyzed several elevator cases in which the plaintiffs

had walked through open elevator doors when the elevators were not present and had fallen into the elevator shafts. The court concluded that, where the plaintiffs had relied on custom and past experience, they had reasonable grounds to believe that the elevator was at their level of entry, and whether they were contributarily negligent for failing to look to ascertain whether the elevator was actually present was a question for the jury to resolve. *Id.* at 75. Plaintiff argues that she similarly had a reasonable expectation that the store's doors would fully open based on her prior visits to the store.

¶ 18 Plaintiff further argues that the abrupt stop of the doors after opening part-way was not open and obvious to a reasonable person in her position. She points to deposition testimony that the doors remained closed the entire time that she walked from her car towards them, and that there were no warnings that the door was set to open only partially. Plaintiff maintains that there was no evidence that she was inattentive, in that she testified that she was not distracted and was looking straight ahead when the door stopped abruptly. She again asserts that her expectation that the doors would open fully was reasonable based on her prior visits to the store.

¶ 19 Plaintiff argues that her situation can be contrasted to that in *Murphy v. Ambassador East*, 54 Ill. App. 3d 980 (1977). There, a police officer's hand was injured when he attempted to manually shut elevator doors. *Id.* at 982. The appellate court upheld the trial court's grant of summary judgment for the defendant, stating that the "danger of catching one's hand in normally operating elevator doors *** is obvious to all." *Id.* at 984-85. Plaintiff argues that while the elevator doors were operating normally in *Murphy*, here defendant manually changed the doors' setting to prevent them from opening completely. Plaintiff maintains that defendant also knew that the reduced opening setting created a dangerous condition, as plaintiff and Brian both testified in their depositions that after they reported plaintiff's injury to Horner, she told them

that plaintiff was not the first person injured by the doors, as a man had previously hit the doors and broken his nose.

¶ 20 Plaintiff further cites *Johnson v. National Sugar Markets, Inc.*, 257 Ill. App. 3d 1011 (1994), and *Buchaklian*. In *Johnson*, the plaintiff saw a black puddle of water near her vehicle, and she later slipped on some ice that had formed over the puddle. *Johnson*, 257 Ill. App. 3d at 1012-13. The appellate court stated that the ice was not open and obvious at the time the plaintiff fell. *Id.* at 1017. Plaintiff argues that just as the *Johnson* plaintiff saw the puddle but did not know that it was icy, she saw the doors but did not know that they were set to open only partially.

¶ 21 In *Buchaklian*, the plaintiff tripped and fell on a mat in a YMCA women's locker room. *Buchaklian*, 314 Ill. App. 3d at 198. After falling, she noticed that a piece of the mat was sticking up one or two inches. *Id.* She admitted that she would have noticed the discrepancy had she been looking at the mat, and that she would not have tripped. *Id.* The appellate court reversed the trial court's grant of summary judgment for the defendant, holding that there was a question of fact whether the danger was open and obvious. *Id.* at 202. In response to the defendant's alternative argument that it lacked notice of the defect, the appellate court stated:

> "The evidence in the record can support 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. Based on any or all of these reasons, or perhaps others, the trial court should not have concluded as a matter of law that the defect in the mat was either open and obvious or that it could reasonably be expected to be discovered. Such a situation raises the issue of whether a

> reasonably prudent person should have anticipated that an injury would result from walking normally. [Citation.] We refuse to hold that invitees, as a matter of law, are required to look constantly downward." *Id.*

Plaintiff argues that, just as in *Buchaklian*, she had no time to avoid the dangerous condition of the doors not fully opening, as she testified that "[m]aybe a second" passed between the time the door started to open and when it stopped.

¶ 22 Last, plaintiff argues that her injury was reasonably foreseeable. She cites *Ward*, 136 Ill. 2d 132, 153-54, where the supreme court held that it was reasonably foreseeable that a customer would collide with a post outside the defendant's store while exiting and carrying merchandise which could obscure the view of the post. The court stated that the defendant had reason to anticipate that customers shopping in the store would, despite exercising reasonable care, momentarily forget the presence of the post even if they had encountered it when entering the store. *Id.* at 154. The court stated that the issue was "not whether the post was inherently dangerous, but whether, under the facts of this case, it was unreasonably dangerous." *Id.* at 151.

¶ 23 Plaintiff argues that *Ward* is similar in that both injuries were reasonably foreseeable. She argues that *Ward* is distinguishable in that the post there was not concealed, whereas she never saw the automatic doors stop after opening only part-way. She also argues that the defendant in *Ward* could not change the post, whereas here defendant intentionally set the doors to partially open. Additionally, plaintiff contends that defendant knew that changing the door's settings created a dangerous condition, in that Horner admitted to plaintiff and Brian that a prior customer had broken his nose on the doors. Plaintiff argues that defendant should have anticipated that another customer entering the store would also be injured by the doors, and should have provided warnings.

¶ 24 Defendant responds that the width of the opening of the sliding glass doors was an open and obvious condition regardless of whether plaintiff failed to properly appreciate it. Defendant maintains that because plaintiff was looking straight ahead when entering the store, could see the doors through her peripheral vision, and was not distracted, the trial court correctly found that she was inattentive with respect to the width of the opening. Defendant argues that it did not owe plaintiff a duty to have its doors operate precisely within her subjective expectations, and that a subjective standard for open and obvious conditions would burden landowners with a vastly expanded scope of duty that is far beyond that currently contemplated under Illinois law. See *Ward*, 136 Ill. 2d at 148 (the scope of a defendant's duty requires focusing on the defendant, not the plaintiff, and whether the defendant could reasonably have foreseen injury). Defendant argues that a reasonable person would be expected to visually perceive the actual width of the door opening and avoid making contact with the door frame when walking through it.

¶ 25 Defendant further argues that it did not owe plaintiff a duty to warn against a condition that was so obvious. It cites Comment e to section 343A of the Restatement (Second) of Torts (1965), which states: "Reasonable care on the part of the possessor *** does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them." Defendant also cites the illustration to Comment e:

> "The A Company has in its store a large front door, made of heavy plate glass. The door is well lighted and plainly visible, and its existence is obvious to any person exercising ordinary attention and perception. B, a customer in the store, while preoccupied with his own thoughts, mistakes the glass for an open doorway, and runs his head against it and is injured. A Company is not liable to B." *Id.*

Defendant argues that, just as the company in the illustration is not liable for its customer's failure to appreciate the difference between plate glass and an open doorway, defendant should not be held liable for plaintiff's failure to appreciate the width of the opening of the entrance doors.

¶ 26 Defendant contends that, for these same reasons, plaintiff's injury was not reasonably foreseeable. Defendant maintains that although plaintiff argues that defendant knew that another customer had been injured by the reduced opening setting, she forfeited this argument by failing to raise it in the trial court. Defendant alternatively argues that there is nothing in the record to support this assertion. It points out that there was no testimony from Hobby Lobby employees of knowledge of a previous customer being injured. Defendant maintains that plaintiff's and Brian's testimony also does not supply such evidence, as they testified only that a prior customer had injured his nose on the doors; they did not say that the doors were set to a reduced opening at the time.

¶ 27 Finally, defendant argues that the cases that plaintiff cites support summary judgment in defendant's favor. It argues that, similar to the freight elevator doors in *Murphy*, the condition of the sliding glass doors was such that a reasonable person would have been expected to protect himself from the danger of making contact with the door frame when passing through, and that the doors did not constitute the type of unreasonable danger that required special protection or special warnings. Defendant argues that *Johnson* is distinguishable because the ice over a puddle was potentially hidden, whereas the width between the sliding glass doors was open and obvious. Last, defendant maintains that in *Buchaklian* there was a factual dispute over the plaintiff's responsibility to look down while walking over a floor mat, whereas here there was no factual dispute about plaintiff's ability to see the sliding glass doors.

¶ 28 We agree with defendant that the width of the opening of the entrance doors was an open and obvious condition. We note that this is not a situation where the doors were defective, as Horner testified that she or another manager applied the manufacturer setting of reduced opening in response to the windy conditions, because the doors might not have otherwise opened at all. Although plaintiff repeatedly emphasizes her prior experiences with the doors always opening fully, as stated, whether a condition is open and obvious depends on the objective knowledge of a reasonable person rather than the plaintiff's subjective knowledge. *Rozowicz*, 2017 IL App (1st) 161177, ¶ 16. Here, it is undisputed that plaintiff had a full view of the doors when she approached the store and entered through the doors next to Brian at the same time two other people were exiting. A reasonable person in plaintiff's situation would have perceived the width of the opening of the doors and waited for sufficient clearance before passing through them. Neither of the exceptions to the open and obvious doctrine apply, as plaintiff admitted that she was not distracted, and she was not deliberately encountering a known or obvious danger. See *Bruns*, 2014 IL 116998, ¶ 20.

¶ 29 This situation is readily distinguishable from the cases relied on by plaintiff as *Kaminsky*, *Johnson*, and *Buchaklian* largely involved the plaintiff's failure to observe something at ground level. Indeed, the *Buchaklian* court stated, "We refuse to hold that invitees, as a matter of law, are required to look constantly downward." *Buchaklian*, 314 Ill. App. 3d at 732. In contrast, the width of the door opening was something that plaintiff could perceive as she looked straight ahead. *Johnson* and *Buchaklian* are additionally distinguishable because they involved conditions that may have been difficult for the plaintiffs to perceive, whereas in this case plaintiff had full view of the width of the door opening.

¶ 30 Regarding plaintiff's assertion that her injury was foreseeable because another person had been injured by the doors, we agree with defendant that plaintiff has forfeited this argument by failing to raise it in her written or oral responses to defendant's motion for summary judgment. See *PNC Bank, Nation Ass'n v. Wilson*, 2017 IL App (2d) 151189, ¶ 29 (an alleged error is not preserved for review if the trial court made no ruling on the argument); *Village of Arlington Heights v. Anderson*, 2011 IL App (1st) 110748, ¶ 15 ("Theories not raised during summary judgment proceedings are waived on review.") That is, plaintiff cannot expect us to reverse the trial court's grant of summary judgment based on an argument that she did not make to the trial court.

¶ 31 Even otherwise, plaintiff's argument would fail. Plaintiff testified in her deposition that Horner told her that she was "not the first person that has been injured from the door" and that "it was a gentleman that had broke[n] his nose hitting the door." Brian testified in his deposition that Horner "started laughing *** about a gentleman that did it I think she said a week prior." Brian testified that "[s]he was just laughing saying that he busted his nose on the door, that [plaintiff's] not the first person to have issues with that door." Defendant emphasizes that its employees did not testify about someone else being injured, but we must view the depositions in the light most favorable to plaintiff when assessing a motion for summary judgment. See *Perry*, 2018 IL 122349, ¶ 30. Still, the deposition testimony does not discuss the circumstances under which the man was allegedly injured, and provides no indication that he was injured because the doors were set to a reduced opening. This is especially true given that Brian testified that it happened about one week prior, and Horner testified that, in her estimation, she had set the doors to reduced opening zero to five times from 2012 up until plaintiff was injured in December 2015.

¶ 32 Where a condition is open and obvious, the condition itself gives caution, and people are expected to appreciate and avoid obvious risks. *Henderson v. Lofts at Lake Arlington Towne Condominium Ass'n*, 2018 IL App (1st) 162744, ¶ 40. Thus, the foreseeabilty of harm and likelihood of injury were low in this case. See *Snow*, 2017 IL App (1st) 151226, ¶ 73. Regarding the remaining factors of the duty analysis (see *supra* ¶ 14), the burden of guarding against the injury may have been slight, such as posting notices on the doors that they had been set to a reduced opening. However, the notices may be ineffectual, as the doors would have begun opening as a person approached them, making it difficult to read the notices. More generally, as the trial court observed, it would have been a significant burden to have stores ensure that their doors operated in a way that was consistent with a customer's subjective assumptions regarding the manner, speed, or width of opening.

¶ 33 In the end, even if the third and fourth factors favor plaintiff, they would not favor her to the extent that they would outweigh the first two factors and call for imposing a duty. See *Bujnowski v. Birchland*, Inc., 2015 IL App (2d) 140578, ¶ 54 (applying such an analysis). As *Bujnowski* observed, no published premises-liability cases have found that both the open-and-obvious rule applied without exception yet the defendant still owed the plaintiff a duty. *Id.* ¶ 55. Given the open and obvious nature of the width of the door opening, and our determination that a reasonable person in plaintiff's situation would have waited for sufficient clearance before proceeding forward, we conclude that defendant did not have a duty to warn plaintiff about how wide its automatic doors would open.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we affirm the judgment of the McHenry County circuit court.

¶ 36 Affirmed.