

ILLINOIS OFFICIAL REPORTS
Appellate Court

Olson v. Williams All Seasons Co., 2012 IL App (2d) 110818

Appellate Court Caption STANLEY OLSON, Plaintiff-Appellant, v. WILLIAMS ALL SEASONS COMPANY, Defendant and Third-Party Plaintiff-Appellee (The City of Highland Park, Third-Party Defendant).

District & No. Second District
Docket No. 2-11-0818

Filed August 9, 2012

Held The fireman's rule did not bar an action for the injuries suffered by a firefighter when he fell through an opening in a warehouse floor while responding to a nonemergency call, but summary judgment was improperly entered for the building's owner where there were issues of material fact as to proximate cause, including issues concerning inadequate lighting, the operation of the safety gate at the opening, and the absence of safety tape on the floor.

(Note: This syllabus constitutes no part of the opinion of the court but has been prepared by the Reporter of Decisions for the convenience of the reader.)

Decision Under Review Appeal from the Circuit Court of Lake County, No. 08-L-866; the Hon. Christopher C. Starck, Judge, presiding.

Judgment Reversed and remanded.

Counsel on
Appeal

Anthony G. Argeros, of Anthony G. Argeros, LLC, of Chicago, for
appellant.

Christine L. Olson McTigue, of Hinshaw & Culbertson LLP, and Colleen
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appellee.

Panel

JUSTICE McLAREN delivered the judgment of the court, with opinion.
Justices Zenoff and Birkett concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff, Stanley Olson, appeals from an order of the circuit court granting summary judgment to defendant, Williams All Seasons Company (Williams), in this negligence action arising from injuries Olson sustained when he fell while responding to a fire alarm at Williams' building. On appeal, Olson argues that: (1) the circuit court erred in granting summary judgment, because Williams' negligence proximately caused Olson's fall; and (2) the fireman's rule provides no basis to affirm the circuit court's order. We reverse and remand for further proceedings.

¶ 2

I. BACKGROUND

¶ 3

On October 17, 2008, Olson filed a complaint seeking monetary damages for injuries incurred as a result of falling more than 11 feet onto a cement surface while investigating a fire alarm at Williams' building in Highland Park, Illinois. Olson alleged the following. During the morning of October 20, 2006, Olson, acting within the scope of his employment as a Highland Park firefighter, investigated a "trouble fire alarm" at Williams' building. Within the building, there was an underground storage area that was accessed through an 11-foot drop-off in the ground floor. The drop-off was "guarded" by a "spring-loaded double door metal gate." As "a direct and proximate result of [Williams'] negligence," Olson "fell through the unlatched gate and down onto the underground storage area, and thus sustained severe and permanent injuries," including fractures of his spine. Williams had a duty "to exercise reasonable care in the ownership, operation, maintenance, possession and control" of its building, "including the spring-loaded double door gate and surrounding area providing access to the underground storage area within said building." Williams was negligent by failing to exercise reasonable care in the ownership, operation, maintenance, possession, and/or control of: (1) "the area surrounding the ground floor access to the aforementioned underground storage area by providing adequate lighting within said area"; (2) "the area surrounding the ground floor access to the aforesaid underground storage area by providing

appropriate safety floor markings, or otherwise adequately warn, of the opening in the floor immediately behind the aforesaid double door metal gate”; and (3) “the aforementioned spring[-]loaded double door metal gate by failing to maintain and/or repair a malfunctioning latch and one or more springs which resulted in the doors remaining unlatched, ajar and inadequate to safely guard the opening in the ground floor leading to the approximately 11 feet, seven inch drop off to the floor of the underground storage area.”

¶ 4 On April 6, 2011, Williams filed a motion for summary judgment, arguing that, pursuant to the common-law fireman’s rule, Williams did not owe Olson a duty of care to prevent injuries occurring in the course of his occupation. In addition, Williams argued that Olson could not establish proximate cause because no one witnessed Olson fall and Olson could not recall how or why he fell.

¶ 5 Olson filed a response to Williams’ motion for summary judgment, arguing that the common law fireman’s rule was inapplicable because Olson was not responding to an emergency, there was no connection between the trouble fire alarm and the defective condition of the premises that caused his injuries, and section 9f of the Fire Investigation Act (425 ILCS 25/9f (West 2006)) superseded the common-law fireman’s rule. Olson also argued that there was sufficient direct and circumstantial evidence to conclude that Williams’ negligence proximately caused his injuries.

¶ 6 Olson testified at his deposition that, on the morning of the incident, he was dispatched to Williams’ building due to a “trouble alarm,” which is a nonemergency call. There was no smoke or other evidence of fire when he arrived at the scene with Lieutenant Tim Pease and firefighter Andrew Seibel. Olson did not have a flashlight with him. His final recollections of the incident prior to his fall were that he proceeded into the building with Pease and Seibel, the area became darker, and he turned right toward a corner where he believed a light switch might be located. While Olson was attempting to locate a light switch, he turned to his right and extended an arm toward the corner. His turn involved a pivot maneuver, by taking at least one step and then bringing his left foot in line with his right foot. As Olson brought his left foot in line with his right, he felt something touching his right thigh and started to reach his left arm down. The next thing Olson recalled was striking his head and then lying flat on his back in a dark area.

¶ 7 Pease testified during his deposition as follows. On the date of the incident, Pease, Olson, and Seibel, a new recruit, responded to a trouble alarm at Williams’ building. A trouble alarm is a nonemergency call: it “is generally a[n] issue with the system[;] *** it’s generally a nuisance call.” Pease was in charge of the crew that morning. It was a “bright sunny, beautiful day.” Olson drove “Squad 33” to the Williams building, with the sirens off. As the engineer on the crew, Olson was responsible for finding the “knox box,” a container holding keys to a building, which can be opened by a master key held by emergency personnel. Before they entered the building, Pease told Olson that he did not know where the alarm panel was located in the building. Pease testified that he had worked with Olson in the past and that he “is quite the professional. He is one of the more reliable senior guys or firefighters that I would depend upon. *** He is experienced, he is a very intelligent firefighter.” Pease did not see what equipment Olson had with him when he left the vehicle.

¶ 8 Pease also testified as follows. He entered the building first. There was a little vestibule, and, because it was very bright outside, his eyes had to adjust to the dark interior. There was some visibility because the door was open. When the door closed, the light became very dim and he began using his flashlight. He did not recall whether Olson used a flashlight. In low-light situations, firefighters are trained to maintain contact with the building with their hands. To provide more visibility, Pease tried to find a light switch by placing his left hand on the wall. About 50 feet into the building there was a lighted vending machine. Olsen and Seibel walked close behind Pease. He could see them and they had “voice contact.” They reached a partition wall. All three firefighters continued past the wall into the warehouse to search for the alarm. “The warehouse was like an abyss, you look out there and it was dark, dark, dark. You wouldn’t know that there was anything to go down, it looked like it was just another room to me. *** [T]here was some lighting in there. It was dim.”

¶ 9 Pease did not hear anything before Olson fell. When Seibel first told Pease that Olson fell, Pease did not understand what he was saying. Pease testified, “I called for his name. I mean he would have heard me, I was in close contact with him.”

¶ 10 Seibel testified at his deposition that the warehouse was “just pitch black. You couldn’t see anything. I couldn’t see anything out there at all.” After Olson fell, Seibel found the light switch as he made his way to Olson. The light switch was located by the stairway leading down to the lower level.

¶ 11 Olson deposed Williams’ former vice president of operations, Lothar Loacker, who testified as follows. Although he had retired from day-to-day work at Williams in 2004, he had worked there since 1973, first as a service manager and then as a vice president of operations. Loacker was familiar with the double door gate in question and had seen it two or three days before the incident at issue. The gate opened outward, toward a person standing in front of it on the ground floor. The gate had a spring-type device that closed the gate if someone opened it and let it go. The gate did not have a latch that would keep the gate closed unless the latch was disengaged.

¶ 12 Loacker also testified as follows. Prior to the date of the incident, Williams had installed yellow- and black-striped safety tape on the floor near the gate. The tape served a safety function. The tape was not present on the day of Olson’s fall, because it had worn out and had not been replaced. The tape was inexpensive and took about one hour to install near all of the five gates at Williams’ warehouse. Lighting was necessary in the area where Olson fell. There was only one 100-watt, incandescent, bare lightbulb affixed to a steel beam about 17 feet above, 25 feet to the west of, and 12 feet to the south of, the gate at issue.

¶ 13 Mark Williams, owner and president of Williams, testified during his deposition as follows. It was feasible to install additional security lighting within the subject area of the warehouse. There is a large window, about 10-by-10 feet, that allowed light in the area where Olson fell. From the ground floor, the gate opened only inward, toward a person. If a person walked into the gate, the person was stopped because the hinges did not open over the drop-off in the floor.

¶ 14 Olson’s retained expert, Michael Fagel, Ph.D., testified that, given the configuration of the room, the testimony of the witnesses, and his own examination of the gate in question,

it was his opinion that the right side of the gate was likely open at the time of Olson's fall. Fagel further testified that the defective condition of the gate, inadequate lighting, and lack of safety tape caused or contributed to Olson's fall.

¶ 15 Highland Park police sergeant Carl Weaver testified at a deposition as follows. He responded to a call of "firefighter down" at the Williams building on the morning of the incident. Weaver might have pushed the gate closed, but he did not recall. Weaver explained that, when the right side of the gate was completely open, it came in contact with, and was stopped by, a metal desk or shelving unit that was attached to the wall. While working the midnight shift at least 10 years prior to Olson's fall, Weaver saw an open gate at Williams' building when he was responding to a false burglar alarm.

¶ 16 After investigating the scene on the morning of the incident, Highland Park police officer Richard Rash prepared a report. The report indicates that Rash investigated the scene approximately an hour after the incident. Rash stated in the report:

"I opened the gate to photograph the area. I noticed when I opened the left half of the gate it didn't spring shut after I let it go. It closed only half way and stopped. I opened the right side of the gate and noticed if I opened it all the way it wouldn't spring shut without some assistance."

¶ 17 Rash also provided the following deposition testimony. He prepared the report and prepared sketches of the areas in question, as requested by Weaver. Rash pulled open the left side of the gate at least 90 degrees and, when he "let it go," it "only closed partially[;] *** I believe half." When Rash opened the right side of the gate at least 90 degrees and "let it go," it "needed more force to close fully." When the gate is opened or closed the gate makes a sound.

¶ 18 After hearing the argument of the parties, the circuit court granted Williams' motion for summary judgment. The circuit court's written order provides in part:

"1. That this Court finds that the [common-law fireman's] rule does not apply in this case.

2. That [Williams'] Motion for summary judgment is hereby granted for reasons set forth in the record."¹

In open court the circuit court stated:

"I'm persuaded that Rusch [*Rusch v. Leonard*, 399 Ill. App. 3d 1026 (2010),] directs this Court that the Fireman's rule does not apply in a situation such as this is[,] so the

¹Olson filed a workers' compensation action against his employer, the City of Highland Park (the City). The City's insurer, Intergovernmental Risk Management Agency, was granted leave to intervene as subrogee of the City.

In addition, Williams filed against the City a third-party complaint seeking contribution, alleging, *inter alia*, that the City was liable for the negligent supervision, training, education, and instruction of Olson. On March 23, 2010, the circuit court granted, in part, the City's motion to dismiss Williams' contribution complaint. On July 19, 2011, when the circuit court granted Williams' motion for summary judgment, it stated: "the Motion for Summary Judgment filed by the City of Highland Park is Moot because of the other rulings made herein."

next question is, it converses [*sic*] to a premises liability case, and is there a duty on the defendant to foresee that firefighters or others maybe walking around premises at a time when it is dark inside, and do they need to provide lights and safety stripings [*sic*] and safety bars, or is the defendant charged with not creating—creating a dangerous condition or a trap for the unwary.

And that dovetails to an extent with the argument about whether there is any evidence at all as far as proximate cause. I’m not convinced that the owner of premises needs to make the premises safe for firefighters or other emergency people entering the premises in the dark at a time when the premises is [*sic*] dark. I’m not sure they have that duty.

But then when I add to that the fact that there really is not evidence that—that makes this the—any alleged negligence that’s the proximate cause of these injuries, nobody knows how this happened. There is no evidence of it one way or the other so I think it’s just speculation so I find there is no evidence of any proximate cause so I grant the motion.”

¶ 19 Olson filed a timely notice of appeal.

¶ 20

II. ANALYSIS

¶ 21

A. Proximate Cause

¶ 22

On appeal, Olson argues that the circuit court erred by granting Williams’ motion for summary judgment, because the evidence established that Williams’ negligence proximately caused Olson’s fall. More specifically, Olson argues that there are genuine issues of material fact regarding whether Williams’ alleged negligent maintenance of its gate and failure to provide adequate lighting and safety tape proximately caused Olson’s injuries.

¶ 23

Summary judgment is appropriate where “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” 735 ILCS 5/2-1005(c) (West 2010); *Adames v. Sheahan*, 233 Ill. 2d 276, 295 (2009). We review *de novo* the circuit court’s grant of summary judgment. *Id.* at 296. When determining whether a genuine issue of material fact exists, the court must construe all pleadings and attachments strictly against the movant and liberally in favor of the nonmovant. *Barnett v. Ludwig & Co.*, 2011 IL App (2d) 101053, ¶ 33. That is, we must view all the pleadings and attachments in the light most favorable to the nonmovant. *Keating v. 68th & Paxton, L.L.C.*, 401 Ill. App. 3d 456, 470 (2010). “The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine issue of material fact exists.” *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004).

¶ 24

Williams argues that there is no direct evidence that any alleged negligence proximately caused Olson to fall, because he “has no memory of his fall and no one saw him fall.” Further, Williams argues that the circumstantial evidence offered by Olson is insufficient to establish proximate cause.

¶ 25

Proximate cause ordinarily is a question of fact for the jury. *Radtke v. Schal-Bovis, Inc.*, 328 Ill. App. 3d 51, 56 (2002). “It becomes a question of law only where there can be no

difference in the judgment of reasonable men on inferences to be drawn.” *Bakkan v. Vondran*, 202 Ill. App. 3d 125, 128 (1990). “Where inferences may be drawn from facts which are not in dispute, and where reasonable minds would draw different inferences from the facts, then a triable issue exists.” *Block v. Lohan Associates, Inc.*, 269 Ill. App. 3d 745, 756 (1993).

¶ 26 Liability cannot be predicated upon surmise or conjecture as to the cause of injury. *Newsom-Bogan v. Wendy’s Old Fashioned Hamburgers of New York, Inc.*, 2011 IL App (1st) 092860, ¶ 16. However, proximate cause can be sufficiently established by circumstantial evidence when an inference can reasonably be drawn from it. *Stojkovich v. Monadnock Building*, 281 Ill. App. 3d 733, 740 (1996). “Circumstantial evidence is the proof of facts and circumstances from which a [fact finder] may infer other connected facts which usually and reasonably follow, according to the common experience of mankind.” *Housh v. Swanson*, 203 Ill. App. 3d 377, 381 (1990). Circumstantial evidence does not need to exclude all other possible inferences or support only one logical conclusion. *Kunz v. Little Company of Mary Hospital & Health Care Centers*, 373 Ill. App. 3d 615, 620 (2007). The inquiry here then is whether Olson presented sufficient circumstantial evidence to raise a genuine issue of material fact as to whether the drop-off in the warehouse floor, the allegedly malfunctioning gate, the inadequate lighting, and the absence of safety tape proximately caused Olson’s injuries.

¶ 27 This case provides sufficient issues of material fact regarding proximate cause to avoid summary judgment. Although no one saw Olson fall and Olson does not recall whether the gate was open, both preoccurrence and postoccurrence witnesses at the scene provided sufficient circumstantial evidence of proximate cause. Pease testified that the warehouse was “dark” and like an “abyss.” Similarly, Seibel testified that the warehouse was “just pitch black. You couldn’t see anything.” Further, there is no dispute that there was no safety tape on the floor near the gate. Also, Rash testified that, during his investigation approximately one hour after Olson’s fall, the gate did not spring closed after he pulled it open. When Rash pulled the left side of the gate open, it closed only halfway, and the right side “needed more force to close fully.” Further, Rash testified that the gate made noise upon opening and closing. Yet, Pease testified that, although he was close to Olson, he did not hear any noise prior to Olson’s fall. Similarly, Seibel did not hear the gate open or close, but he did hear the thud of Olson hitting the cement floor. We are here reminded of Sherlock Holmes’ dog in the nighttime, the significance of which was that he did not bark.² Just as the dog was not moved to bark, neither was the gate moved to sound.

¶ 28 After viewing all the pleadings and attachments in the light most favorable to Olson (see *Keating*, 401 Ill. App. 3d at 470), we determine that a proximate causal relationship between Williams’ alleged negligence and Olson’s injuries is supported by sufficient circumstantial

²In Sir Arthur Conan Doyle’s story, “Silver Blaze,” Inspector Gregory asserts that a stranger must have stolen a race horse from Colonel Ross’s barn in the night. Dubious, Sherlock Holmes asks how Gregory can explain the “curious incident” of the guard dog’s silence. Holmes later reveals that the dog was silent because the thief was the horse’s trainer, a person familiar to the dog. See Sir Arthur Conan Doyle, *Silver Blaze*, in *The Memoirs of Sherlock Holmes* (1894).

evidence and the reasonable inferences that might be drawn therefrom, creating genuine issues of material fact.

¶ 29 Other courts have determined circumstantial evidence of proximate cause sufficient in cases where there was no direct evidence of the causes of falls and injuries, either because the plaintiffs had no recollection or because they died from their injuries. For example, in *Housh*, 203 Ill. App. 3d 377, the plaintiff was found on the ground with an antenna wire wrapped around her legs after stepping onto a second-floor deck of a house at night. *Id.* at 380. The plaintiff alleged that the defendant was negligent by failing to remove the wire and failing to warn the plaintiff about it. *Id.* at 379. The plaintiff did not recall seeing the wire on the deck, did not recall falling, and did not recall what caused her to fall. *Id.* at 380. This court determined that there was sufficient circumstantial evidence of proximate cause.³ *Id.* at 382.

¶ 30 In *Block*, 269 Ill. App. 3d at 751-52, the widow of a construction worker filed suit against contractors after the construction worker died when he fell from a ladder. “[N]o witnesses saw the accident happen ***.” *Id.* at 752. The appellate court determined that, although no one saw the construction worker fall, the testimony of the preoccurrence and postoccurrence witnesses, who were on the scene, provided sufficient circumstantial evidence of proximate cause. *Id.* at 757.

¶ 31 Further, in *Stojkovich*, 281 Ill. App. 3d 733, the plaintiff was injured when he fell down an elevator shaft after the elevator car had been stalled for about an hour. The plaintiff fell through the five-foot unprotected opening in the elevator shaft while attempting to jump from the elevator car to the landing below. *Id.* at 737. Although there were nine other passengers who successfully made the jump and two passengers remaining in the elevator car when the plaintiff fell, no one saw the plaintiff attempt to exit the elevator car, and the plaintiff’s injuries rendered him unable to recall anything about the incident. *Id.* The defendant appealed from a jury verdict in the plaintiff’s favor, arguing that there was insufficient evidence to support a reasonable inference that the defendant’s negligence caused the plaintiff’s fall. *Id.* at 739. The appellate court affirmed the jury’s verdict, reasoning:

“Under the known facts and circumstances of this case, even in the absence of an eyewitness to plaintiff’s attempt to exit the elevator car, the inference that he fell down the unprotected elevator shaft while attempting to exit the stalled car is both reasonable and probable and could have been drawn by the jury.” *Id.* at 740.

¶ 32 This case is at the summary judgment stage and, therefore, Olson’s burden is not as great as the *Stojkovich* plaintiff’s at trial. A plaintiff is not required to prove his case at the summary judgment stage; rather, in order to survive a motion for summary judgment, the plaintiff must present a factual basis that would arguably entitle the plaintiff to a judgment. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). Under the facts and circumstances contained in the pleadings and attached documents, the inference that Olson fell through the drop because the safety gate was open, there was inadequate lighting, and/or there was no safety tape is both reasonable and probable. See *Stojkovich*, 281 Ill. App. 3d at 740. Thus,

³However, we note that summary judgment was affirmed on other grounds. *Id.* at 384-85.

Olson has presented a factual basis that would arguably establish proximate cause. *Id.*

¶ 33 Williams cites several cases to support its claim that summary judgment was appropriate. However, each of these cases is distinguishable from the case at bar. In *Keating*, 401 Ill. App. 3d 456, there was evidence that the plaintiff removed an allegedly unsafe rail before he fell from a porch. *Id.* at 473-74. In this case, Williams provided no evidence that Olson opened the gate. Further, Olson provided preoccurrence and postoccurrence witnesses to support his allegation that the gate was open. Thus, *Keating* is distinguishable from this case.

¶ 34 Williams cites *Clark v. Hajack Equipment Co.*, 220 Ill. App. 3d 919 (1991), to support its argument that the condition of its gate is irrelevant because no one knew the position of the gate when Olson fell. In *Clark*, the plaintiff was injured when he fell from a dock ramp while operating a forklift. *Id.* at 920-21. The plaintiff alleged that the defendant failed to properly maintain and repair a component of the dock leveler that would have prevented his injury. *Id.* at 921. The circuit court granted summary judgment in favor of the defendant and the appellate court affirmed, in part for a lack of proximate cause, because “the record indicates that [the machine] functioned properly the day after the accident.” *Id.* at 925. In this case, Williams cites to nothing in the record indicating that the gate functioned properly after the accident. Rather, there is evidence that the gate malfunctioned within an hour after the accident. Thus, *Clark* is distinguishable from the case at bar.

¶ 35 Williams also cites *Canales v. Dominick’s Finer Foods, Inc.*, 92 Ill. App. 3d 773 (1981), and *Escher v. Norfolk & Western Ry. Co.*, 77 Ill. App. 3d 967 (1979), to support its argument that Olson’s evidence of the postaccident inspection of the gate is irrelevant because there is no evidence that the condition of the gate remained unchanged. In *Canales*, the plaintiff was awarded damages after slipping on an open tube of Ben-Gay in the defendant’s store. *Canales*, 92 Ill. App. 3d at 773-74. The plaintiff’s husband testified that, when he returned to the store 80 minutes after the accident, the area was covered with brown paper bags. *Id.* at 778. The husband did not testify as to what was under the bags. *Id.* The appellate court held that the husband’s testimony should not have been admitted because there was no evidence that the conditions were essentially unchanged in the interim. *Id.* In *Escher*, the appellate court held that an expert’s testimony regarding his inspection of an allegedly defective door was inadmissible because he inspected the door more than 3½ years after the incident and “the door was used by more than 80 employees daily, indicating that it was subject to a substantial amount of wear and tear.” *Escher*, 77 Ill. App. 3d at 972. Thus, in *Canales* and *Escher*, direct and circumstantial evidence, respectively, indicated that the conditions had changed. *Canales*, 92 Ill. App. 3d at 778; *Escher*, 77 Ill. App. 3d at 972. There is no such evidence in this case; thus, *Canales* and *Escher* are factually distinguishable from the case at bar.

¶ 36 Further, where there is evidence that “the nature of a condition and the surrounding circumstances permit a reasonable inference that the condition existed at the time of an alleged accident, such evidence is admissible.” *Yedor v. Centre Properties, Inc.*, 173 Ill. App. 3d 132, 145 (1988). In this case, the gate was inspected within an hour of the incident and, thus, was not subject to wear and tear, and there is no evidence that anyone tampered with it in a way that would alter its operation. In fact, Weaver testified that he was likely the first person to enter the premises after Olson’s fall and that he remained there after Olson was

taken to the hospital. Weaver then ordered the investigation of the incident, including the testing of the gate in which he personally participated. Weaver further testified that he did not see anyone manipulate the gate to change its operational characteristics. Thus, Williams' argument, that Olson's evidence of the postaccident inspection of the gate is irrelevant because there is no evidence that the condition of the gate remained unchanged, is not persuasive.

¶ 37 Williams cites several other cases to support its argument. However, in each of these cases the plaintiff provided little more than the fact that an accident occurred. See *Nowak v. Cogill*, 296 Ill. App. 3d 886 (1998) (no evidence that a pile of snow caused plaintiff to fall, in part because no evidence of where plaintiff fell and defendant saw plaintiff fall on wet grass); *Geelan v. City of Kankakee*, 239 Ill. App. 3d 528 (1992) (no evidence of why a driver struck an underpass pier); *Bakkan*, 202 Ill. App. 3d 125 (no evidence that a worker fell from a scaffold or that it was unsafe); *Monaghan v. DiPaulo Construction Co.*, 140 Ill. App. 3d 921 (1986) (no evidence that median strips caused driver of motorcycle to flip into the air). In this case, it is undisputed that Olson fell through a drop-off in the floor of Williams' warehouse. Further, Olson provided testimony from preoccurrence and postoccurrence witnesses who were at the scene, and he provided circumstantial evidence of proximate cause. Thus, *Nowak*, *Geelan*, *Bakkan*, and *Monaghan* are distinguishable from this case.

¶ 38 B. Duty

¶ 39 1. Open-and-Obvious Doctrine

¶ 40 Williams argues that we should affirm the circuit court's order granting summary judgment in Williams' favor, because it did not owe a duty as alleged in Olson's complaint. Williams argues that it had no duty to warn Olson, because the lower level of its warehouse was an open-and-obvious danger.

¶ 41 Williams did not raise this argument in its motion for summary judgment. An appellant who fails to raise an issue in the circuit court forfeits that issue on appeal. *DOD Technologies v. Mesirow Insurance Services, Inc.*, 381 Ill. App. 3d 1042, 1050 (2008). However, an appellee who fails to raise an issue in the circuit court may raise it on appeal to affirm the circuit court's order, if the factual basis for the issue was before the circuit court. *Id.* In this case, the record contains a factual basis for Williams' argument that it did not owe Olson a duty because the drop-off in the warehouse floor was an open-and-obvious danger. Thus, we will address the issue.

¶ 42 The open-and-obvious doctrine is an exception to the general duty of care owed by a land owner and in Illinois is based on section 343A(1) of the Second Restatement of Torts, which has been adopted by our supreme court. See *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 151 (1990). Section 343A(1) 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(1) (1965).

A condition is open and obvious where a reasonable person in the plaintiff's position,

exercising ordinary perception, intelligence, and judgment, would recognize both the condition and the risk involved. *Bezanis v. Fox Waterway Agency*, 2012 IL App (2d) 100948, ¶ 16. Where the facts are not in dispute about the physical nature of the condition, the question of whether the condition is open and obvious is a legal one, properly determined by a court. See *Alqadhi v. Standard Parking, Inc.*, 405 Ill. App. 3d 14, 17-19 (2010). However, where the facts are in dispute about the physical nature of the condition, such as its visibility, the question of whether the condition is open and obvious is properly determined by a fact finder. *Id.*

¶ 43 In this case, Pease testified that he noticed a difference in the floor levels only when he shined his flashlight in the area of the drop-off in the warehouse floor. Pease also stated that the warehouse was “dark” and “like an abyss,” but he also testified that there was “some lighting in there. It was dim.” Seibel testified that when he entered the warehouse “It was very dim, but you could still see.” Seibel also testified that when he walked into the warehouse “it was just pitch black. You couldn’t see anything out there at all. I couldn’t see anything out there at all.” Thus, the pleadings and attached documents reveal a factual dispute about the physical nature of the condition’s visibility, specifically, whether there was sufficient light to discern the danger of the drop-off in the floor. Therefore, Williams is not entitled to affirmance based on the open-and-obvious doctrine.

¶ 44 Williams cites *Briones v. Mobil Oil Corp.*, 150 Ill. App. 3d 41, 45 (1986), to support its argument. *Briones* is distinguishable from this case. There, the plaintiff did not allege that holes in the floor were concealed from him, and the evidence revealed that there was no problem with visibility and that other firefighters saw the holes in the floor from across the room. *Id.* at 44-45. In this case, there is testimony that the area around the drop-off was not visible because it was either dark or dim.

¶ 45 2. Fireman’s Rule

¶ 46 Although the circuit court determined that the common-law fireman’s rule did not apply to this case, Williams urges us to affirm the circuit court’s order based on the fireman’s rule. Olson argues that section 9f of the Fire Investigation Act (425 ILCS 25/9f (West 2006)) superseded the fireman’s rule and imposed a duty on Williams under the facts alleged in this case. We agree with Olson.

¶ 47 The common-law fireman’s rule, a doctrine based on assumption of the risk, limits the extent to which firefighters or other public officers may recover for injuries they incur when entering onto private property in the discharge of their duties, while fighting fires or in emergency situations. *Rusch*, 399 Ill. App. 3d at 1031. Notwithstanding the common-law fireman’s rule, an owner or occupier of land still has the duty to exercise reasonable care to maintain its property in a safe condition to prevent injury that firefighters might sustain from a cause independent of a fire. *Id.*

¶ 48 On July 22, 2003, section 9f of the Fire Investigation Act (425 ILCS 25/9f (West 2006)) became effective. Our supreme court has held that section 9f imposes a duty on landowners that did not previously exist under the common law. *Lazenby v. Mark’s Construction, Inc.*, 236 Ill. 2d 83, 98 (2010). Section 9f provides:

“The owner or occupier of the premises and his or her agents owe fire fighters who are on the premises in the performance of their official duties conducting fire investigations or inspections or responding to fire alarms or actual fires on the premises a duty of reasonable care in the maintenance of the premises according to applicable fire safety codes, regulations, ordinances, and generally applicable safety standards, including any decisions by the Illinois courts. The owner or occupier of the premises and his or her agents are not relieved of the duty of reasonable care if the fire fighter is injured due to the lack of maintenance of the premises in the course of responding to a fire, *false alarm*, or his or her inspection or investigation of the premises.” (Emphasis added.) 425 ILCS 25/9(f) (West 2006).

¶ 49 In this case, Olson alleged that, due to Williams’ negligent maintenance of its property, he was injured while responding to a trouble alarm. Thus, pursuant to section 9f of the Fire Investigation Act, Williams owed Olson a duty of reasonable care, and the common-law fireman’s rule does not bar Olson’s cause of action.

¶ 50

3. Duty to Provide Lighting

¶ 51 Williams essentially argues that Olson cites no case supporting that Williams had a duty to “have all the lights on 24 hours a day.” Whether a duty exists is a question of law. *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 388-89 (1998). Factors to consider in deciding whether to impose a duty are: (1) the reasonable foreseeability of the injury; (2) the likelihood of the injury; (3) the burden on the defendant to protect against the injury; and (4) the consequences of placing that burden on the defendant. *Id.* at 388-89. We also find instructive comment b of section 343 of the Restatement (Second) of Torts.⁴ It reads, in part:

“[A]n invitee enters upon an implied representation or assurance that the land has been prepared and made ready and safe for his reception. He is therefore entitled to expect that the possessor will exercise reasonable care to make the land safe for his entry, or for his use for the purposes of the invitation.” Restatement (Second) of Torts § 343 cmt. b (1965).

¶ 52 In this case, Olson presented evidence that the warehouse was dark and that the gate was open due to a malfunction. Thus, it was reasonably foreseeable that, while looking for a light switch in the dark warehouse, it was likely that an invitee would fall through the unprotected drop-off in the floor. Further, the burden of providing adequate lighting was not great. Therefore, we determine that Williams owed a duty to Olson to provide adequate lighting.

¶ 53 Accordingly, we hold that the pleadings and attached documents establish genuine issues of material fact regarding proximate cause. Further, the pleadings and attached documents establish that Williams owed Olson a duty of reasonable care. Therefore, the circuit court erred by granting Williams’ motion for summary judgment.

⁴Section 343 of the Restatement (Second) of Torts has been adopted by our supreme court. See *LaFever*, 185 Ill. 2d at 389.

III. CONCLUSION

¶ 54

¶ 55

For these reasons, the judgment of the circuit court of Lake County is reversed and the cause is remanded for further proceedings.

¶ 56

Reversed and remanded.