2013 IL App (1st) 1121810-U

FIRST DIVISION
May 20, 2013

No. 1-12-1810

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ELISEO MAGANA,	)	Appeal from the Circuit
	)	Court of Cook County
Plaintiff-Appellant,	)	
	)	
v.	)	No. 10 L 2919
	)	
JEFFREY GARCIA,	)	
	)	Honorable
	)	Jeffrey Lawrence,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 ***Held:*** Defendant property owner did not owe duty to plaintiff who was injured after diving head-first into an above-ground swimming pool, because danger was open and obvious. The ruling below granting summary judgment in favor of the defendant is affirmed.

¶ 2 Plaintiff Eliseo Magana (Magana) filed a single-count complaint against defendant, Jeffrey Garcia (Garcia), for negligence to recover damages for injuries Magana sustained when he jumped into Garcia's above-ground swimming pool at night, resulting in Magana becoming

quadriplegic. The trial court granted summary judgment in favor of Garcia. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Magana's complaint, filed in March 2010, alleged that on August 4, 2009 Magana was an invited guest on Garcia's premises. Garcia maintained an above-ground swimming pool on the premises. Magana alleged Garcia negligently permitted the premises to remain in a dangerous condition by (1) failing to properly light the area at and around the pool, (2) failing to warn the Magana of the dangerous condition of the pool, and (3) failing to make reasonable inspection of the premises and pool. The complaint alleged that as a direct and proximate result of Garcia's negligence Magana suffered injury when he entered the unsafe pool.

¶ 5 Garcia answered the complaint and raised several affirmative defenses, including comparative fault and assumption of risk. The affirmative defenses alleged the Magana ignored multiple notices on the side, deck, and outer edge of the pool warning against diving, and that he willingly and voluntarily dove head first into the shallow, above-ground pool. The defenses also alleged that prior to arriving at the pool, Magana consumed a substantial amount of alcohol, and his blood alcohol content was more than double the legal limit for driving an automobile in Illinois. Magana admitted that he consumed alcohol that night but denied that he was intoxicated or that his blood alcohol content was twice the legal driving limit.

¶ 6 The pertinent facts relevant to the dispositive motion for summary judgment were established through discovery. In his deposition, Magana testified that on the evening of August 3, 2009, he and his sister went to the home of Garcia's friend Emanuel Muñoz for "a get

together," where they arrived between 10 and 11 p.m. Magana ate a meal, and had six or seven beers, spread over the entire time he was at Muñoz's house. He stayed there until sometime after 1 a.m. on August 4, 2009. Jeffrey Garcia, Jr., defendant's son, had arrived at the party approximately one hour after Magana. Magana had never met Jeffrey Garcia, Jr. before that day. As the party began to wind down, Jeffrey Garcia, Jr. suggested going to the pool to swim. Another guest, Eddie, whom Magana had not met before that night, drove plaintiff to the Garcia home. Eddie had a bottle of liquor in his car, and on the way to the pool Magana "took a little sip. Not even a shot." Magana testified that he felt drunk when he left the Muñoz home.

¶ 7 Jeffrey Garcia, Jr. did not tell Magana anything about the pool other than there was a pool at his house. Magana had never been to the home before. Magana entered the backyard from the alley, followed Eddie up to the pool deck, and removed his clothes down to his shorts. Magana testified: "You can't really see the pool walking into the backyard because the way the deck wraps around it." Magana was shown a picture of a floodlight on defendant's home, and denied that the light was on the night in question. He described a light in the alley behind the premises as a dim orange light, and testified that the light would not have been sufficient to permit him to see any waning signs. Magana walked in the backyard and went "right up to the deck of the pool." He did not recall exactly how many stairs there were, except that there were "[m]ore than five, less than ten." Magana looked into the pool as he was standing on the deck. It was so dark that he could not see his feet as he stood on the deck. He testified he saw the pool full of water and that it was dark. He also testified the because of the darkness, he could see neither the lawn from the top of the pool, nor the bottom of the pool.

¶ 8 Magana stated he was five or six feet off the ground when he was on top of the deck, and that he was on the deck standing in one place for approximately 10 minutes. During that time, he spoke to Eddie and others. At that time, Magana still felt drunk. After talking for 10 minutes, he dove into the pool. He thought about the depth of the pool before he dove in, and thought it was deep enough to dive. Magana initially testified that he had looked into the pool and could see the bottom, "but it was deceiving," but later in the deposition said it was so dark that he cold not see the bottom of the pool.

¶ 9 Magana stated he decided to dive into the pool not knowing how deep it was. He thought the pool was more than five feet deep. He did not think the pool went below the ground. He understood the bottom of the pool was at ground level, but he thought the pool was deeper than the height of the stairs he walked up. When asked why he thought that, he stated it was due to the darkness, and explained that "[i]t was just dark. I couldn't really see the bottom of the pool."

¶ 10 After he dove in the pool, he felt cold running down his back. He remained floating in the water holding his breath until Eddie and others pulled him out. Paramedics transported him to the hospital. Due to his injuries, he will be confined to a wheelchair for the rest of his life.

¶ 11 According to Garcia's answers to interrogatories, The Pool Store, where he purchased the pool, installed a new liner in the mid-2000s. Garcia's wife maintains the pool. Defendant testified at his deposition that he is the sole owner of the property on which the pool is located, and that the above-ground pool is 18 feet in diameter and four feet deep. The pool has a medium blue liner with a checkered pattern on the floor. Five or six stairs lead up to the pool deck. A floodlight attached to the house overlooks the pool. The pool abuts the alley and does not have

interior lighting. In the nearby alley there is a light on a pole. The pole is approximately four feet from Garcia's property and the light is approximately 30 feet high on the pole. The alley lights are "bright" and "white." Garcia did not know if either the floodlight or the alley light was on the night in question. He also testified that the bottom of the pool is visible when it is dark and the floodlights are off because of the alley light.

¶ 12 Renee Garcia, defendant's wife, testified at her deposition that the pool has a flat bottom. She described the alley light as "bright." Nothing blocked the alley light when the incident occurred. Mrs. Garcia testified that the bottom of the pool is visible when the floodlight is not on because of the alley light. She has seen the pool with the alley light. She testified that "even if we walk at night to throw away the garbage, you can clearly see the bottom of my pool." The "alley light" is on the east side of the premises. Another light located two lots west also illuminates the premises. The premises is on the south side of the alley. A third light on the north side of the alley and two lots to the east also illuminates the premises.

¶ 13 Plaintiff's expert Jon Ver Halen, P.E., submitted two affidavits. He stated he is an expert in the area of human factors analysis, particularly regarding premises safety and code compliance. Ver Halen reviewed the deposition transcripts and photographs of the premises, and inspected the premises twice in January 2012. When he visited the first time,"the sun had set, it was dark and the lighting was the same or substantially similar to that which existed in the early morning of August 4, 2009." He stated he inspected "the lighting that was available" but did not specifically state whether the floodlights or alley lights were on. He used a light meter to measure the intensity of the light in the backyard and pool area. The metric for light intensity is

foot-candles. On January 5, he performed a number of different measurements at various areas on the deck. He claimed that under "general illumination standards *** the appropriate general lighting for any recreational activity in a backyard is between 10 foot and 25 foot-candles." He researched state requirements for swimming pool lighting and learned that the requirements vary from state to state from a high of 30 foot-candles to a low of approximately 10 foot-candles. His affidavit is silent with respect to any Illinois requirements. His measurements on the deck varied between .25 and 1 foot-candles. On January 11, he partially removed the cover of the pool and observed the pool from the deck as well as the bottom.

¶ 14 Ver Halen rendered an opinion "based upon a reasonable degree of certainty in the field of human factors engineering *** that the lighting in the backyard, and specifically at the pool at the subject premises, was insufficient and did not comply with the generally accepted standards in the early morning hours of August 4, 2009" and as such, "defendant was negligent by providing inadequate lighting for the pool area." His opinion does state that the light conditions hindered Magana's ability to assess his surroundings, to accurately estimate the depth of the pool and to see the warning signs. He opined the lighting affected Magana's vision, "thereby reducing visual acuity, and causing or contributing to [Magana's] inability to judge of the depth of the pool," and was a cause of the accident and the injuries.

¶ 15 In his second affidavit, Ver Halen stated that he examined the pool liner on January 11, 2012 and discovered the liner had a stone pattern along the sides and bottom. He stated that under "standards accepted by professionals in the field of human factors, the ability of a person to distinguish a pools [sic] side from its bottom is based upon several factors including

illumination, and visual contrast between the sides and the bottom of the pool." The supplemental affidavit also states the "lack of contrast between the sides and the bottom combined with the insufficient lighting in the early morning hours of August 4, 2009 *** made it virtually impossible to distinguish a pool's side from its bottom ***." In his opinion, "based upon a reasonable degree of human factor engineering certainty, that the lack of contrast between the sides and the bottom of the liner combined with the insufficient lighting at the premises caused or contributed to [plaintiff's] injuries."

¶ 16 On August 23, 2011, Garcia filed a motion for summary judgment, arguing the above-ground pool was an open and obvious danger as a matter of law, and also because the danger of diving headfirst into a uniform depth, above-ground pool that is only 5 feet off the ground is open and obvious to any reasonable person. He argued the lighting was irrelevant because an above-ground pool has a uniform depth that is apparent at any time of day or night since a person must ascend a distance equal to the depth of the pool in order to enter the pool.

¶ 17 The plaintiff's response relied in part on Van Halen's affidavits. In reply, Garcia also argued that the Van Halen affidavit should be stricken pursuant to Illinois Supreme Court Rule 191(a) (Ill. S. Ct. R. 191(a) (eff Jul. 1, 2002)) because he included no factual support or foundation for his conclusion that the lighting on January 5, 2012, the date of his examination, was the same as the light existing in the early morning hours of August 4, 2009.

¶ 18 On May 24, 2012, the court granted Garcia's motion for summary judgment, stating that *Barham v. Knickrehm*, 277 Ill. App. 3d 1034 (1996), was indistinguishable from the present case. Magana's counsel argued that *Barham* was, in fact, distinguishable because in this case darkness

obscured the pool. The trial court disagreed and entered an order granting the motion for summary judgment. This appeal followed.

¶ 19 ANALYSIS

¶ 20 "We review a trial court's decision to grant a motion for summary judgment *de novo*. Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt. *** A defendant moving for summary judgment bears the initial burden of proof. The defendant may meet his burden of proof *** by affirmatively showing that some element of the case must be resolved in his favor ***. *** We may affirm on any basis appearing in the record, whether or not the trial court relied on that basis or its reasoning was correct." (Internal quotation marks and citations omitted.) *Lewis v. Chica Trucking, Inc.*, 409 Ill. App. 3d 240, 251-52 (2011). We consider the record in the light most favorable to plaintiff. *Lewis*, 409 Ill. App. 3d at 253.

¶ 21 The complaint alleged that the defendant's premises were in a dangerous condition for persons using the premises with the exercise of ordinary care. Because the complaint is based on premises liability, "[o]ur analysis begins with a review of sections 343 and 343A of the Restatement (Second) of Torts which has been adopted by Illinois ***. Section 343 provides:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against danger."

(Internal quotation marks and citations omitted.) *Waters v. City of Chicago*, 2012 IL App (1st) 100759, ¶ 9 (2012).

¶ 22 "Section 343 should be read together with section 343A, which provides the following 'known or obvious' exception to the liability of a possessor of land under section 343:

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." (Internal quotation marks and citations omitted.) *Id.*, ¶ 10.

"Our supreme court has held that once a court finds that a danger is open and obvious, the court's analysis is not 'complete' until it has analyzed [the] four 'traditional factors.' " (Internal citation omitted.) *Id.*, ¶ 12.

¶ 23 I. Open and Obvious Danger

¶ 24 We must first determine whether the condition of the premises that caused Magana's injuries was "open and obvious." If it was, then Garcia owed him no duty to warn of the condition as a matter of law, unless Garcia should have anticipated the harm to Magana *despite* the obviousness of the condition. On that question, the trial court found *Barham v. Knickrehm*, 277 Ill. App. 3d 1034 (1996), dispositive. *Barham* was an appeal from a dismissal with prejudice pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West

1996)). In *Barham*, a 13-year-old girl jumped off the wooden decking of the defendants' above-ground pool toward the bottom, struck her head and/or neck, and fractured her spinal column, resulting in quadriplegia. *Barham*, 277 Ill. App. 3d at 1170. The *Barham* court began its analysis by noting that "[a] homeowner's above-ground swimming pool presents an open and obvious danger as a matter of law." *Id*., at 1038 (citing *Englund v. Englund*, 246 Ill. App. 3d 468, 477 (1993)). The *Barham* court found that the second amended complaint failed to state a claim because the complaint (1) failed to allege facts to support an allegation the defendants owed a duty of care to the minor, and (2) failed to allege that the actions or inactions of the defendants were the proximate cause of the minor's injuries. *Barham*, 277 Ill. App. 3d at 1038.

¶ 25 Magana argues that a question of fact exists as to whether the dangers associated with the pool were open and obvious because questions of fact exist regarding the visibility of the pool, its bottom, and the visibility of any posted warnings. He contends that lighting or other conditions can obscure a "usually open and obvious condition" rendering the danger not open and obvious, giving rise to a potential duty of care. Here, Magana argues, the evidence raises a question of fact that the lighting in the backyard obscured the danger of the above-ground pool.

¶ 26 Magana relies strongly on *Ward v. K Mart Corporation*, 136 Ill. 2d 132 (1990), for the proposition that blocked vision can make something that was open and obvious not so, and, therefore, creating a duty of care. In *Ward*, the plaintiff sought damages for injuries he sustained after walking into a concrete post located just outside a customer entrance to the department store operated by the defendant. *Ward*, 136 Ill. 2d at 135. A jury returned a verdict in favor of the plaintiff. The trial court granted judgment to the defendant notwithstanding the verdict, finding

that the defendant had no reason to expect that the plaintiff's attention would be distracted when he exited the defendant's store, or that the plaintiff would forget about the posts he passed when he entered the store. *Id*., at 139. The appellate court affirmed. *Id*.

¶ 27 Our supreme court first recognized that the sole inquiry before it concerned the existence of a duty. *Ward*, 136 Ill. 2d at 140. The court held that "the obviousness of a condition is *** relevant to the existence of a duty ***." *Id*., at 143. The issue for the court was "whether [the] defendant's general duty of reasonable care extended to the risk encountered by [the] plaintiff." *Id*., at 145. The court held that there is no *per se* rule to the effect that the defendant's duty of reasonable care never extends to conditions which may be labeled "open and obvious" or of which the plaintiff is in some general sense "aware." *Id*., at 147. The "explanation for the 'open and obvious' rule must be either that the defendant in the exercise of reasonable care would not anticipate that the plaintiff would fail to notice the condition, appreciate the risk, and avoid it, or perhaps that reasonable care under the circumstances would not remove the risk of injury in spite of foreseeable consequences to the plaintiff." (Internal citation omitted.) *Ward*, 135 Ill. 2d at 147. Thus, the proper inquiry is whether the condition is *unreasonably* dangerous. *Id*., at 152. If the condition is not "unreasonably" dangerous no duty arises. See *Ward*, 136 Ill. 2d at 151. There may be conditions on a person's premises which are in fact dangerous, but not "unreasonably" so, because the defendant may have no reason to anticipate that an entrant on his premises will fail to see and appreciate the danger. *Id*., at 152.

¶ 28 In *Ward,* our supreme court found that "it was reasonably foreseeable that a customer would collide with the post while exiting [the] defendant's store carrying merchandise which

could obscure view of the post." *Ward*, 136 Ill. 2d at 153-54. The court distinguished similar cases finding that the defendants were not negligent as a matter of law on the grounds they would have no reason to anticipate that a condition (a glass door) posed any danger to people exercising reasonable care for their own safety. *Id*., at 154. In distinguishing those cases relied on by the appellate court, the *Ward* court held that "[w]hatever the validity of this presumption might be, it is not controlling in the case before us" because a defendant "can be expected under *certain circumstances* to anticipate that customers even in the general exercise of reasonable care will be distracted or momentarily forgetful." (Emphasis added.) *Id*., at 155. If "the defendant may reasonably be expected to anticipate that even those customers in the general exercise of ordinary care will fail to avoid the risk because they are distracted or momentarily forgetful, then his duty may extend to the risk posed by the condition." *Id*., at 156. Where there is such a reasonable expectation, then "[w]hether in fact the condition itself served as adequate notice of its presence or whether additional precautions were required to satisfy the defendant's duty are questions properly left to the trier of fact." *Id*.

¶ 29 *Ward* provides little support to the claim at issue here. Garcia's swimming pool was not obscured by darkness. We recognize that Magana's claim is based on his alleged inability to visually perceive only the bottom of the pool. Regardless, under *Ward*, the inquiry is not whether the condition was simply visually obscured. Instead, the proper inquiry is whether the defendant should expect that an adult exercising ordinary care under the circumstances might not appreciate the danger, forget the danger, or would be distracted from it. *Ward*, 136 Ill. 2d at 155-56. In Illinois, courts of review have consistently found as a matter of law that there is open and

obvious danger when voluntarily jumping into an above-ground pool, or into any body of water of unknown depth. *Barham*, 277 Ill. App. 3d at 1038 ("A homeowner's above-ground swimming pool presents and open and obvious danger as a matter of law"); *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 425-26 (1998) ("the water's danger is considered to be apparent not only to experienced swimmers but even to very young children") (internal citations omitted); *Bucheleres v. The Chicago Park District*, 171 Ill. 2d 435, 454-56 (1996).

¶ 30 Magana suggests that *Duffy v. Togher*, 382 Ill. App. 3d 1 (2008), supports his position that there is an unresolved issue of fact regarding the dangerousness of the pool. In *Duffy*, the plaintiff dove into an in-ground swimming pool and sustained injuries that lead to his becoming a quadriplegic. *Duffy*, 382 Ill. App. 3d at 3. The deepest part of the pool in that case was in the middle, with shallow areas at both ends. *Id*., at 4. The plaintiff's experts gave opinions that the design of the pool was "very unusual" and unsafe for the ordinary pool user who expects a shallow end and a deep end. The pool compounded that problem by creating an optical illusion of a deep end resulting from placing a classic deep-end ladder at one end of the pool and steps typically associated with a shallow end at the opposite end of the pool. Finally, the plaintiff's expert stated that the liner made the pool bottom uniform in texture and pattern, making the pool depth difficult if not impossible to judge, and that the color of the liner helped to obscure the bottom. *Duffy*, 382 Ill. App. 3d at 9-10.

¶ 31 The plaintiff in *Duffy* sued the pool owner under a premises liability theory, as well as the entity that sold and installed the pool, and the manufacturer of the pool liner. *Duffy*, 382 Ill. App. 3d at 3. The *Duffy* court held that the record created a genuine issue of material fact about

whether the defendants knew there was a danger and failed to follow through on their duty to warn. *Id*., at 7. The pool owners moved for summary judgment on the grounds their pool posed an open and obvious danger. *Duffy*, 382 Ill. App. 3d at 8. The *Duffy* court held that the "expert's affidavit and deposition testimony created a material issue of fact about whether a shallow bottom in a 'deep end' section of the pool was a nonobvious danger." *Duffy*, 386 Ill. App. 3d at 10. The *Duffy* court did state that the unusual danger of the pool was "submerged." *Id*., at 11. Because the court's holding was based on the unusual construction of the pool which created an optical illusion of a deep end, it could not conclude as a matter of law that the danger was obvious. *Id*., at 11.

¶ 32 *Duffy* is distinguishable from the facts at issue here. The *Duffy* court distinguished *Barham* on the grounds that "[u]nlike the pool in *Barham*, [the *Duffy* defendants'] pool did not have a uniform depth and was not above ground." *Id*., at 10. The *Duffy* court specifically noted that "depth is usually more obvious in an above-ground pool ***." *Id*. The *Duffy* court expressly refused to rely on the plaintiff's testimony that the illusion created by the pool caused him to assume it was safe to dive. *Id*., 382 Ill. App. 3d at 10. Thus, what was visible to the eye of the plaintiff was not a necessary factor in the holding in *Duffy*.

¶ 33 *Duffy*, like the cases finding that above-ground pools create open an obvious danger with respect to diving, is based on what is obvious to an objectively reasonable person exercising ordinary care for their own safety. See *Duffy*, 382 Ill. App. 3d at 10 ("the obviousness of the danger and the duty to warn are decided not based on plaintiff's own subjective perception but by an objective standard"). The danger of diving into an above-ground pool is not "obvious"

because the bottom of the pool is visible. Rather, the danger of diving into an above-ground pool is open and obvious because an inherent danger of bodies of water is diving into water that is too shallow. *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 422, 426 (1998) ("Cases addressing the open and obvious danger of water are premised on the notion that bodies of water pose two particular types of risk: the risk of drowning and the risk of injury from diving into water that is too shallow").

¶ 34 Plaintiff's reliance on *Jackson* is similarly misplaced. In *Jackson*, a swimmer dove into a man-made lake, hit his head, suffered injuries, and died. *Jackson*, 185 Ill. 2d at 420-21. The court found that a "swimmer standing on the shore has no way to gauge the lake's depth or detect the presence of any submerged obstructions." *Id*., at 421. A question of fact existed as to how the swimmer sustained his injuries, but there was evidence that he hit his head on a submerged plastic pipe the premises owner placed in the body of water. *Id*., at 424. The pipe itself was "black in color and approximately two inches in diameter. It was not anchored down, its location was variable, and it did not always remain in the water." *Id*., at 422. On the date of the injury, the pipe extended into the deep end of the lake from a point near where the decedent dove into the water. *Id*. The pipe "ran along the shore for a short distance, then entered the water. It disappeared from view a few feet to the left of where [the decedent] made his dive." *Id*.

¶ 35 The *Jackson* court found "problematic" the lower court's conclusion that the premises owner did not owe a duty of care to the decedent as a matter of law because the risks of diving into a body of water that is murky and of uncertain depth are open and obvious. *Jackson*, 185 Ill. 2d at 424. However, the *Jackson* court's ruling does not disturb the appellate court's finding that

the risk of diving into a body of water of uncertain depth is open and obvious. The *Jackson* court stated its agreement with the doctrine that "[a] body of water is deemed to present an open and obvious danger whether it is natural or artificial, clear or murky." (Internal citations omitted.) *Id*., at 425. The *Jackson* court simply held those cases did not apply to the situation before it because the open and obvious risk associated with bodies with water, *i.e.*, "the risk *** from diving into water that is too shallow," was not at issue. *Id*., at 426.

¶ *36* In this case, plaintiff's expert's opinions that (1) the lighting at the premises was insufficient; (2) the insufficient lighting was substandard and hindered plaintiff's ability to see and appreciate the risks; and (3) the substandard and insufficient lighting combined with the pool liner pattern caused or contributed to plaintiff's injuries do not raise a triable question of fact. The alleged darkness is insufficient as a matter of law to create a reasonable expectation on the part of defendant that plaintiff would fail to appreciate and avoid the risk of jumping into the pool when plaintiff knew it was an above-ground pool and did not know the precise depth of the pool. *Bucheleres*, 171 Ill. 2d at 448 ("In cases involving obvious and common conditions, such as *** bodies of water, the law generally assumes that persons who encounter these conditions will take care to avoid any danger inherent in such condition. *** [P]eople are expected to appreciate and avoid obvious risks"); *Id*., at 453 ("Nothing concealed or obscured the existence of the lake from the divers, who knew they were diving into the water and specifically intended to do so").

¶ 37 We therefore hold, as a matter of law, that the condition on defendant's premises that caused plaintiff's injuries was an open and obvious danger.

¶ 38 II. Distraction Exception

¶ 39 Plaintiff argues that even if the pool presented an open and obvious danger, we should find that special circumstances created a distraction. Our supreme court has recognized a "forgetfulness or distraction" exception to the general rule of no liability for open and obvious conditions. *Bucheleres*, 171 Ill. 2d at 451. Under the exception, a possessor of land may be liable to his invitees for harm caused by an obvious condition on the land if he has reasons 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." (Internal quotation marks and citation omitted.) *Id*., at 451-52. Plaintiff argues "the party and the darkness were distractions from the danger" because they obscured his ability to assess where he had already traveled and to judge the depth of the pool.

¶ 40 *Bucheleres* involved whether the Chicago Park District had a duty to warn against the risks associated with diving off of concrete seawalls into Lake Michigan. *Bucheleres*, 171 Ill. 2d at 437. The court acknowledged that "Illinois law does not view the existence of an open and obvious condition as an automatic or *per se* bar to the finding of a legal duty on the part of the defendant who owns, occupies, or controls the area in which the injury occurred." *Id*., at 449. Therefore, the court went on to examine cases illustrating the "forgetfulness or distraction" exceptions or limitations on the "open and obvious" bar to the existence of a duty. *Id*., at 449.

¶ 41 The *Bucheleres* court concluded that the forgetfulness or distraction exception did not apply to the seawalls. *Id*., at 456. The court so found because the record did not indicate that the plaintiffs were distracted or forgetful of the "lake's existence." *Id*., at 452-53. The court

reasoned that "[n]othing concealed or obscured the existence of the lake from the divers, who knew they were diving into the water and specifically intended to do so." *Id.*, at 452-53.

¶ 42 *Bucheleres*, and the cases cited therein, teach that the distraction exception applies when the owner of the premises can reasonably expect an invitee to be forgetful of or distracted from the existence of the condition, not distracted from perceiving the dangers involved with a known condition. "[T]he distraction exception generally involves a situation where the injured party was distracted from the open and obvious condition because circumstances required him or her to focus on some other condition or hazard." *Waters*, 2012 IL App (1st) 100759 ¶ 15. See also *Ward*, 136 Ill. 2d at 153-54 ("Defendant had reason to anticipate that customers shopping in the store would, even in the exercise of reasonable care, momentarily forget that presence of the posts which they may have previously encountered by entering through the customer entrance door").

¶ 43 Plaintiff does not argue that he was distracted from the existence of the pool. Rather, plaintiff's argument is more akin to an assertion that because he was distracted he could not appreciate the risk. The circumstances analogous to those cases that applied the exception to the general rule of no liability are completely lacking here. Plaintiff knew he was diving into an above ground pool "and specifically intended to do so." *Bucheleres*, 171 Ill. 2d at 453. Plaintiff did not know the depth of the water. In this case, "[p]oor lighting should have been more of a reason for [plaintiff] to exercise great caution and to question the apparent depth of *** the pool." *Lederman v. Pacific Industries*, 939 F. Supp. 619, 626 (N.D. Ill. 1996). We hold as a matter of law that the distraction exception does not apply.

¶ 44 III. Traditional Duty Factors

¶ 45 Finally, Magana argues that Garcia owed a duty to him because the conditions of the backyard created a likelihood of injury, his injury was foreseeable, minimal effort by defendant would have prevented the injury, and Garcia would suffer no consequences from having the burden to warn placed on him. Magana argues the conditions of the backyard created a likelihood of injury because he could not have reasonably discovered or appreciated the dangers because of the dark conditions. He contends that the danger was that the pool was not safely or sufficiently illuminated and, given the darkness, it was foreseeable that he would not see the bottom of the pool and that he would nonetheless dive in the pool and be injured. He believes that proper lighting and visible warning signs would have alerted him to the danger and impacted his decision.

¶ 46 "The essential elements of a cause of action *** based on common law negligence are the existence of a duty, and an injury proximately caused by that breach. Generally, a duty of care arises where the parties stand in such a relationship to one another that the law imposes upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff. Whether a defendant owes a plaintiff a duty of care is usually a question of law to be decided by the court. In making this determination, the court is to consider the following factors: (1) the foreseeability of the injury; (2) the likelihood of the injury; (3) the magnitude of the burden on the defendant of guarding against the injury; and (4) the consequences of placing the burden on the defendant. Where no duty exists, the plaintiff cannot recover." (Internal quotation marks and citations omitted.) *Waters*, 2012 IL App (1st) 100759, ¶ 12.

¶ 47 "With respect to the first factor, [our supreme court has] observed *** that the law generally considers the likelihood of injury slight when the condition in issue is open and obvious because it is assumed that persons encountering the potentially dangerous conditions of the land will appreciate and avoid the risks." *Bucheleres*, 171 Ill. 2d at 456 (citing *Ward*, 136 Ill. 2d at 147). Having determined that the dangers associated with diving into the above-ground pool were open and obvious, we similarly find that "the likelihood-of-harm factor in the duty analysis has little weight in [this case.]" *Bucheleres*, 171 Ill. 2d at 456.

¶ 48 The degree of obviousness also effects the foreseeability-of-the-harm element. "[T]he foreseeability of harm to others may be greater or lesser depending on the degree of obviousness of the risks associated with the condition." *Bucheleres*, 171 Ill. 2d at 456. Illinois courts have consistently held that the risks associated with jumping into above-ground pools are obvious "even to very young children." *Jackson*, 185 Ill. 2d at 425-26. "While injuries from *** diving might be anticipated wherever there are *** swimming pools, *** the legal concept of *reasonable* foreseeability of injury arising from open and obvious conditions takes into account that even young, unsophisticated or immature people are generally assumed to appreciate the risks associated with such conditions and therefore exercise care for their own safety." (Emphasis in original.) *Bucheleres*, 171 Ill. 2d at 456-57. Under the circumstances of this case, we find that it was not foreseeable that plaintiff would fail to appreciate the risk of jumping head-first into an above-ground pool or that plaintiff, an adult, would fail to avoid that risk. The same is true even if he was uncertain of its depth. Defendant could have reasonably expected plaintiff "to appreciate the risk associated with diving into water of unknown depth ***." *Id*., at 459.

¶ 49 The magnitude of the burden and the consequences of placing the burden on defendant to warn or prevent plaintiff from diving into the above-ground pool are actually quite high. Plaintiff relies on *Jackson*, 185 Ill. 2d at 426-27, in which our supreme court reversed summary judgment under the traditional duty analysis, in part, because the threat of injury could have been completely eliminated at virtually no cost or expense. There, the court found that patrons of the commercial swimming area would have no way of knowing of the risks associated with a submerged pipe that had nothing to do with the inherent characteristics of bodies of water. *Id*., at 426-27. *Jackson* is distinguishable. In this case, the harm did result from a risk of an inherent characteristic of the body of water. As a matter of law, that risk is obvious, even to very young children. Magana argues the burden of additional lighting or warnings is low. But he voluntarily dove into a swimming pool of unknown depth, knowing it to be an above-ground pool. There is no reason to believe that additional lighting or warning signs would have prevented his injury. To impose a duty on a property owner in these circumstances would effectively require him to personally warn against or to stop any diving attempts. The magnitude of that burden and the consequences on the public's use and enjoyment of swimming pools is not warranted by the circumstances of this case. See *Bucheleres*, 171 Ill. 2d at 458 (mere awareness that some beach patrons dive from seawall did not translate into legal duty to prevent all diving by enforcing the existing prohibition with increased personnel. "To require the [defendant] to undertake such steps *** would create a practical and financial burden of considerable magnitude"). Therefore, we find that consideration of the last two factors in the duty analysis also suggest that no duty should be imposed under the circumstances of this case.

¶ 50 CONCLUSION

¶ 51 The above-ground swimming pool on defendant's premises was an open and obvious dangerous condition. Plaintiff is deemed to have appreciated the risk of diving into shallow water or water of unknown depth as a matter of law. No exceptions to that general rule of no liability apply here. We have, therefore, no need to reach the parties' arguments concerning whether (1) expert testimony is sufficient to create a fact issue, or (2) Van Halen's affidavit should be stricken pursuant to Rule 191. The judgment of the trial court granting summary judgment in favor of defendant is affirmed.

¶ 52 Affirmed.