2016 IL App (1st) 160429-U

FOURTH DIVISION
December 22, 2016

No. 1-16-0429

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOAN NOVAK, Plaintiff-Appellant, v. LQ MANAGEMENT, LLC, f/k/a LA QUINTA INNS, INC., LA QUINTA FRANCHISING, LLC, and LA QUINTA INN CHICAGO WILLOWBROOK HOTEL, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 13 L 1047 Honorable William E. Gomolinski, Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Ellis and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment in favor of defendant because no legal duty existed where plaintiff was injured due to an open and obvious condition on the premises.

¶ 2 Plaintiff Joan Novak filed a personal injury action based on allegations of negligence following a trip and fall in June 2012 at a La Quinta Inn (the hotel) in Willowbrook, Illinois. Plaintiff alleged that she fell and was injured when her right foot was caught in a child's

highchair as she walked down an aisle in the breakfast area at the hotel. Following discovery, defendant LQ Management LLC[1] filed a motion for summary judgment which the trial court granted. On appeal, plaintiff argues that (1) defendant owed plaintiff a duty of reasonable care; (2) there is a question of material fact as to whether the condition was open and obvious; (3) there is a question of material fact as to whether the television protruding from the wall distracted plaintiff from the condition; and (4) there is a question of material fact as to whether plaintiff was more than 50% comparatively negligent.

¶ 3 In May 2013, plaintiff filed her first amended personal injury complaint, stating that on June 4, 2012, she was a guest at the hotel and was walking in the breakfast area of the hotel "when she was caused to fall to the ground as a result of an obstruction created by the unsafe placement of a highchair and mounted television set." The complaint alleged that defendant had a duty "to own, operate, manage, staff and control The Hotel so as to ensure all of the hotel facilities, including the cafeteria, were safe for their intended use by hotel guests, including plaintiff."

¶ 4 Plaintiff further alleged that defendant breached its duty in one or more of the following negligent acts or omissions: failed to maintain an open and unobstructed pathway to the garbage area of the restaurant area, failed to warn guests of the danger created by the unsafe placement of the highchair and the mounted television, failed to post a sign warning guests that there was an obstruction in the pathway to the garbage area, and failed to properly and adequately staff the restaurant area to ensure unsafe obstructions to pathways used by guests would be removed before injury to guests occurred. As a proximate result of one or more of these negligent acts

[1] Defendant La Quinta Franchising LLC was voluntarily dismissed from plaintiff's complaint. Defendant La Quinta Inn Chicago Willowbrook Hotel is a trade name of the hotel operated by LQ Management LLC. This appeal only involves defendant LQ Management LLC.

and/or omissions, plaintiff fell and sustained severe and permanent injuries. Plaintiff sought damages in excess of $50,000.

¶ 5 In September 2015, defendant filed a motion for summary judgment, contending that (1) the alleged dangerous condition of the highchair in the aisle was open and obvious to plaintiff, and defendant owed no duty to plaintiff, and (2) plaintiff was more than 50% comparatively negligent and barred from recovery. Defendant attached portions of plaintiff's deposition and an affidavit from another hotel guest to its motion.

¶ 6 In her deposition, plaintiff stated that on June 4, 2012, she was a guest at the hotel. She went to the breakfast area around 8:30 a.m. After she finished her breakfast at approximately 9 a.m., she started to walk to the garbage can to dispose of her trash. Plaintiff admitted that there were two paths to the garbage can. A wide aisle was to the right of plaintiff's table in the breakfast area. Another aisle was closer to plaintiff's table. Approximately 10 to 15 minutes before she left her table, a family came to the breakfast area with a child. The child was seated in a highchair in the closer aisle. Plaintiff stated that the aisle was narrower, less than two feet, after the placement of the highchair. Plaintiff said she was aware of the wider aisle, but she did not think she would have a problem walking through the narrow aisle.

¶ 7 Plaintiff said that to the left of the highchair was a mounted television. The television was on an arm that could be extended. The television was extended while plaintiff was in the breakfast area. She did not see anyone extend the television while she was there, it was extended when she arrived.

¶ 8 Plaintiff stated that as she walked down the aisle, she turned sideways to move between the highchair and another table, facing toward the highchair. She stepped with her left foot first, and then her right foot. As she was moving, plaintiff realized that the television was extended

farther than she had thought and was concerned that she would hit her head as she passed. She said she bent her head forward as she continued to pass the highchair. After she was sure she had cleared the television, plaintiff turned her body and took a step with her left foot. When plaintiff attempted to step with her right foot, her foot caught on the highchair and she "pitched forward." Plaintiff stated that she was clear of the television, but she "never dreamed that [she] hadn't totally cleared the highchair."

¶ 9 Donnell Owens stated in an affidavit that he was a guest at the hotel on June 4, 2012. He was seated alone at a table facing the breakfast counter in the breakfast area of the hotel. He observed plaintiff seated at the table to his right. Owens said that there was another guest with her children at the first table closest to the food counter, with one child in a highchair. The highchair was placed in the aisle next to the guest's table and was "very visible." At some point during breakfast, plaintiff got up from her table and started walking toward the front breakfast counter. As she reached the highchair, plaintiff "turned her body and attempted to squeeze in the space between the [highchair] and the table closest to the wall." While she was squeezing through the space, plaintiff's foot caught on the lower part of the highchair, causing her to fall forward and land on the floor. Owens went to help plaintiff. He stated that the floor was clean, dry, and free of any debris and the lighting in the area was fine.

¶ 10 In response to the summary judgment motion, plaintiff argued that (1) the condition was not open and obvious and defendant failed to address the television protruding from the wall as she attempted to pass the highchair, and (2) her contributory fault is a question of fact for the jury. Plaintiff attached portions of depositions from three employees from the hotel.

¶ 11 Jamie Foley stated in his deposition that on June 4, 2012, he was the front desk manager for the hotel. Foley said that he was not aware of any policy that precluded patrons from putting

a highchair at the end of a table, and that a guest would have to step around the highchair to pass through the aisle. Foley also said that if the television was pulled out such that it protruded into the aisle, it was a hazard. When asked if a guest was trying to make her way past a highchair in an aisle and also had to be aware of an extended television either close to or into the aisle was not a situation that Foley wanted to happen at the hotel, he responded, "I don't want a safety hazard in all of the hotel." Foley stated, "If [the television] was protruding into the aisle and the highchair was in there, that could cause some difficulties, sure."

¶ 12 Martha Murillo testified at her deposition that she was the housekeeping manager at the hotel in June 2012. She had been on duty during breakfast in the course of her job. Murillo stated that the television can be extended, but when she observes it extended, she pushes it back. She said the television can be in the way of people passing by. Murillo also said that guests become upset when the television is pushed back because they were the ones that extended it. She stated that it is pushed back to prevent an accident.

¶ 13 Roswitha Ried-Korpas testified at her deposition that in June 2012, she was the area general manager for the hotel. Ried-Korpas stated that there are four trash receptacles in the breakfast room. When asked if the television could be a distraction when extended to the edge of the table if a patron was trying to pass through the aisle with a highchair placed at the end of a table, she answered, "It could be a distraction." She said it "could be" enough of a distraction that it caused the patron to not pay attention to where she was placing her feet.

¶ 14 After defendant filed a reply to its motion, the trial court granted the motion without a hearing or a written order.

¶ 15 This appeal follows.

¶ 16 On appeal, plaintiff argues that the trial court erred in granting defendant's summary judgment motion because (1) defendant owed her a duty of care and breached said duty; (2) the placement of the highchair was not an open and obvious condition where the television was a distraction, such that a question of fact exists; and (3) there is a question of fact as to whether plaintiff was comparatively negligent in excess of 50%.

¶ 17 Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014). We review cases involving summary judgment *de novo*. *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 349 (1998).

¶ 18 "To state a cause of action for negligence, a complaint must allege facts that establish the existence of a duty of care owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach." *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430 (2006). "The question of the existence of a duty is a question of law, and in determining whether a duty exists, the trial court considers whether a relationship existed between the parties that imposed a legal obligation upon one party for the benefit of the other party." *Sameer v. Butt*, 343 Ill. App. 3d 78, 85 (2003). In contrast, "whether a defendant breached the duty and whether the breach was the proximate cause of the plaintiff's injuries are factual matters for the jury to decide, provided there is a genuine issue of material fact regarding those issues." *Marshall*, 222 Ill. 2d at 430. " 'In the absence of a showing from which the court could infer the existence of a duty, no recovery by the plaintiff is possible as a matter of law and summary judgment in favor of the defendant is proper.' " *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 13 (quoting *Vesey v.*

Chicago Housing Authority, 145 Ill. 2d 404, 411 (1991)).

¶ 19 There are four factors to consider in a duty analysis: "(1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant." *Id.* ¶ 14. "A legal duty refers to a relationship between the defendant and the plaintiff such that the law imposes on the defendant an obligation of reasonable conduct for the benefit of the plaintiff." *Choate v. Indiana Harbor Belt Railroad Co.*, 2012 IL 112948, ¶ 22.

¶ 20 Generally, under the open and obvious rule, " 'a party who owns or controls land is not required to foresee and protect against an injury if the potentially dangerous condition is open and obvious.' " *Bruns*, 2014 IL 116998, ¶ 16 (quoting *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 44 (2003)). "The open and obvious rule is also reflected in section 343A of the Restatement (Second) of Torts, which this court has adopted." *Id.* "Under section 343A, 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.' " *Id.* (quoting Restatement (Second) of Torts § 343A, at 218 (1965)). " 'Obvious' means that 'both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment.' " *Id.* (quoting Restatement (Second) of Torts § 343A cmt. b, at 219 (1965)).

¶ 21 "Whether a dangerous condition is open and obvious may present a question of fact," but "where no dispute exists as to the physical nature of the condition, whether the dangerous condition is open and obvious is a question of law." *Id.* ¶ 18. However, "[t]he existence of an open and obvious danger is not an automatic or *per se* bar to the finding of a legal duty on the part of a defendant." *Id.* ¶ 19. To determine whether a duty exists, a court must still consider the

four factors of the duty analysis under the facts of the case at bar. *Id.* "Application of the open and obvious rule affects the first two factors of the duty analysis: the foreseeability of injury, and the likelihood of injury." *Id.* "Where the condition is open and obvious, the foreseeability of harm and the likelihood of injury will be slight, thus weighing against the imposition of a duty." *Id.*

¶ 22 Assuming without deciding that the highchair constitutes a dangerous condition, we turn to the circumstances of this case. It is undisputed that a highchair was placed in the aisle of the breakfast area by other patrons approximately 10 to 15 minutes prior to plaintiff's fall. Plaintiff admits that she knew the highchair partially obstructed the aisle to the garbage can, but she believed she could pass through the narrower space. Plaintiff asserts that she was distracted by the extended television as she attempted to pass around the highchair, causing her fall.

¶ 23 The distraction exception to the open and obvious rule "applies ' "where the possessor of land has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it." ' " *Bruns*, 2014 IL 116998, ¶ 20 (quoting *Sollami v. Eaton*, 201 Ill. 2d 1, 15 (2002), quoting Restatement (Second) of Torts § 343A cmt. f, at 220 (1965)). "[T]he distraction exception will only apply where evidence exists from which a court can infer that plaintiff was actually distracted." *Id.* ¶ 22.

¶ 24 In *Bruns*, the plaintiff was going to an appointment at an eye clinic when she stubbed her toe on a raised crack on a city-maintained sidewalk, causing her to fall. *Id.* ¶ 4. At the time of her fall, the plaintiff was not looking down at her feet, but was looking torward to the clinic's steps and door. *Id.* The plaintiff admitted that she had seen the crack on prior visits and was certain that she saw it on the day of her fall. *Id.* The plaintiff filed a negligence action against

the city. *Id.* The city filed its motion for summary judgment arguing that the sidewalk defect was open and obvious, and that it was therefore not required to foresee and protect against injuries resulting from the defect. *Id.* In answer to the motion, the plaintiff argued that she was distracted because she was looking at the clinic door, and that it was reasonable for the city to foresee that a person could become distracted in this manner. *Id.* ¶ 7. In granting summary judgment, the trial court concluded that the defect was open and obvious and that the distraction theory was inapplicable. *Id.* ¶ 8. The appellate court reversed the grant of summary judgment. *Id.* ¶ 13.

¶ 25 The supreme court reversed the appellate court, finding that that the distraction theory only applies when there is evidence from which the court can infer that the plaintiff was actually distracted, and that the "mere fact of looking elsewhere does not constitute a distraction." *Id.* ¶ 22. The supreme court also noted the circumstances in which the distraction exception had been found applicable. *Id.* ¶¶ 24-27; see *Ward v. Kmart Corp.*, 136 Ill.2d 132, 153-54 (1990) (Kmart sold the plaintiff bulky merchandise that obscured his view and prevented him from walking into a five-foot concrete post outside the entrance of the store); *Deibert v. Bauer Brothers Construction Co.,* 141 Ill. 2d 430, 439-40 (1990) (plaintiff fell in a heavy equipment tire rut when exiting a bathroom because he was looking upward to ensure that workers were not throwing debris down from a balcony as the workers had historically done on this project); *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14, 28-29 (1992) (billboard painter who came into contact with a high-voltage power line hanging above a walkrail that ran the length of the billboard was distracted by having to carefully watch where to place his feet on the walkrail); *Rexroad v. City of Springfield,* 207 Ill. 2d 33, 46 (2003) (student manager of a football team instructed by a coach to retrieve a helmet in the

locker room, and forced to return using a different path because the original access gate was locked, was focused on returning the helmet to the coach and was distracted from a large hole in this alternate path to the field).

¶ 26 In this case, plaintiff argues that the protruding television served as a distraction from the highchair. Plaintiff admits that the television was extended when she entered the breakfast area and she did not observe anyone extend it. She asserts that she did not realize how far it was extended until she was in the aisle. Her path included navigated around both the highchair and the extended television. She turned sideways toward the highchair to pass around it, but leaned forward to ensure that she did not bump into the television. Plaintiff was not facing or watching the television at the time of her fall. Plaintiff also admits that she was aware of another wider, unobstructed aisle in the breakfast area.

¶ 27 We reject plaintiff's contention that the television was a distraction. The television was plainly visible to plaintiff and remained in the same position the entire time plaintiff was in the breakfast area. The television was also open and obvious to plaintiff, especially in light of its positioning behind the highchair in the narrow aisle. Plaintiff was not watching the television, such that, she was distracted from navigating around the highchair. Nor did plaintiff testify that she momentarily forgot about the highchair because she was distracted by the television. A reasonable person in the position of the visitor objectively would view the narrow aisle with both a highchair and a protruding television as an obvious hazard and would proceed down the wider aisle. Plaintiff's subjective view that she believed she could pass around these objects is not relevant. Nothing in these circumstances obscured plaintiff's line of sight as she moved through the aisle around the conditions in her path.

¶ 28 Further, we are unpersuaded by plaintiff's assertion that the determination of whether

these circumstances were open and obvious is a factual question for the jury. We note that cases relied on by plaintiff are distinguishable. See *Duffy v. Togher*, 382 Ill. App. 3d 1, 8 (2008) (plaintiff presented an expert witness on the question of an open and obvious danger who testified the design of the pool was "very unusual," "unsafe for the ordinary pool user," and gave an "optical illusion of a deep end"); *Buckalian v. Lake County Family YMCA*, 314 Ill. App. 3d 195, 203 (2000) (the reviewing court found a question of fact based differing testimony in which the plaintiff's friend did not observe defect in a floor mat until shown after fall, but other patrons had previously tripped on the mat). We question the viability of *Simmons v. American Drug Stores*, 329 Ill. App. 3d 38,43 (2002). There, the reviewing court held that whether a condition is open and obvious is a question of a fact, which is counter to the supreme court's position as discussed in this case. See *Bruns*, 2014 IL 116998, ¶ 18.

¶ 29 Finally, plaintiff cites the decision in *Bulduk v. Walgreen Co.*, 2015 IL App (1st) 150166, ¶ 15, as support for her argument that the determination of an open and obvious condition is a question of fact. The supreme court issued a supervisory order directing the appellate court to vacate its decision and reconsider in light of *Bruns*. 2016 IL 120196. A new decision was recently filed in *Bulduk*. In the new decision, the majority found *Bruns* distinguishable from the facts in that case. There, the plaintiff went to a Walgreen's store to purchase cosmetics. A large cleaning machine was placed on the floor in the middle of the cosmetics aisle. The plaintiff alleged that she continued into the aisle to find the product she was seeking, and as she was reaching for an item on the shelf, the cleaning machine struck her and caused injury. *Bulduk*, 2015 IL App (1st) 150166-B, ¶ 6. The plaintiff alleged that "her focus on finding the cosmetic items she wanted to purchase distracted her from noticing the danger the machine posed." *Id.* ¶ 22. The majority found that "[u]nlike the plaintiff in *Bruns*, plaintiff was performing a task,

supported by defendant, in looking at the cosmetics on the shelf; she was not merely 'looking elsewhere.' Defendant also knew the cleaning machines were being used at its store on the day in question, and recognized that the machines could pose a risk to customers." *Id*. ¶ 23. The majority held that a question of material fact remained as to whether the plaintiff was distracted from the open and obvious danger. *Id.* ¶ 24. The dissenting justice disagreed, stating that "there was no evidence presented in the pleadings that would establish that plaintiff was distracted at the time of her alleged injury such that she failed to discover the cleaning machine in the aisle, or that she forgot that it was there." *Id*. ¶ 38 (Connors, J., dissenting). As Justice Connors observed, the plaintiff admitted to seeing the cleaning machine, but walked around it to reach the items she wanted. Thus, the justice reasoned that the distraction exception did not apply in the case, and the accident was not reasonably foreseeable. *Id.*

¶ 30 We find *Bulduk* to be distinguishable from the instant case. First, we have already found the television was not a distraction to plaintiff. She was not watching the television or even facing it as she attempted to pass through the aisle. Second, the plaintiff was injured in *Bulduk* as she attempted to shop in an open business, which was the basis for her distraction from the cleaning machine. Here, plaintiff was trying to pass an aisle by maneuvering around both the highchair and the television simultaneously. Both were visible and known to plaintiff when she entered the aisle, despite having a clear aisle in which to pass. The plaintiff in *Bulduk*, however, had no other option to shop for the cosmetics in the store other than the aisle with the cleaning machine.

¶ 31 Here, there is no question of material fact as to the placement of both the television and the highchair. As discussed, the television had been extended for at least the 30 minutes plaintiff was in the breakfast area and the highchair was placed by patrons 10 to 15 minutes prior to

plaintiff's fall. The affidavit from Owens, another hotel guest, corroborates plaintiff's deposition testimony regarding the obstructed aisle. These facts are not in dispute, and therefore, this is a question of law appropriate for summary judgment.

¶ 32 Additionally, as defendant points out, plaintiff testified that she caught her foot after she had cleared the television set. Plaintiff stated at her deposition, "And after I was sure I had cleared the TV, that's when I turned my body, took one step with my left foot. As I drew my right foot forward, it caught on the chair, and I pitched forward." Plaintiff's testimony established that her fall was not contemporaneous with the alleged distraction of the television.

¶ 33 We conclude that the distraction exception to the open and obvious rule does not apply in this case. However, application of the open and obvious doctrine does not end the inquiry as to whether the premises owner or occupier owes a duty of due care. *Bruns*, 2014 IL 116998, ¶ 35. Accordingly, we must consider the four factors referenced earlier in this order: "(1) the reasonable foreseeability of injury, (2) the reasonable likelihood of injury, (3) the magnitude of the burden that guarding against injury places on the defendant, and (4) the consequences of placing that burden on the defendant." *Id*.

¶ 34 None of the factors carry weight to support a duty in light of the open and obvious condition of the aisle. For the first factor, "a defendant is ordinarily not required to foresee injury from a dangerous condition that is open and obvious." *Id.* ¶ 36. Second, " 'it is assumed that persons encountering the potentially dangerous condition of the land will appreciate and avoid the risks,' making the likelihood of injury slight." *Id*. (quoting *Sollami*, 201 Ill. 2d at 17). Third, the burden on defendant to safeguard against injury would be significant. Here, the highchair was placed by other patrons, not an employee of the hotel. There is no evidence regarding who extended the television. If we were to place a burden on defendant, it would have

to constantly monitor all patrons in the breakfast area at all times to ensure that nothing is placed in a manner that might create a condition that another guest could be injured. Further, the hotel already had another means of safe ingress and egress through the breakfast area, ensuring a safe passage for patrons. Fourth, the consequences of the burden of monitoring would require an employee present at all times and would cause a financial burden when considering breakfast is offered every morning. The imposition of this burden is unreasonable given the open and obvious condition of the aisle as well as the presence of an alternative safe aisle for patrons to use. Accordingly, we hold that defendant did not owe plaintiff a legal duty. The trial court properly granted defendant's motion for summary judgment.

¶ 35 Since we have found that no legal duty existed, we need not consider defendant's alternative argument that plaintiff was more than 50% comparatively negligent.

¶ 36 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 37 Affirmed.