2011 IL App (2d) 100909-U
No. 2-10-0909
Order filed December 1, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

SARA MILJEVICH and JOSEPH MILJEVICH, Plaintiffs-Appellants, v. PROVENA HOSPITALS, an Illinois not-for-profit corporation and FRANCISCAN SISTERS HEALTH CARE CORPORATION, an Illinois not-for-profit corporation, V-3 COMPANIES OF ILLINOIS, LTD., an Illinois corporation, d/b/a V-3 CONSULTANTS, RANDALL BACIDORE, LINN FLOERCHINGER, WILLIAM HEUN, and RONALD KOBOLD, a Partnership, d/b/a MATTHEI AND COLIN ASSOCIATES, Defendants-Appellees. (Primary Cardiology, LLC, an Illinois limited liability company and James M. Burks, M.D., S.C.-Defendants).	)	Appeal from the Circuit Court of Kane County. No. 07-LK-490 Honorable Robert B. Spence, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

Held: On plaintiffs' claims of personal injury and loss of consortium caused by a fall from a retaining wall in a parking lot, the trial court properly granted summary judgment for the hospital that owned the lot and the engineers and the architects who designed it.

¶ 1 Plaintiffs, Sara and Joseph Miljevich, filed claims of personal injury and loss of consortium after Sara suffered serious injuries from falling from a four-foot retaining wall in a parking lot. The lot served and was owned and operated by defendants Provena Hospitals and Franciscan Sisters Health Care Corporation (collectively, Provena). Provena had hired defendants V-3 Consultants (V-3), an engineering firm, to design the lot; and Matthei and Colin Associates (MCA), an architectural firm, to review the plans. Provena, V-3, and MCA filed separate motions for summary judgment, which were granted.

¶ 2 On appeal, plaintiffs renew their argument that defendants were negligent for breaching various duties to prevent a dangerous condition in the parking lot. Plaintiffs' principle contention is that the parking lot violated a local building code that mandated guard rails along "open-sided walking surfaces." We have reviewed the photographs of the location as well as the pleadings, affidavits, depositions, and admissions on file; and when viewing these items in the light most favorable to plaintiffs, we conclude that there is no genuine issue of material fact and that defendants are entitled to a judgment as a matter of law. See 735 ILCS 5/2-1005(c) (West 2010). We affirm.

¶ 3 FACTS

¶ 4 Between 2000 and 2001, Provena expanded its hospital campus in Elgin by adding a medical office building. After the building was completed, Provena became concerned with the slope of the parking lot near the entrance. The building entrance had a canopy that covered a loading and unloading zone for patients. At the end of the canopy, the parking lot sloped downward at a steep

grade. In 2002, Provena revisited the project to evaluate the grade and slope of the parking lot. Provena was concerned for the safety of people in wheelchairs and pedestrians slipping on ice. Provena hired V-3 and MCA for the design and construction of a two-level parking lot. To level the existing sloped lot, Provena implemented a design that created upper and lower parking areas that were level.

¶ 5 A photograph of Provena's parking lot shows the two adjacent parking areas, with one lower than the other. A four-foot retaining wall connects the two areas, with the upper level ending at the top of the retaining wall and the lower level beginning at the bottom of the retaining wall. Short stairways in the retaining wall connect the upper level to the lower level.

¶ 6 In their 12-count, third-amended complaint, plaintiffs allege that, on September 21, 2005, Sara and Joseph drove to Provena's offices, where Joseph had a doctor's appointment. The weather was clear and sunny. At the time, Sara was 73 years old and had been in the parking lot many times before and was familiar with the upper level, lower level, and the retaining wall. Sara also was familiar with the driveways connecting the two levels.

¶ 7 Sara pulled the car into the upper level of the parking lot and parked in the row nearest the retaining wall. Each space in the row contained a wheel stop. Beyond the line of wheel stops was a continuous curb to block cars from driving off the pavement, over the edge of the retaining wall, and onto the lower level. Past the curb was a one-foot-wide strip of what appears in the photograph to be a mixture of dirt, mulch, and wood chips. The strip contains a few signs marking the spaces, and beyond the strip is the edge of the four-foot-tall retaining wall itself, which consisted of a line of wide concrete blocks.

¶ 8 Sara and Joseph entered the building without incident, and upon learning that Joseph's appointment would take some time, Sara decided to run an errand. Upon her return, Sara pulled into the same parking spot. While pulling the car into the space, Sara accidentally drove the driver-side front tire over the concrete wheel stop at the front of the parking space. The car did not reach the curb but it became stuck on the wheel stop. Sara went inside and returned to the space with Joseph, but she did not tell him the car was stuck.

¶ 9 Joseph got behind the wheel and attempted to back out of the parking space, but he could not. Sara exited the car, walked to the front, held onto the hood, and directed Joseph. Sara described what happened as follows:

> "I got out of the car and worked my way around in front. I had my hands on the hood, and I was trying — I knew that if I couldn't move the car, he'd be able to, because he is a much better driver than I. So I was just around in front there and thinking we are going to be in big trouble if we can't get this car out of here and we have to get home."

¶ 10 Sara testified that she had to hold onto the hood of the car to keep her balance as she edged her way around to the front of the car. Once Sara reached the front, she found herself standing in the strip of wood chips between the curb and the top of the retaining wall. Sara described the strip as "about the same size as my shoe, maybe a little bit wider [and it] looked like it had been maybe for a garden or something. I think wood chips probably." Sara did not consider the strip of wood chips to be walkway.

¶ 11 Sara removed her hands from the hood, lost her balance, and fell backward off the retaining wall to a grassy area at the edge of the lower level. Ula Shair Salah witnessed the incident from across the street. Salah testified that it appeared that Sara was attempting to push the car when she

removed her hands from the hood, took a few steps backs, and fell. Salah testified that, except for pushing a car from the parking spot, "[t]here would be no other reason for [Sara] to be there."

¶ 12 Plaintiffs allege that Provena was negligent for (1) failing to recognize that Sara would be "distracted by activities involving her car" resulting in a fall from the retaining wall; (2) failing to provide a barrier or railing to prevent patients using the parking lot from falling from the upper level to the lower level while being distracted by activities involving their car parked in the lot; (3) failing to post a warning sign to remind patients about the danger of falling from the retaining wall; (4) failing to provide a wheel stop in a size and shape to prevent plaintiffs' car from crossing over it; (5) failing to provide a parking lot with enough space for people to stand in front of their parked car without falling off the wall; (6) failing to exercise reasonable care in violation of the Premises Liability Act (see 740 ILCS 130/2 (West 2010)); and (7) failing to follow the City of Elgin's building code, which allegedly required guard rails along the retaining wall. Plaintiffs alleged that defendants Primary Cardiology, LLC, and Dr. Burks were negligent for the same reasons, but those defendants are not part of this appeal.

¶ 13 Plaintiffs also allege that V-3 and MCA breached their duties to provide professional services in that V-3 provided an unsafe design for the parking lot and MCA failed to advise Provena of the risks after reviewing the design. Specifically, plaintiffs allege that (1) the two-level parking lot lacked a guard or barrier to prevent people using the parking lot from falling from the upper level to the lower level; (2) the lot lacked a parking curb of sufficient size and shape to prevent the tires of plaintiffs' car from crossing over it; (3) the parking spaces at the top of the retaining wall were not large enough for people to safely stand in front of their cars; (4) the lot was not reasonably safe for its intended use; (5) the lot did not comply with the laws of the City of Elgin; and (6) V-3 and

MCA failed to schedule a final inspection with the City of Elgin for the approval of the design. Consistent with Sara's negligence claims against Provena, V-3, and MCA, Joseph claims damages for loss of consortium because of Sara's injuries. The trial court entered summary judgment for defendants on all claims, and plaintiffs timely appeal.

¶ 14 ANALYSIS

¶ 15 Plaintiffs argue that the trial court erred in granting defendants summary judgment on the claims of negligence and loss of consortium. Specifically, plaintiffs argue that (1) V-3 and MCA owed and breached duties to plaintiffs to use the same degree of knowledge, skill, and ability as an ordinarily careful professional would exercise under the circumstances; (2) the parking lot violated the City of Elgin's building code and that the violation is *prima facie* evidence of Provena's negligence; and (3) even if the risk of falling from the retaining wall was open and obvious, Provena still owed and breached a duty to exercise reasonable care to protect plaintiffs. We disagree with each of plaintiffs' propositions.

¶ 16 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). Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010); *Klitzka v. Hellios*, 348 Ill. App. 3d 594, 597 (2004). In reviewing a grant of summary judgment, this court must construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the nonmoving party. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Where reasonable persons could draw

divergent inferences from the undisputed material facts or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114 (1995). If a party moving for summary judgment introduces facts that, if not contradicted, would entitle him to a judgment as a matter of law, the opposing party may not rely on his pleadings alone to raise issues of material fact. *Klitzka*, 348 Ill. App. 3d at 597 (citing *Hermes v. Fischer*, 226 Ill. App. 3d 820, 824 (1992)).

¶ 17 The summary judgment procedure is to be encouraged as an aid in the expeditious disposition of a lawsuit. *Adams*, 211 Ill. 2d at 43. However, summary judgment is a drastic means of disposing of litigation that should not be granted unless the movant's right to judgment is clear and free from doubt. *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280 (2007).

¶ 18 To prevail in an action for negligence, the plaintiff must prove that the defendant owed a duty, that the defendant breached that duty, and that defendant's breach was the proximate cause of injury to the plaintiff. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 225 (2010). Unless a duty is owed, there can be no recovery in tort for negligence. *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14, 26 (1992).

¶ 19 The existence of a duty is a question of law that is shaped by public policy considerations. *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 388 (1998). Whether the law will impose an obligation of reasonable conduct upon a defendant for the benefit of a plaintiff depends on the nature of the relationship. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 441 (2006); *LaFever*, 185 Ill. 2d at 388-89. The four factors relevant to whether a duty exists are (1) the reasonable foreseeability of the plaintiff's injury, (2) the reasonable likelihood of the injury, (3) the magnitude of the defendant's

burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant. *LaFever*, 185 Ill. 2d at 389.

¶ 20 "Where the plaintiff fails to provide facts 'from which the court could infer the existence of a duty,' summary judgment for the defendant is appropriate." *Klitzka*, 348 Ill. App. 3d at 596 (quoting *Vesey v. Chicago Housing Authority*, 145 Ill. 2d 404, 411 (1991)). In all appeals from the entry of summary judgment, we conduct a *de novo* review of the record. *Klitzka*, 348 Ill. App. 3d at 596-97 (citing *Espinoza*, 165 Ill. 2d at 113).

¶ 21 A. Completeness of the Record

¶ 22 The record does not contain the trial court's reasons for granting defendants summary judgment. Plaintiffs argue that the trial court must have found that defendants owed plaintiffs no duty as a matter of law, but there is nothing in the record to support plaintiffs' speculation on this point. In the trial court, defendants presented arguments on the existence of duty, breach of duty, and causation, any or all of which could have been the basis for the entry of summary judgment.

¶ 23 Defendants contend that the summary judgment must be affirmed because plaintiffs have failed to supply this court with reports of proceedings from the hearing on defendants' summary judgment motions. Under *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984), an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error; and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court conformed with the law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 391-92.

¶ 24 Plaintiffs respond that reports of proceedings are not available because there was no court reporter at the hearing, but plaintiffs could have remedied that circumstance easily. In this court, plaintiffs could have filed a bystanders report under Supreme Court Rule 323(c) (Ill. S. Ct. R. 323(c)

(eff. Dec. 13, 2005)) or an agreed statement of facts under Rule 323(d) (Ill. S. Ct. R. 323(d) (eff. Dec. 13, 2005)). Either could have provided the reasons for the trial court's ruling. Doubts that arise from the incompleteness of the record will be resolved against the appellant (*Foutch*, 99 Ill. 2d at 392), but in this case, our review is *de novo* and limited to the pleadings and supporting documents that are part of the record. We construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the nonmoving party, without showing deference to the reasons that trial court gave for granting summary judgment. Thus, the record is sufficiently complete for us to determine whether the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. See 735 ILCS 5/2-1005(c) (West 2010); *Klitzka*, 348 Ill. App. 3d at 597. The incompleteness of the appellate record does not hinder our review, and we reject defendants' assertion that we must affirm the summary judgment dismissal on that basis.

¶ 25 B. V-3 and MCA

¶ 26 Plaintiffs argue that V-3 and MCA each owed and breached a duty to plaintiffs to use the same degree of knowledge, skill, and ability as an ordinarily careful professional would exercise under the circumstances because V-3 and MCA failed to include guards on the retaining wall where Sara fell. V-3 responds that V-3's design was not in place at the time of the incident; there was no evidence as to what caused Sara to fall; V-3 had fulfilled its duty under its contract with Provena; and plaintiffs' claims were precluded by the doctrine of condition versus cause. MCA adopts V-3's arguments and additionally responds that Provena did not ask MCA to give advice regarding the need for a guard rail at the top of the retaining wall where Sara fell.

¶ 27 In professional negligence claims like this one, the professional standard of care is "the use of the same degree of knowledge, skill and ability as an ordinarily careful professional would exercise under similar circumstances," and the plaintiff bears the burden to establish the standard of care through expert witness testimony. *Advincula v. United Blood Services*, 176 Ill. 2d 1, 23-24 (1996). Expert testimony is necessary to establish both the professional's standard of care and the professional's deviation from the standard of care. *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 295 (2000).

¶ 28 Provena hired V-3 to design a plan to change the grade of the parking lot. Dwayne Gillian, V-3's project manager for the parking lot project, reviewed photographs of the scene of the accident that plaintiffs introduced into evidence. Plaintiffs testified that the photographs showed the design and condition of the parking lot on the date of the incident. Gillian testified that the photographs showed the retaining wall, a small landscape area, a "B612" barrier curb, and parking stalls, all of which were designed by V-3. Gillian testified that each parking stall in the row nearest the retaining wall contained a wheel stop that was installed after V-3's work on the project ended. The wheel stops were not part of V-3's design, and Gillian was unaware of their installation until he became familiar with plaintiffs' case. Gillian testified that the addition of a wheel stop to Sara's parking space created more room at the front of the space such that a person could stand near the front of the space more easily. Gillian testified that the additional room at the front of the row did not transform the small landscape area into a walkway, but without the wheel stops, a car could be pulled so far forward that a person could not walk around the front of the car without falling over the edge of the retaining wall. Gillian explained that V-3's design did not intend or anticipate that a patron would park his car and attempt to walk around the front of it. Al Jensen of Provena also testified that the

wheel stops in the spaces of the parking lot were not part of the design prepared by V-3, but had been added sometime after the parking lot was constructed.

¶ 29 John Shales, of the contracting firm Shales and McNutt, served as the general contractor on the parking lot project. When Shales submitted his bid to Provena, the bid incorporating V-3's design did not include guards on the retaining wall. However, Shales testified that V-3's design called for a line of bushes to be planted between the curb and the edge of the retaining wall. Instead, the photographs show the strip of wood chips without bushes.

¶ 30 Representatives of Provena, V-3, and MCA testified that MCA's work on the project was limited to drawing plans for the enclosure of supports for the canopy at the entrance of the building and providing recommendations regarding one of the four site plans submitted by V-3. MCA's contract with Provena did not require MCA to furnish plans or specifications for the parking lot.

¶ 31 We agree with V-3 and MCA that plaintiffs have not offered any expert testimony that an ordinarily careful professional should anticipate that the recommended design plan would be materially altered after the review and implementation of the plan. V-3 and MCA could not have anticipated that Provena would change the parking lot design by including the wheel stops and omitting the line of bushes. Both changes made it more likely that a person using the parking lot might stand in the area near the edge of the retaining wall.

¶ 32 Plaintiffs rely upon *Laukkanen v. Jewel Tea Co.*, 78 Ill. App. 2d 153 (1966), which was an action for damages suffered by a plaintiff who was injured when a building designed by the defendant engineers collapsed during a violent windstorm. A jury found the engineers professionally negligent in designing a pylon that fell on the plaintiff. The jury heard evidence that the engineers failed to specify with particularity that a standard heavy concrete block was to be used in

constructing the pylon, instead of lightweight aggregate concrete block specified for use in other portions of the building. The appellate court determined that, based on the evidence, the jury was justified in finding that the engineers' omission resulted in the pylon being built with inadequate strength to withstand the winds which accompanied the severe storm. *Laukkanen,* 78 Ill. App. 2d 160. The court concluded that the jury's determination amounted to a finding that the defendants did not use the degree of skill ordinarily and customarily used by members of the defendants' profession under similar circumstances. *Laukkanen,* 78 Ill. App. 2d 160.

¶ 33 On appeal, the engineers argued that they owed the plaintiff no duty because their duty extended only to the party who contracted for their services. The *Laukkanen* court rejected that argument, holding that privity of contract was not a prerequisite to liability. *Laukkanen,* 78 Ill. App. 2d 161. In reaching its decision, the court commented that "[w]e conceive that the defendants owe a duty to respond in damages to those members of the general public who can be reasonably anticipated to be present in the structure they designed when negligence in design is a causal factor in injuries sustained through collapse of the building." *Laukkanen,* 78 Ill. App. 2d 161. Plaintiffs misinterpret this statement as broadly holding that engineers and architects, like V-3 and MCA, are strictly liable whenever a person is injured on premises the professionals design.

¶ 34 In *Laukkanen*, the engineers designed the building knowing that the public would use it for business purposes. The pylon that collapsed on the plaintiff was located directly above the entrance used by customers, and the pylon was so tall that any defect could not be detected by the public. The reasonable foreseeability and likelihood that a member of the public could be present under the pylon at the time of a collapse was not contested. *Laukkanen* instead focused on the reasonable foreseeability and likelihood of the collapse occurring at all. Unlike *Laukkanen*, this case turns on

the reasonable foreseeability and likelihood that a member of the public would be present at the location of the injury, which in this case was the top of a retaining wall that a patron would not ordinarily encounter. *Laukkanen* is distinguishable on its facts and does not compel reversal of the summary judgments entered for V-3 and MCA.

¶ 35 C. Provena

¶ 36 Plaintiffs further argue that the parking lot violated the City of Elgin's building code and that the violation is *prima facie* evidence of Provena's negligence, which would preclude summary judgment. In a common law negligence action, a violation of a statute or ordinance designed to protect human life or property is *prima facie* evidence of negligence. *Abbasi v. Paraskevoulakos*, 187 Ill. 2d 386, 394 (1999).

¶ 37 At the time the parking lot was designed, the City of Elgin had adopted the 2000 International Building Code (IBC) as part of the city's ordinances. Plaintiffs' architectural expert, Donald White, opined that section 1003.2.12 of the IBC required guards along the top of the retaining wall. A "guard" is defined as "a building component or a system of building components located at or near the open sides of elevated walking surfaces that minimizes the possibility of a fall from the walking surface to a lower level." 2000 International Building Code, Chapter 10, §1002. Section 1003.2.12 is a safety ordinance that governs general means of egress and provides as follows:

> "(12) Guards. Guards shall be located along *open-sided walking surfaces*, mezzanines, industrial equipment platforms, stairways, ramps, and landings which are located more than 30 inches (762 mm) above the floor or grade below. Guards shall be adequate in strength and attachment in accordance with Section 1607.7. Guards shall also be located along glazed sides of stairways, ramps and landings that

> are located more than 30 inches (762 mm) above the floor or grade below where the glazing provided does not meet the strength and attachment requirements in Section 1607.7." (Emphasis added.) 2000 International Building Code, Chapter 10, §1003.2.12.

¶ 38 Plaintiffs contend that section 1003.2.12 of the IBC, in an effort to protect human life, mandated guard rails along the retaining wall because the area where Sara fell was an "open-sided walking surface." White opined that the top of the retaining wall was an "open-sided walking surface" under section 1003.2.12 of the IBC and that a guard was required because the retaining wall was 48 inches high. White concluded to a reasonable degree of architectural certainty that Sara would not have fallen if guards had been installed on the retaining wall in compliance with the IBC. White believed that the guards would have prevented Sara from standing in the area where she fell. However, White admitted that he would not design a walkway that was no more than 12 inches wide, like the strip of wood chips where Sara fell.

¶ 39 Sara testified that the strip of wood chips was barely as wide as the length of her shoe, and she admitted that the area was not designed to be a walkway. Moreover, plaintiffs' own expert testified that he would not design a walkway to look like the strip of wood chips. We conclude, as a matter of law, that the strip of wood chips, where Sara was standing when she fell, was not a open-sided walking surface, and therefore, the absence of guard rails was not a violation of section 1003.2.12 of the IBC. Without a violation of the IBC, plaintiffs have failed to set forth a *prima facie* case of negligence, but that does not end our analysis.

¶ 40 In addition to arguing that the retaining wall did not violate the IBC, Provena contends that the risk of falling from the top of the retaining wall in the parking lot was "open and obvious,"

negating any alleged duty to construct the parking lot differently or warn plaintiff of the danger. Plaintiffs respond that, even if the risk of falling from the retaining wall was open and obvious, Provena still owed and breached a duty to exercise reasonable care and install a guard rail to protect plaintiffs because it was foreseeable that Sara could be injured from falling from the retaining wall.

¶ 41 The Illinois Supreme Court has treated the applicability of the open-and-obvious doctrine as a threshold issue before reaching an analysis of the traditional factors used to evaluate whether the law will impose a duty of reasonable care. *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 455 (1996). The open and obvious doctrine is an exception to the general duty of care owed by a landowner and in Illinois is based on the Second Restatement of Torts:

> " '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.' " *Alqadhi v. Standard Parking, Inc.*, 405 Ill. App. 3d 14, 17 (2010) (quoting Restatement (Second) of Torts § 343A(1) (1965)).

¶ 42 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. *Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430, 435 (1990); see also *Sandoval v. City of Chicago*, 357 Ill. App. 3d 1023, 1028 (2005) (whether a condition is open and obvious "depends not on plaintiff's subjective knowledge but, rather, on the objective knowledge of a reasonable person confronted with the same condition.") Normally, where there is no dispute about the physical nature of the condition, the question of whether a condition is open and obvious is a legal one for the court. *Wilfong v. L.J. Dodd Construction*, 401 Ill. App. 3d 1044, 1053 (2010).

¶ 43 In cases involving common open and obvious conditions, such as fire, height, and bodies of water, the law generally assumes that persons who encounter these conditions will take care to avoid any danger inherent in such condition. *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 448 (1996). Plaintiffs do not seriously dispute that standing on the retaining wall involved an open and obvious risk of falling from a height.

¶ 44 Instead, plaintiffs argue that an exception to the open and obvious doctrine applies to impose liability on Provena. Our supreme court has recognized a "distraction" exception and a "deliberate encounter" exception to the general rule. *Sollami v. Eaton*, 201 Ill. 2d 1, 15-18 (2002). Under the "deliberate encounter" exception, the "open and obvious" doctrine does not negate liability if the landowner has reason to anticipate or expect the invitee will proceed to encounter an "open and obvious" condition because the advantages of doing so outweigh the apparent risks to a reasonable person in the invitee's position. *Kleiber v. Freeport Farm & Fleet, Inc.*, 406 Ill. App. 3d 249, 257, (2010). This exception does not apply because Provena had no reason to expect that Sara would proceed to encounter the retaining wall under normal circumstances. The uncontested evidence on file shows that the parking lot was oriented in such a way that when a person parked his car facing the curb as Sara did, he would pull up to the curb, park the car, exit the car, and walk toward the rear of the car to reach the building entrance. A person would have no reason to stand in front of his car because the point of travel from the car door to the building would lead a person away from the retaining wall.

¶ 45 Another exception to the "open and obvious" rule is the "distraction" exception. This exception applies if the landowner has reason to expect or anticipate that an invitee's attention will be distracted to the extent the invitee will forget about the condition or will fail to protect himself

or herself from the condition. *Kleiber*, 406 Ill. App. 3d at 257. Plaintiffs argue that Provena had reason to expect or anticipate that Sara's attention would be distracted to the extent that she would forget about the risk of falling from the retaining wall or fail protect herself from the risk. We disagree.

¶ 46 Plaintiffs rely on the seminal case of *Ward v. K Mart Corp.*, 136 Ill. 2d 132 (1990), but that reliance is misplaced. In *Ward*, our supreme court discussed the duties owed by a store to its customers with respect to conditions on its premises. The customer had walked into a concrete post, which he did not see because he was carrying a large mirror which obstructed his view. The supreme court rejected K mart's contention that it had no duty to warn of the condition because it was not foreseeable that its customers would fail to observe the concrete post. The court specifically recognized that the " 'obviousness' of a condition or the fact that the injured party may have been in some sense 'aware' of it may not always serve as adequate warning of the condition and of the consequences of encountering it." *Ward*, 136 Ill. 2d at 148-49, citing Restatement (Second) of Torts § 343A (1965). The defendant therefore had a duty to protect the customer from the condition. *Ward*, 136 Ill. 2d at 149. Unlike in *Ward*, where the defendant sold the plaintiff a large mirror that obscured his view of the concrete post outside the store, in this case, Sara unfortunately created the dangerous circumstance herself.

¶ 47 Under the uncontested facts, we conclude that Provena had no reason to expect that Sara would be so distracted that she would fail to see the retaining wall, would forget about the edge of the retaining wall, or would fail to protect herself from the danger posed by losing her balance and falling from the retaining wall. In fact, Sara herself testified that she was familiar with the retaining wall and the rest of the parking lot because she had been there many times before. Sara testified that

she saw the edge of the retaining wall and knew that she had little room to maneuver along the top. Sara also saw how high she was standing and how far she might fall.

¶ 48 Contrary to the facts of *Ward*, Sara's testimony in this case also established that there was little to no delay between the time that she recognized the danger and the time when she was injured. In other words, Sara had no time to forget about the danger. Rather, Sara's own testimony established that she walked to the front of the car toward the edge of the retaining wall, leaned on the hood, attempted to either push the car or direct Joseph's attempt to back the car from the space, and then fell after taking a couple steps backward. As the appellate court has pointed out, " '[d]istraction exception' cases generally involve situations in which the injured party is distracted from the open and obvious condition because circumstances required that she focus her attention on some other condition or hazard." *True v. Greenwood Manor West, Inc.*, 316 Ill. App. 3d 676, 680, (2000). Sara's own testimony established that she had not been distracted but rather had knowingly walked near a ledge on which she could not maintain her balance. She simply failed to take reasonable care despite admitted problems with imbalance. Such testimony is not sufficient for the distraction exception to apply, and we conclude, therefore, that Provena could not have reasonably foreseen that Sara would be distracted when she was injured while immediately attempting to balance near the edge of the retaining wall. See *LaFever*, 185 Ill. 2d at 391-92; *True*, 316 Ill. App. 3d at 680.

¶ 49 Even if a landowner creates a condition that is deemed to be open and obvious, the existence of an open and obvious danger is not a *per se* bar to finding that a landowner has a duty to exercise reasonable care. *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 425-26 (1998); *Bucheleres*, 171 Ill. 2d at 449. In determining whether such a duty is owed, a court still must apply the traditional

duty analysis, including consideration of the likelihood of injury; the reasonable foreseeability of such injury; the magnitude of the burden of guarding against the injury; and the consequences of placing that burden on the defendant. *Jackson*, 185 Ill. 2d at 425. Surprisingly, the parties' briefs offer little if any analysis of these factors.

¶ 50 Our supreme court has held that the open and obvious doctrine implicates the first two factors of the traditional duty analysis: likelihood of injury and foreseeability. *Sollami*, 201 Ill. 2d 1, 15, 17 (2002) (citing *Bucheleres*, 171 Ill. 2d at 456). First, 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 condition of the land will appreciate and avoid the risks. *Bucheleres*, 171 Ill. 2d at 456; *Ward*, 136 Ill. 2d at 147. In contrast, if a danger is concealed or latent, rather than open and obvious, the likelihood of injury increases because people will not be as readily aware of such latent danger. We conclude that because the retaining wall presented an open and obvious risk of falling from a height, the likelihood-of-harm factor in the duty analysis does not weigh in favor of imposing a duty to install a guard rail.

¶ 51 Second, the foreseeability of harm to others may be greater or lesser depending on the degree of obviousness of the risks associated with the condition. While injuries from falling might be anticipated wherever there are steep changes in elevation, 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. *Bucheleres*, 171 Ill. 2d at 456-57. Moreover, simple foreseeability of injury is not, and has never been, dispositive on the issue of whether the law imposes a duty in negligence. *Bucheleres*, 171 Ill. 2d at 457. We conclude that the

first two factors of the duty analysis weigh against imposing a duty upon defendants to install a guard rail to prevent a person from falling off the retaining wall. With the narrow forgetfulness-or-distraction exception discussed in cases such as *Ward* and *Deibert*, the law does not require persons to protect or warn against possible injuries from open and obvious conditions, which by their nature carry their own "warning" of potential harm. *Bucheleres*, 171 Ill. 2d at 457. As discussed, that exception does not apply.

¶ 52 Consideration of the last two factors in the duty analysis also weigh against imposing a duty on Provena under the circumstances of this case. These factors are the magnitude of the burden of imposing the duty and the consequences of such burden. To prevent falls from the retaining wall, Provena would be asked to install a guard rail that would have added $10,000 to the project's cost of $195,137. We believe that requiring Provena to undertake such steps would create a financial burden of considerable magnitude, especially in light of the steps Provena already had undertaken in installing the wheel stops and curb, which were designed to prevent serious injuries from cars driving off the retaining wall. Moreover, if we were to adopt plaintiffs' position, the consequence would be to require parking lot owners to place guard rails along relatively short retaining walls even when they are not intended or expected to be encountered by pedestrians. Based on our consideration of all the relevant factors, we conclude that the trial court did not err in declining to impose a tort duty upon Provena. See *Bucheleres*, 171 Ill. 2d at 458. We have reviewed the photographs of the location as well as the pleadings, affidavits, depositions, and admissions on file; and when viewing these items in the light most favorable to plaintiffs, we conclude that there is no genuine issue of material fact and that defendants are entitled to a judgment as a matter of law. See 735 ILCS 5/2-1005(c) (West 2010).

¶ 53 CONCLUSION

¶ 54 For the preceding reasons, the summary judgment entered for defendants by the Circuit Court of Kane County is affirmed.

¶ 55 Affirmed.