2018 IL App (4th) 170740-U

NO. 4-17-0740

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 12, 2018
Carla Bender
4th District Appellate
Court, IL

DANIEL L. STAHL,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Macon County
DECATUR MEMORIAL HOSPITAL,	)	No. 14L106
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas E. Little,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the trial court properly (1) determined portions of plaintiff's affidavit should be stricken and (2) granted defendant's motion for summary judgment where defendant owed no duty to plaintiff to protect against an open and obvious condition.

¶ 2 In September 2014, plaintiff, Daniel L. Stahl, filed a complaint against defendant, Decatur Memorial Hospital (defendant or DMH), following a fall in the emergency room parking lot. The complaint alleged defendant failed to (1) eliminate the danger created by the accumulation of mud in its parking lot, and (2) properly maintain its premises in a reasonably safe condition. In April 2016, defendant filed a motion for summary judgment. In June 2017, defendant filed a motion to strike plaintiff's affidavit attached to his response to defendant's motion for summary judgment. In July 2017, the trial court granted, in part, defendant's motion to strike and granted defendant's motion for summary judgment.

¶ 3 Plaintiff appeals, arguing the trial court erred by (1) striking a portion of his affidavit, and (2) granting defendant's motion for summary judgment because there was a genuine issue of material fact. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 A. Complaint and Answer

¶ 6 In September 2014, plaintiff filed a complaint against defendant, alleging he sustained injuries following a fall in defendant's emergency room parking lot. Specifically, the complaint alleged that, on October 5, 2012, plaintiff arrived at the emergency room in the early afternoon to visit his father-in-law. "While proceeding carefully from his vehicle to the front door of [d]efendant's emergency department, [p]laintiff slipped and fell on a patch of the pavement which was covered with mud which had accumulated on the parking lot from a nearby grassy slope after a recent rain." The complaint alleged defendant knew or should have known the condition of the parking lot and the unreasonable risk the accumulation of mud presented.

¶ 7 The complaint further alleged defendant owed plaintiff a duty to exercise ordinary and reasonable care to eliminate the danger created by the accumulated mud and to maintain its premises in a reasonably safe condition. According to the complaint, defendant took no action to eliminate the danger presented by the accumulated mud and, therefore, it breached the duty it owed plaintiff. Finally, the complaint alleged serious injuries and requested damages in excess of $50,000.

¶ 8 Defendant's answer admitted it owned the parking lot in question and it owed a duty to exercise ordinary and reasonable care. However, defendant denied violating a duty owed to plaintiff and denied a violation of any duty was the cause of plaintiff's alleged injuries. Defendant further raised two affirmative defenses: (1) comparative negligence, alleging plaintiff

failed to exercise that degree of care which a reasonably prudent person would have used in the same or similar circumstances; and (2) the condition of the parking lot was open and obvious, which barred plaintiff from recovery under a negligence theory against defendant.

¶ 9 B. Motion for Summary Judgment

¶ 10 In April 2016, defendant filed a motion for summary judgment, asserting there were no genuine issues of material fact and it was entitled to summary judgment on three bases. In pertinent part, the motion stated the following bases for summary judgment:

> "First, [plaintiff] cannot prove proximate cause because he does not know what substance or condition caused him to fall. Nor is there any evidence that [defendant] created any condition, or had actual or constructive knowledge of any substance or condition, which caused [plaintiff's] fall. Second, if [plaintiff] fell due to mud or water in the parking lot, this was a natural accumulation for which [defendant] had no duty to address. Finally, if [plaintiff] fell due to mud or water in the parking lot, he elected to encounter an open and obvious condition which bars him from recovery."

Defendant attached plaintiff's deposition transcript to the motion for summary judgment.

¶ 11 1. *Plaintiff's Deposition*

¶ 12 During the deposition, plaintiff stated he went to defendant's emergency room at approximately 2:30 p.m. on October 5, 2012, to visit his father-in-law. Plaintiff parked in front of the emergency room in parking lot "M," where he fell. According to plaintiff, it rained quite a bit that day, but it was not raining when he arrived at the emergency room. Plaintiff parked his

car and began to cross the parking lot to the emergency room entrance. According to plaintiff, he carefully crossed a sloped embankment with grass, gravel, and dirt.

¶ 13 After crossing the embankment, plaintiff began crossing another section of blacktop when his feet went out from underneath him, he fell straight back, and hit his buttocks, shoulders, and head. When plaintiff got up, he was covered in mud. Plaintiff went back to his vehicle and retrieved a towel to clean up some of the mud from his hands and clothes. Plaintiff then proceeded into the emergency room, where he learned his father-in-law was not a patient at defendant hospital. Plaintiff reported his fall in the parking lot and security personnel came to file a report. The security guard interviewed plaintiff, took a report, and took photographs of the area where plaintiff fell. According to plaintiff, you could see marks in the water and mud where he fell at the time the guard took the photographs.

¶ 14 According to plaintiff, the parking lot was wet from the rain and he walked through, instead of around, the shallow puddles he noticed. Plaintiff walked through puddles on the upper part of the parking lot and did not slip at all. Plaintiff acknowledged the rain could have created muddy conditions on the embankment and mud could have attached to or accumulated on his shoes. According to plaintiff, he crossed a grassy area of the embankment. Plaintiff never noticed any mud accumulated on his shoes. After crossing the embankment, plaintiff stated he took approximately six steps across the parking lot before slipping. Plaintiff assumed mud caused him to slip because he was covered in mud when he got up. However, plaintiff admitted he "could not say a hundred percent for sure" that mud caused his fall. Plaintiff testified he had slipped on mud many times previously while doing chores on his farm. According to plaintiff, it felt like he slipped on mud in defendant's parking lot. Toward the end of plaintiff's deposition the following exchange occurred:

"Q. Okay, but your testimony previously was that you do not know what substance or condition caused you to fall, correct?

A. I'm not a hundred percent sure, but it felt like mud caused it.

Q. Okay. Did you see any mud before you fell?

A. No, I didn't see mud. I seen [*sic*] water.

Q. Okay. But no accumulation of mud?

A. I didn't see it before I fell, no."

¶ 15 Plaintiff testified regarding pictures he took subsequently of the parking lot. Plaintiff stated he did not take the photographs on the day he fell and acknowledged the photographs did not exactly depict the condition of the parking lot that day. Plaintiff did not know when he took the photographs, but he testified the photographs were taken at different times because some showed leaves on the trees and green grass, while other showed barren trees and bushes. Plaintiff also stated he had no way of knowing how long the mud was present in the parking lot. Plaintiff did not know if anyone employed by defendant knew of the mud in the area where he fell.

¶ 16 Plaintiff also testified regarding a diagram he made of the parking lot sometime after his fall, although he did not know when he made the diagram. According to plaintiff, the diagram reflected the parking lot on the date of his fall. Plaintiff testified he observed the parking lot on the date of his fall with the security guard. Counsel asked plaintiff if he showed the security guard the area where he fell, and plaintiff responded, "Yeah, and you could see, you know, where I fell at the time. I mean, there was mud, and there was water puddles with mud over it." The diagram depicted one area of mud where plaintiff fell, as well as two other areas

where mud accumulated in the parking lot. Plaintiff could not recall if the other two areas of mud were there the day he fell, but he noticed them when he returned at some unknown date to observe the parking lot.

¶ 17 2. *Plaintiff's Affidavit Opposing Defendant's Motion for Summary Judgment*

¶ 18 In pertinent part, plaintiff's affidavit contained the following paragraph:

> "8. At my deposition, we also discussed a map that I drew after my fall, which shows where I walked across the parking lot and where I fell, a true and correct copy of which is attached hereto as Exhibit 2. When I stepped across the curb into the puddle on this 'lower' section of the parking lot, I did not notice any mud. I simply thought I was stepping into a water puddle, like those I had traversed without a problem on the 'upper' section of the parking lot. I discovered the areas of dirt that had washed down onto the parking lot, highlighted in orange on my drawing, after the date of my fall, as more fully detailed below."

¶ 19 Paragraph 13 of plaintiff's affidavit stated he returned to the parking lot in question several times following his accident and continued to see people visiting the hospital taking the same path across the embankment. Plaintiff further stated he took pictures of the area where he fell on two occasions and attached four photographs as exhibits. Pages one and two contained photographs taken on October 2, 2014, while pages three and four contained photographs taken on March 12, 2016. Paragraph 13 further stated, "With the exception of the fact that the area was wet on the date of my fall, all of the areas depicted appear to be exactly the

same as they did on the day that I fell." Finally, paragraph 13 contained the following descriptions of the photographs:

> "Page 1 : This picture shows the embankment between Rows 6 and 7 of Parking Lot M at DMH looking South. As described above, the embankment has areas of grass, alternating with areas of dirt and gravel that have washed away. The area where I fell would have been between cars 4 and 5 in Row 7 on the lower level, depicted on the lefthand side of this picture. The grassy and barren areas of the embankment appear exactly as they did on the day that I fell.
>
> Page 2: This picture again shows the embankment between Rows 6 and 7 of Parking Lot M at DMH looking North. I walked down the grassy strip that ends between the fourth and fifth cars shown in this picture, the Dark Blue Dodge sedan and the Black KIA SUV. This picture clearly shows the dirt washing over the curb from the embankment, just as it did on the date of my fall.
>
> Page 3: This picture shows the curb next to Row 7 of Parking Lot M at DMH looking South between the fourth and fifth parking spaces. This shows where the dirt has washed down over the embankment and collected in the curb in a pile that is several inches deep. This exactly matches the accumulation of mud shown at the same place on this curb in the photographs taken by the

DMH security guard on the date of my fall, as shown on Pages 3 and 4 of Exhibit 3 attached hereto.

Page 4: This picture shows the embankment between Rows 6 and 7 of Parking Lot M at DMH looking West. The spot where I fell would have been between the dark colored SUV and Silver sedan. As on the date of my fall, dirt and mud has washed from the accumulation on the curb into the asphalt parking lot. On the date of my fall, the dirt and mud had washed even further East in the parking lot, as depicted in my drawing, which is Exhibit 2 attached hereto."

¶ 20 The photographs taken by the security guard on the date of plaintiff's fall show a thick layer of mud with a distinct heel print. Plaintiff's photographs taken in 2016 show a similar accumulation of mud, both in the parking lot and on the curb of the embankment. As depicted in the 2016 photographs, the area where plaintiff stated he crossed the embankment had some patchy grass and two larger areas comprised of dirt and gravel.

¶ 21 Paragraph 14 of the affidavit stated plaintiff had a great deal of experience walking on wet and muddy ground due to his experience as a farmer. Plaintiff further stated, "I did not slip in any manner in the water puddles I walked through on the 'upper' level of Parking Lot M. I also did not slip or accumulate any mud on my shoes when I walked down the grassy area on the embankment between Rows 6 and 7." When he slipped and fell, plaintiff had the same sensation he experienced in the past when he slipped on mud while working on his farming chores. Plaintiff stated, "When I got up after the fall and was covered in mud, the only conclusion I could make is that I slipped on mud which had accumulated on the parking lot

under the water puddle ***. I did not see or feel anything else which could have caused my fall on that date." Finally, paragraph 14 stated the photographs show the mud took a significant amount of time to accumulate and was not due solely to the rain on the day plaintiff fell.

¶ 22 Paragraph 15 stated plaintiff sustained severe injuries to his neck, shoulders, back, and ankle as a result of his fall. Five years after the fall, plaintiff was still receiving treatment for his injuries. Defendant "originally covered a majority of [plaintiff's] medical expenses for the injuries [he] suffered in the fall without any written agreement, talk of 'settlement,' or [his] having retained an attorney." Last, plaintiff stated, "I am simply seeking to recover my damages in this instance where I believe the negligent conduct of DMH caused me significant damages."

¶ 23 C. Trial Court's Order

¶ 24 In July 2017, the trial court entered an order granting, in part, defendant's motion to strike plaintiff's affidavit. The court reviewed plaintiff's entire deposition and found his "statements about his lack of knowledge about what caused his fall were unequivocal and deliberate so as to preclude explanation or contradiction by way of affidavit." The court reached a similar conclusion regarding plaintiff's statements that he did not know how long the mud was present in the parking lot or whether defendant knew about the condition of the parking lot on the date he fell. Accordingly, the court found the motion to strike "should be allowed in part in that paragraphs 8, 13, 14, and 15 should be stricken from the plaintiff's affidavit."

¶ 25 The trial court's order also granted defendant's motion for summary judgment. The court determined there was no material factual dispute and summarized the facts as follows: "It rained on the day in question. The parking lot was wet. The plaintiff walked through puddles of water in the parking lot and down a wet grassy embankment. He was rushing to get inside the hospital to check on his father-in-law. He stepped off a curb and walked through, not around,

additional puddles of water. He slipped and fell." Based on these undisputed facts, the court concluded, as a matter of law, the condition of the parking lot was open and obvious.

¶ 26 This appeal followed.

¶ 27 II. ANALYSIS

¶ 28 On appeal, plaintiff argues the trial court erred by (1) striking a portion of plaintiff's affidavit, and (2) granting defendant's motion for summary judgment because there was a genuine issue of material fact. We address these arguments in turn.

¶ 29 A. Plaintiff's Affidavit

¶ 30 1. *Standard of Review*

¶ 31 We begin by noting the parties disagree as to the standard of review regarding the trial court's order striking portions of plaintiff's affidavit. Plaintiff contends our review is *de novo*, while defendant asserts we review the court's decision for an abuse of discretion because striking an affidavit is an evidentiary matter and, thus, within the court's discretion.

¶ 32 In the present case, we are reviewing the trial court's ruling on a motion to strike an affidavit made in conjunction with the court's ruling on a motion for summary judgment. See *Lucasey v. Plattner*, 2015 IL App (4th) 140512, ¶ 18, 26 N.E.3d 1046. In an analogous situation, the supreme court held that the award of attorney fees (generally reviewed for an abuse of discretion) in conjunction with a ruling on a motion for judgment on the pleadings should be reviewed by the standard of review appropriate for a grant of judgment on the pleadings—*de novo*. *Employers Insurance v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 160, 708 N.E.2d 1122, 1139 (1999). This court, in addressing the standard of review for a court's ruling on a motion to strike an affidavit made in conjunction with a ruling on a motion for summary judgment made the following observation:

> "Applying a *de novo* standard of review in such situations is logical, as the following hypothetical illustrates. Assume that the trial court had before it this same case, with the same affidavits, but that the defendant had not filed a motion to strike those affidavits. In such a case, the court could have—and should have—engaged in the same analysis as it did here. In other words, the court did not need to have before it a motion to strike in order to find that the affidavits were insufficient under Rule 191(a) [citation]. Under that circumstance, the appropriate standard of review clearly would be *de novo*." *Jackson v. Graham*, 323 Ill. App. 3d 766, 774, 753 N.E.2d 525, 531 (2001)).

Accordingly, we review the trial court's ruling to strike portions of plaintiff's affidavit, made in conjunction with its ruling on defendant's motion for summary judgment, *de novo*.

¶ 33 2. *Plaintiff's Affidavit*

¶ 34 Plaintiff contends the trial court erred by striking paragraphs 8, 13, 14, and 15 from his affidavit in opposition to defendant's motion for summary judgment.

¶ 35 Illinois Supreme Court Rule 191 provides, in part, as follows:

> "Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure *** shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the

> affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013).

In the summary judgment context, affidavits serve as a substitute for trial testimony. *Berke v. Manilow*, 2016 IL App (1st) 150397, ¶ 21, 63 N.E.3d 194. When assessing a motion for summary judgment, the trial court may not consider evidence that would be inadmissible at trial. *Id.* "Affidavits in opposition to motions for summary judgment must consist of facts admissible in evidence as opposed to conclusions and conclusory matters may not be considered in opposition to motions for summary judgment." *Id.* An affidavit will be stricken to the extent that it contains self-serving or conclusory statements and unsupported assertions. *Madden v. Paschen*, 395 Ill. App. 3d 362, 387, 916 N.E.2d 1203, 1223 (2009).

¶ 36 Moreover, "[a] party may not create a genuine issue of material fact by taking contradictory positions, nor may he remove a factual question from consideration just to raise it anew when convenient." *Chmielewski v. Kahlfeldt*, 237 Ill. App. 3d 129, 132, 606 N.E.2d 641, 644 (1992). Thus, admissions made during a deposition that are so deliberate, detailed, and unequivocal will conclusively bind the party-deponent, and he or she may not contradict those admissions at trial. *Id.* at 133. "The judicial policy behind this rule, which is well accepted in summary judgment cases, is that once a party has given sworn testimony he should not be allowed to change his testimony to avoid the consequences of his prior testimony." *Id.*

¶ 37 As an initial matter, we note that, even if the trial court erred by striking the paragraphs from plaintiff's affidavit, the summary judgment ruling would not have changed. Nevertheless, we will address the parties' arguments regarding the stricken paragraphs.

¶ 38 a. Paragraph 8

¶ 39 Paragraph 8 of plaintiff's affidavit addressed a diagram plaintiff made after the date of the fall. Plaintiff further stated he did not notice any mud on the day of the fall, and he simply thought he was stepping into a water puddle. Finally, the affidavit stated plaintiff, after the date of his fall, discovered areas of dirt that had washed down into the parking lot.

¶ 40 Plaintiff's diagram and the conclusions in the affidavit are based on plaintiff's observations made at some unknown date after his fall. There is no evidence to support the implicit assertion that the conditions plaintiff observed on this unknown date were the same as the conditions the day he fell in the parking lot. Moreover, the assertion in the affidavit that plaintiff was simply walking into a water puddle is contradicted by his deposition testimony. During his deposition, when asked about where he looked as he made his way to the emergency department, plaintiff described looking straight ahead, and never looking down. Plaintiff testified he observed the area where he fell with the security guard and stated there were visible marks in the water and mud where he fell at the time the guard took the photographs. At another point in his deposition, plaintiff described the area as containing visible mud, stating, "Yeah, and you could see, you know, where I fell at the time. I mean, there was mud, and there was water puddles with mud over it." Any assertion in the affidavit that the mud was not visible was contradicted by plaintiff's deposition testimony. Accordingly, we conclude the trial court did not err by striking this portion of the affidavit.

¶ 41 b. Paragraph 13

¶ 42 Paragraph 13 of plaintiff's affidavit addressed four photographs he took of the parking lot on October 2, 2014, and on March 12, 2016. Plaintiff stated, "With the exception of the fact that the area was wet on the date of my fall, all of the areas depicted appear to be exactly

the same as they did on the day that I fell." In the written descriptions of the four photographs, plaintiff stated the conditions were just as they had been the day of his fall.

¶ 43 These statements directly contradict plaintiff's deposition testimony that the photographs were not taken on the date of his fall and did not exactly depict the condition of the parking lot on that date. Further, these statements are based purely on conjecture, as the first two photographs were taken 2 years after the fact and the second two photographs were taken almost 3½ years after the fact. There is no evidence to support the assertion that the conditions were the same on the date of the fall. Moreover, the very nature of the condition—mud caused by rainfall—is one that would naturally change over time, perhaps even very quickly if a heavy storm passed. Therefore, it is speculation to assume the conditions years later reflect the conditions on the date of plaintiff's fall. Accordingly, we conclude the trial court did not err by striking paragraph 13 from plaintiff's affidavit. *Lewis v. Rutland Township*, 359 Ill. App. 3d 1076, 1079, 824 N.E.2d 1213, 1216 (2005) ("Unsupported assertions, opinions[,] and conclusory statements do not comply with the rule and may be stricken.").

¶ 44 c. Paragraph 14

¶ 45 Paragraph 14 of the affidavit stated plaintiff had a great deal of experience walking on wet and muddy ground due to his experience as a farmer. Plaintiff further stated, "I did not slip in any manner in the water puddles I walked through on the 'upper' level of Parking Lot M. I also did not slip or accumulate any mud on my shoes when I walked down the grassy area on the embankment between Rows 6 and 7." When he slipped and fell, plaintiff had the same sensation he experienced in the past when he slipped on mud while working on his farming chores. Plaintiff stated, "When I got up after the fall and was covered in mud, the only conclusion I could make is that I slipped on mud which had accumulated on the parking lot

under the water puddle ***. I did not see or feel anything else which could have caused my fall on that date." Finally, paragraph 14 stated the photographs show the mud took a significant amount of time to accumulate and was not due solely to the rain on the day plaintiff fell.

¶ 46 We note the allegations in the affidavit regarding plaintiff's experience with walking on muddy ground and the sensation of slipping on mud he had experienced previously while working on farming chores were consistent with plaintiff's deposition testimony. However, the statement that plaintiff did not accumulate any mud on his shoes is not entirely consistent with his deposition testimony. At the deposition, plaintiff acknowledged it was possible that he accumulated mud on his shoes, but he did not notice any mud on his shoes before he stepped onto the parking lot surface. Moreover, as discussed above, any assertion in the affidavit that the mud was not visible was contradicted by plaintiff's deposition testimony that he accompanied the security guard and observed visible mud in the area on the day of the fall. Finally, the statement that the mud took a "significant amount" of time to accumulate and was not caused solely by the rain on the day of the fall is conclusory and, thus, properly stricken. See *Lewis*, 359 Ill. App. 3d at 1079 (assertion in the affidavit that a depression in a road had been present for "some time" was properly stricken where nothing in the affidavit indicated the witness could competently testify as to the age of the depression and "some time" was meaningless because it "could mean 5 minutes, it could mean 15 years, or it could mean any time at all.").

¶ 47 d. Paragraph 15

¶ 48 We first note that plaintiff has forfeited review of this issue by failing to include any argument regarding this paragraph of his affidavit. Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument,

or on petition for rehearing."). Nonetheless, we conclude the trial court did not err by striking this paragraph from plaintiff's affidavit. Paragraph 15 stated plaintiff's injuries were the result of his fall and he continued to receive treatment for the injuries five years later. Plaintiff further stated his belief that defendant acted negligently, particularly because defendant "originally covered a majority of [plaintiff's] medical expenses for the injuries [he] suffered in the fall without any written agreement, talk of 'settlement,' or [his] having retained an attorney." These statements are legal conclusions, which the trial court properly ruled stricken from the affidavit. See *Madden*, 395 Ill. App. 3d at 388 (affirming trial judge's decision to strike a paragraph containing legal conclusions from the affidavit). Accordingly, we affirm the judgment of the circuit court.

¶ 49 B. Summary Judgment

¶ 50 An appeal following a grant of summary judgment is subject to *de novo* review. *Seymour v. Collins*, 2015 IL 118432, ¶ 42, 39 N.E.3d 961. "Summary judgment should be granted only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to a judgment as a matter of law." *Wells Fargo Bank, N.A. v. Norris*, 2017 IL App (3d) 150764, ¶ 19, 83 N.E.3d 1045. Courts have a duty to construe the record strictly against the moving party and liberally in favor of the nonmoving party. *Seymour*, 2015 IL 118432, ¶ 42. "As a result, summary judgment is not appropriate: (1) if there is a dispute as to a material fact [citation]; (2) if reasonable persons could draw divergent inferences from the undisputed material facts [citation]; or (3) if reasonable persons could differ on the weight to be given the relevant factors of a legal standard [citation]." (Internal quotations marks omitted). *Id.*

¶ 51 "To succeed in an action for negligence, the plaintiff must establish that the defendant owed a duty to the plaintiff, that defendant breached that duty, and that the breach proximately caused injury to the plaintiff." *Choate v. Indiana Harbor Belt R.R. Co.*, 2012 IL 112948, ¶ 22, 980 N.E.2d 58. To determine whether a duty exists, we consider whether the plaintiff and the defendant had such a relationship that the law imposed an obligation on the defendant to conduct itself reasonably for the benefit of the plaintiff. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 14, 21 N.E.3d 684. "Four factors guide our 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.* The weight given to each of these factors depends upon the particular circumstances of each case. *Id.*

¶ 52 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 conditions is open and obvious." *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 44, 796 N.E.2d 1040, 1046 (2003). " '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.' " *Bruns*, 2014 IL 116998, ¶ 16 (quoting Restatement (Second) of Torts § 343A cmt. B, at 219 (1965)). "The open and obvious nature of the condition itself gives caution and therefore the risk of harm is considered slight; people are expected to appreciate and avoid obvious risks." *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 448, 665 N.E.2d 826, 832 (1996). Whether a dangerous condition is open and obvious is a question of law when there is no dispute as to the physical nature of the condition. *Bruns*, 2014 IL 116998, ¶ 18.

¶ 53 "The 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.* However, application of the open and obvious rule affects (1) the reasonable foreseeability of the injury, and (2) the likelihood of the injury. *Id.* Where a condition is open and obvious, the foreseeability and likelihood of injury will be slight, which weighs against imposing a duty. *Id.*

¶ 54 However, Illinois law recognizes two exceptions to the open and obvious rule for situations in which the landowner can and should anticipate the dangerous condition will cause injury to the invitee. *Id.* ¶ 20. First, the "distraction exception" applies where the landowner has reason to expect the invitee's attention may be distracted such that he or she may not discover the obvious condition, or will forget what he or she has discovered and fail to protect themselves from the condition. *Id.* Second, the "deliberate encounter" exception applies where the landowner has reason to expect the invitee will encounter the obvious condition because, to a reasonable person in the same position, the advantages of doing so outweigh the risks. *Id.* "Whereas operation of the open and obvious rule negatively impacts the foreseeability and likelihood of injury, application of an exception to the rule positively impacts the foreseeability and likelihood of injury." *Id.*

¶ 55 Plaintiff contends the uncontested facts show that he walked through several puddles on the "upper" level of the parking lot without incident and could not see the danger lurking beneath the surface of the puddle he walked through on the "lower" level of the parking lot. Plaintiff further argues the mud concealed beneath the surface of this puddle was not an open and obvious condition because it could not be seen.

¶ 56 Plaintiff's argument distorts the evidence contained within both his deposition testimony and in his affidavit, including the evidence and assertions contained within the stricken

portions of his affidavit. The photographs taken by the security guard clearly show a thick, visible layer of mud—not concealed by any puddles—with a heel print in the area where plaintiff fell. For a puddle to cover this layer of mud, it would have to be several inches deep. However, plaintiff testified it had rained earlier in the day, but it was not raining at the time he fell. He also described the puddles in the parking lot as "shallow." A shallow puddle would not have concealed the layer of mud depicted in the photographs taken by the security guard. Moreover, plaintiff's deposition testimony described the area on the day of his fall as containing visible mud with "marks" where he fell. Accordingly, we reject plaintiff's assertion that the uncontested facts show plaintiff "could not see" the mud. Although we acknowledge plaintiff testified he did not *notice* the mud, the facts clearly show the thick layer of mud was visible.

¶ 57 As we mentioned above, we conclude that, even if the trial court erred by striking portions of plaintiff's affidavit, the assertions contained within the stricken portions further strengthen the conclusion that this was an open and obvious hazard. On the one hand, plaintiff insists his photographs, although taken years later, are consistent with the conditions at the time of his fall. If that is the case, then there was visible mud spilling over the curb from the embankment into the parking lot, forming a layer several inches thick. Although we determined this speculation based on conditions several years later was properly stricken from his affidavit above, plaintiff cannot assert it was not speculative for purposes of his affidavit, then refuse to acknowledge the same photographs when arguing the mud was not an open and obvious condition.

¶ 58 Based solely on plaintiff's deposition testimony and the photographs from the day of his fall, we conclude the parking lot's condition was an open and obvious hazard, which plaintiff should have appreciated and taken care to avoid. *Bucheleres*, 171 Ill. 2d at 448

("[P]eople are expected to appreciate and avoid obvious risks."). Plaintiff's testimony that he did not notice the mud is not the same as evidence that the mud was not visible, and the mere assertion after the fact that a puddle concealed the mud is insufficient to raise a dispute as to the condition of the parking lot. The pleadings, depositions, admissions, and affidavits, viewed in the light most favorable to plaintiff, show no genuine issue as to any material fact regarding the condition of the parking lot. *Wells Fargo Bank*, 2017 IL App (3d) 150764, ¶ 19.

¶ 59 Where, as here, a condition is open and obvious, the foreseeability and likelihood of injury will be slight, which weighs against imposing a duty. *Bruns*, 2014 IL 116998, ¶ 18. We now consider the other two factors guiding our duty analysis: the magnitude of the burden of guarding against the injury and the consequences of placing that burden on defendant. *Id.* ¶ 14. The burden of guarding against a potential injury caused by mud and rain would be high, considering defendant could exert no control over the weather. The only control defendant could exert would be over its physical property, either by anticipating and clearing away mud, providing an alternative pathway free of mud, or doing away with all areas containing dirt that may turn into mud in the event of rain. We note there was a sidewalk free of mud through the parking lot and down the embankment, which plaintiff did not use. We further note that conditions creating mud are obviously not within defendant's control and can change unpredictably based on the weather. The magnitude of the burden and the consequences of placing that burden on defendant in this case do not weigh in favor of imposing a duty on defendant to guard against the hazard presented by this open and obvious condition. Accordingly, we conclude the trial court properly determined defendant had no duty to plaintiff and granted defendant's motion for summary judgment.

¶ 60 To the extent that defendant had a duty to exercise ordinary care to maintain its property in a reasonably safe condition, we conclude plaintiff has failed to show that defendant created or was aware of this accumulation of dirt, mud, or rain water. In the absence of such a showing, defendant's duty to exercise ordinary care to maintain its property in a reasonably safe condition did not include a duty to remove the accumulated dirt, mud, or rain water. Accordingly, we affirm the judgment of the trial court granting summary judgment in defendant's favor.

¶ 61 III. CONCLUSION

¶ 62 For the reasons stated, we affirm the trial court's judgment.

¶ 63 Affirmed.