SIXTH DIVISION
October 21, 2016

No. 1-15-2311



IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| WILLIAM DINKLE, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 12 L 3770 |
| | ) | |
| HIGHLAND PARK CVS, LLC, | ) | |
| | ) | |
| | ) | Honorable |
| Defendant-Appellant. | ) | Deborah Mary Dooling, |
| | ) | Judge Presiding. |

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

**ORDER**

¶ 1 *Held*: We affirmed the denial of defendant's motion for JNOV, finding the evidence at trial, viewed in the light most favorable to plaintiff, did not so overwhelmingly favor defendant that no verdict for plaintiff could stand.

¶ 2 Plaintiff, William Dinkle, brought this action against defendant, Highland Park CVS, L.L.C. (CVS), seeking damages for personal injuries he suffered after tripping on a wooden pallet at a CVS store and falling to the floor. The jury returned a verdict for plaintiff. CVS appeals from the denial of its motion for judgment notwithstanding the verdict (JNOV), arguing that it owed plaintiff no duty as the condition that caused his fall was open, and obvious. We affirm.

¶ 3 Plaintiff filed his amended one-count complaint on May 30, 2012, alleging negligence against CVS. Plaintiff alleged that on January 11, 2012, he was a business invitee at a store owned and operated by CVS located in South Barrington, Illinois (the store), and that CVS owed him a legal duty to keep and maintain the aisles in said store in a reasonably safe condition. Plaintiff alleged that, in breach of that duty, CVS negligently placed, or failed to clear or remove an empty pallet from the end of an aisle. While shopping at the store, plaintiff tripped over the pallet, fell to the ground, and was injured.

¶ 4 On June 26, 2012, CVS filed an answer and affirmative defenses asserting, in pertinent part, that it did not owe a duty to plaintiff because the empty pallet on which he fell was open and obvious.

¶ 5 At the jury trial, plaintiff testified he was 82 years old on January 11, 2012, when he and his wife, Mrs. Dinkle, stopped at the store. He had lost vision in his left eye 50 years ago, but he testified that it never caused him problems with bumping into things or falling.

¶ 6 Plaintiff and Mrs. Dinkle entered the store onto aisle one, which runs through the middle of the store, past the cashiers on the left side, and continues to the back of the store. They walked to the back of the aisle and selected a carton of milk. Mrs. Dinkle then asked plaintiff to go to aisle two to retrieve a bag of popcorn.

¶ 7 Plaintiff turned and retraced his steps up aisle one, toward the front of the store. As he rounded the corner of aisle one, plaintiff noticed a gray wooden pallet on the floor that was approximately four feet wide and four inches tall (pallet one). Pallet one encroached about a foot and one-half into aisle one. Paper products, likely toilet paper, were stacked approximately five feet high on pallet one. Plaintiff was about five foot six inches tall, and the paper products stacked on pallet one obstructed his vision.

¶ 8 Plaintiff walked around pallet one on the right, and began to turn left onto aisle two. As he turned left, plaintiff was looking at the merchandise on the shelves to his right in aisle two. Plaintiff's left foot caught on something, and he fell to the floor, injuring himself. Plaintiff looked back and saw that he had fallen on an empty pallet (pallet two) that was next to pallet one. Pallet two had the same gray color and dimensions as pallet one and was encroaching about a foot and a half into aisle two. Plaintiff did not see pallet two before he tripped over it and fell hard to the floor. Plaintiff testified he did not see pallet two prior to his fall because: (1) he was looking at the merchandise on the shelves in aisle two as he was turning the corner; (2) pallet two was empty and, therefore, no merchandise drew his eyes to it; and (3) he was not expecting an empty pallet to be located so close to pallet one.

¶ 9 Plaintiff testified that both pallets were the same gray color as the rug on which they stood. Plaintiff took only two steps from the end of pallet one before tripping over pallet two.

¶ 10 On cross-examination, plaintiff acknowledged that he could have seen pallet two if he had been looking at the floor as he turned the corner into aisle two, but that he does not generally "walk around looking on the ground."

¶ 11 Mrs. Dinkle testified she and plaintiff entered the store and walked down aisle one to the back of the store to get some milk. She then went into aisle two, and picked up a small bag of popcorn. She returned to aisle one, saw a bigger bag of popcorn that she wanted, and asked plaintiff to return the small bag of popcorn to aisle two. Plaintiff proceeded to walk up aisle one to the front of the store so as to turn onto aisle two and return the small bag of popcorn.

¶ 12 Mrs. Dinkle was looking at candy in aisle one when she heard plaintiff scream out, and she rushed over to aisle two and saw him on the ground near pallet two. She did not see plaintiff fall. Mrs. Dinkle stated that there were two pallets near each other: pallet two, the empty pallet

that plaintiff said he had tripped over; and pallet one, which was full of paper products, likely toilet paper. Mrs. Dinkle was four feet, seven inches tall, and the toilet paper stacked on pallet one was higher than her head. Both pallets were painted the same color and blended in with the color of the carpet, which was black/brown or black.

¶ 13 Mrs. Dinkle testified that although she had failed to notice either pallet when she first entered the store, there was nothing obstructing her view of both pallets from the front entrance. After plaintiff fell, the store clerk gave him a compress and called the paramedics.

¶ 14 Paramedic Mark Lutzow testified he and his partner were on duty at the East Dundee Fire Department and received a call about an incident at the store just before 11 am on January 11, 2012. The paramedics arrived shortly thereafter and saw plaintiff sitting on the floor of aisle two, near two side-by-side pallets, one empty and one full of product. Plaintiff told the paramedics he tripped over the empty pallet and fell onto his left side. Mr. Lutzow did not recall the type of product that was stacked on the full pallet.

¶ 15 Mr. Lutzow testified that the empty pallet encroached into aisle two approximately one to one and a half feet, and was made of blue wood. On cross-examination, Mr. Lutzow testified that the empty pallet was plainly visible from the front entrance, and that the placement of the pallets did not interfere with him or his partner providing treatment to plaintiff.

¶ 16 Mr. Lutzow testified that plaintiff initially refused treatment, but he later agreed to go to the hospital. Mr. Lutzow and his partner transported plaintiff to St. Alexius Medical Center a short distance away. At the hospital, Mr. Lutzow completed and submitted an incident report.

¶ 17 Laura Sheeks, a cashier at the store, testified she was assisting a customer when plaintiff fell and she did not witness his fall. She heard a commotion behind her then turned and saw

plaintiff laying face down in aisle two. Ms. Sheeks testified that plaintiff and Mrs. Dinkle had been regular customers at the store since she started working at CVS four years prior.

¶ 18 Ms. Sheeks testified that her duties as a cashier include monitoring the store for unsafe conditions, ensuring that there are no objects blocking the aisles and that all pallets are more than halfway full of merchandise. Any pallet filled halfway or less with merchandise should be removed or restocked, and she explained that there should never be an empty pallet left on the floor as it would pose a danger to customers.

¶ 19 Ms. Sheeks testified that as part of her duties, she would check for empty pallets halfway through her shift. On the day of the incident, Ms. Sheeks' shift began at 7 a.m. and finished at 2 p.m. or 3 p.m., placing the midpoint of her shift at 10:30 a.m. or 11 a.m. Ms. Sheeks admitted that she had not checked the floor for empty pallets on the day plaintiff fell.

¶ 20 Ms. Sheeks testified that she surmised plaintiff tripped over a nearby pallet that was stacked with 24 packs of bottled water. She stated the pallet was approximately three feet by three feet and light wood, natural color. She did not notice whether there was a second, empty pallet adjacent to the pallet that plaintiff tripped over, but stated CVS never places two pallets next to each other on the floor. Ms. Sheeks testified the pallet that caused plaintiff to trip was more than half full and the stack of water bottles was higher than her waist, however, she acknowledged that during her deposition she stated that she could not recall whether the stack of water bottles was higher than her waist.

¶ 21 The shift supervisor at the store, Linda Meyers-Watson, testified she was acting manager at the time of the fall. She did not witness plaintiff fall. She was notified of the incident by Ms. Sheeks via an intercom call, and then walked to the front of the store where she saw plaintiff

sitting up in aisle two. Ms. Meyers-Watson testified that the incident occurred at approximately 11 a.m.

¶ 22 Ms. Meyers-Watson testified that plaintiff initially refused treatment, but she insisted on calling the paramedics given plaintiff's age. Plaintiff was bleeding, and he could not stand up. The paramedics treated plaintiff and transported him from the store to the hospital.

¶ 23 Ms. Meyers-Watson testified that she believed plaintiff tripped on a pallet being used in the aisle one end cap. She explained that end caps are merchandise displays at the end of shelving units, (and between aisles), and can be either rack displays or merchandise stacked on top of pallets. The aisle one end cap, for example, refers to the product display on the first row of shelving units from the right of the store (facing the cash registers). The purpose of an end cap is to stimulate impulse purchases, and they are intentionally designed by CVS upper management to attract customer attention.

¶ 24 Ms. Meyers-Watson disputed that there was a second, empty pallet in the location where plaintiff fell. She testified that the end cap plaintiff tripped over contained 24-packs of bottled water stacked on a pallet. She testified that the pallet was three and one-half or four foot square and four inches off the ground, and she estimated that there were more than seven cases of water stacked on the pallet. Ms. Meyers-Watson did not notice the color of the pallet but testified that typically two colors of pallets are used: black/brown or tan/beige. Ms. Meyers-Watson testified that there was a nearby pallet at the aisle two end cap, and approximately four feet between the shelving units in aisle two. Ms. Meyers-Watson testified that she has never seen two pallets used in a single end cap display.

¶ 25 Ms. Meyers-Watson testified that, as shift supervisor, she must keep the store safe for customers, which includes ensuring no empty pallets are on the floor. CVS store policy, in

compliance with ADA regulations, prohibits more than one pallet per end cap in order to keep a clear path of at least 36 inches or three feet in all aisles at all times. CVS store policies also prohibit empty pallets in aisles, and goods from protruding into aisles. She explained that "all goods in an end cap must be flush with the end cap."

¶ 26 Store Manager Robert Szpila was not at the store when plaintiff fell. Mr. Szpila testified that he arrived at the store at 1 p.m. for the start of his shift and Ms. Meyers-Watson showed him where plaintiff fell: the end cap of an aisle at the first row of shelving in the store. Mr. Szpila testified that plaintiff tripped over a pallet stacked with 20 or 30 cases of bottled water. The carpet where plaintiff fell is blueish-gray. The dark pallet color used by the store blends in with the carpet.

¶ 27 Mr. Szpila testified that he built the aisle-one end cap three days before the incident. The basic rule for end cap displays is there must be a three foot pathway between the shelving units at all times. Mr. Szpila acknowledged that, at times, end-cap displays include more than one pallet, and that it is not against CVS policy to use two pallets in a single end cap, so long as there remains a pathway of at least three feet. Mr. Szpila testified that at the time of the incident there was a 60-inch pathway between end caps, so even an end cap protruding one and one-half feet into the aisle would have allowed plaintiff to comfortably walk down the aisle. Mr. Szpila testified it is an unwritten rule that no empty pallets should ever be left on the floor.

¶ 28 On March 9, 2015, the jury returned a verdict for plaintiff in the amount of $700,000. The jury determined plaintiff was 20% responsible for the incident and reduced the damages award to $560,000.

¶ 29 CVS moved for a judgment notwithstanding the verdict (JNOV), or a new trial or, alternatively, the reduction of the jury award. As to the motion for JNOV, CVS argued that if

there was a second, empty pallet that plaintiff allegedly tripped over, such a condition was open and obvious and CVS owed no duty to protect plaintiff from an obvious condition. CVS relied on witness testimony that the pallet was clearly visible from the front of the store, and plaintiff's testimony that he would have seen the pallet had he had been looking down while walking instead of looking straightforward at the product displays.

¶ 30 The trial court denied CVS' posttrial motions. On appeal, CVS argues that the trial court erred in denying its motion for JNOV. No arguments are made with regard to the denial of CVS' other posttrial motions.

¶ 31 "[V]erdicts ought to be directed and [JNOV] entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). The trial court may not enter a JNOV if the evidence demonstrates a substantial factual dispute, or where the assessment of witness credibility or the determination regarding conflicting evidence is decisive to the outcome. *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992); *Vanderhoof v. Berk*, 2015 IL App (1st) 132927, ¶ 59. A motion for JNOV presents a question of law that we review *de novo*. *Pedrick*, 37 Ill. 2d at 409.

¶ 32 To establish a *prima facie* claim of negligence, the plaintiff must prove the defendant owed a legal duty to the plaintiff, which the defendant breached, and the breach actually and proximately caused injury to the plaintiff. *Choate v. Indiana Harbor Belt R.R. Co.*, 2012 IL 112948, ¶ 22. CVS argues that the trial court should have granted its motion for JNOV because the empty pallet on which plaintiff allegedly fell (pallet two) was an open and obvious condition for which CVS did not owe him a duty to protect against.

¶ 33 Courts must consider whether the relationship between plaintiff and defendant is such that the law obligates defendant to conduct itself reasonably for the plaintiff's benefit. See *Krywin v. Chicago Transit Aut*hority, 238 Ill. 2d 215, 226 (2010). Whether a legal duty exists depends on "whether defendant and plaintiff stood in such a relationship to one another that the law imposed upon defendant an obligation of reasonable conduct for the benefit of plaintiff." *Ward v. K Mart Corp*., 136 Ill. 2d 132, 140 (1990); see also *Simpkins v. CSX Transportation, Inc*., 2012 IL 110662, ¶ 18.

¶ 34 Four factors guide the duty analysis: the reasonable foreseeability of the injury, the likelihood of the injury, the magnitude of the burden on defendant to guard against the injury, and the consequences of placing the burden on defendant. See *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 14; and *Ward*, 136 Ill. 2d at 140-41. The weight attributed to each of the four factors depends on the specific facts at issue. *Bruns*, 2014 IL 116998, ¶ 14.

¶ 35 The open and obvious doctrine pertains to the elements of duty in a negligence action. *Atchley v. University of Chicago Medical Center*, 2016 IL App (1st) 152481, ¶ 32. Pursuant to that doctrine, a landowner is not required to foresee or protect against injury where the potentially dangerous condition is open and obvious. *Id*. ¶ 33. However, an open and obvious condition does not automatically eliminate a legal duty on defendant's part. *Id*. "Instead, the existence of an open and obvious dangerous condition affects the first two factors relevant to assessing duty: the reasonable foreseeability and likelihood of the injury." *Id*. Specifically, the open and obvious condition renders the impact of those first two factors slight, weighing against a determination that defendant owed plaintiff a duty. *Id*. Even where a condition is open and obvious, courts still must consider all four factors relevant to duty. *Id*.

¶ 36 Whether a condition is open and obvious depends on whether a reasonable person in the invitee's position, while exercising ordinary intelligence, perception, and judgment would recognize the riskiness of the condition and take steps to avoid it. See *Bruns*, 2014 IL 116998, ¶16.

¶ 37 CVS claims pallet two, the condition allegedly causing plaintiff's fall, was open and obvious as a matter of law, such that CVS owed him no duty and was entitled to JNOV.

¶ 38 "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. But, where there is a dispute about the condition's physical nature, such as its visibility, the question of whether a condition is open and obvious is factual. Where a court cannot conclude as a matter of law that a condition poses an open and obvious danger[,] the obviousness of the danger is for the jury to determine." (Internal citations and quotation marks omitted). *Alqadhi v. Standard Parking, Inc*., 405 Ill. App. 3d 14, 17 (2010).

¶ 39 In the present case, the parties disputed how plaintiff fell. Specifically, plaintiff testified that as he rounded aisle one to turn left onto aisle two, his left foot caught on pallet two, which was an empty pallet that was next to a pallet that was stacked high with toilet paper, and that he fell hard to the floor. However, Ms. Sheeks and Ms. Meyers-Watson testified that plaintiff tripped and fell over a pallet stacked with bottled waters, and that there was no empty pallet next to it.

¶ 40 Even assuming plaintiff tripped over pallet two, CVS disputed plaintiff's testimony that it was not visible to him when he tripped and fell to the floor. Plaintiff testified that as he walked to the front of aisle one and began to turn left, his line of sight was obscured by pallet one which was piled high with toilet paper. Plaintiff took two steps past pallet one, then tripped and fell

over pallet two, which he had not seen prior to his fall. Plaintiff testified he did not see pallet two as he moved past pallet one because he was looking at the merchandise on aisle two, pallet two was empty and therefore no merchandise drew his eyes down to it, and he was not expecting an empty pallet to be located so close to pallet one. However, CVS argued at trial that pallet two was open and obvious because of its four foot by four foot area and because plaintiff testified that he would have seen it had he been looking down at the floor at the time of his fall. CVS also noted the paramedic's testimony that pallet two was plainly visible, and Mrs. Dinkle's testimony that nothing obstructed the view of pallet two from the front entrance.

¶ 41 This dispute regarding the existence and/or visibility of pallet two raised questions of fact to be decided by the jury. *Buchaklian v. Lake County Family Young Men's Christian Ass'n*, 314 Ill. App. 3d 195 (2000), is informative. In *Buchaklian*, the plaintiff there filed a negligence action against a YMCA after tripping over the YMCA's dark uneven mat that was standing one or two inches higher than the other portions of the mat. *Id*. at 198. The plaintiff did not observe the mat in this condition until after falling because, as she stated in her deposition, she was not looking down at the mat at the time of her fall. *Id.* The plaintiff admitted that had she been looking down at the mat, she would have noticed its dangerous condition and not fallen over it. *Id*. The trial court granted summary judgment in favor of the YMCA, finding that the mat was an open and obvious danger for which the YMCA owed the plaintiff no duty of care as a matter of law. *Id*. at 199. The appellate court reversed and remanded, holding that a question of fact existed regarding whether the raised condition of the mat was open and obvious, where there was evidence supporting a reasonable inference that the defect in the mat was difficult to discover because of its size, the lack of significant color contrast between the defect and the surrounding mat, and because the plaintiff had a short time to discover the defect as she only took a few steps

before falling on the mat. *Id*. at 202. The appellate court further held: "We refuse to hold that invitees, as a matter of law, are required to look constantly downward." *Id*.

¶ 42 Although the present case involves the denial of a motion for JNOV as opposed to the grant of a summary judgment motion, we may look to *Buchaklian* for guidance regarding whether the evidence here was sufficient to raise a question of fact for the jury. In this case, plaintiff testified that pallet two was to his left as he turned left out of aisle one, but his view was blocked by the paper products on pallet one; he was not expecting pallet two to be adjacent to pallet one; and plaintiff took only two steps from pallet one before tripping over pallet two. Pallet two was four inches high and painted a dark color that blended in with the color of the carpet. Similar to *Buchaklian*, plaintiff's testimony presented a question of fact regarding whether the condition causing his fall was open and obvious.

¶ 43 The trial court correctly determined that the evidence at trial demonstrated a substantial factual dispute regarding the open and obvious nature of the condition causing plaintiff's fall, and that an assessment of plaintiff's credibility and the determination regarding conflicting evidence was decisive to the outcome. Given this substantial factual dispute, we cannot say this is a case in which all of the evidence, when viewed in its aspect most favorable to plaintiff, so overwhelmingly favors CVS that no verdict for plaintiff could ever stand. Accordingly, the trial court did not err in denying CVS' motion for JNOV.

¶ 44 For the foregoing reasons, we affirm the circuit court. Plaintiff's motion for sanctions against CVS for filing a frivolous appeal is denied.

¶ 45 Affirmed.