2018 IL App (1st) 163209-U

No. 1-16-3209

Order filed September 28, 2018

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

NICOLE JACKSON, as Independent Administrator of the Estate of Kristian Jackson Reese,	)	
	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 13 L 7629
	)	
THOMAS KRYGSHELD and THERESA WILLIAMS,	)	Honorable
	)	James N. O'Hara,
Defendants	)	Judge, presiding.
	)	
(Thomas Krygsheld, Defendant-Appellee.)	)	

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

O R D E R

¶ 1 *HELD*: We reverse the entry of summary judgment where genuine issues of material fact exist regarding whether the hidden deep end of defendant's pool was open and obvious and whether he owed the decedent a duty to warn against the dangerous condition.

¶ 2 Nine-year-old Kristian Jackson Reese drowned in an above-ground swimming pool owned by defendant, Thomas Krygsheld. Kristian's mother, Nicole Jackson, acting as the independent administrator of Kristian's estate, filed a negligence claim against defendant. The trial court granted summary judgment in favor of defendant and denied plaintiff's motion to reconsider that order, finding the swimming pool posed an open and obvious danger and defendant did not owe Kristian a duty of care under the circumstances. On appeal, plaintiff contends the subject swimming pool was not an open and obvious danger due to an undisclosed, hidden deep-end. Plaintiff additionally contends that, even if the pool posed an open and obvious danger, defendant owed Kristian a duty of reasonable care. Based on the following, we reverse and remand.

¶ 3 FACTS

¶ 4 On June 28, 2012, Kristian was visiting his grandmother, Theresa Williams. Theresa lived next door to defendant. Kristian and Dejia Williams, who was Kristian's 11-year-old aunt, were playing in Theresa's backyard when they observed approximately nine children and three adults in and around defendant's backyard above-ground pool. The neighboring properties were separated by a metal chain link fence.[1] The record reveals that defendant had a policy of allowing neighbors to use his pool at any time without express permission, including when he was not home, so long as the children were accompanied and supervised by a parent or adult family member. Many neighbors taught their children how to swim in defendant's pool.

[1]Theresa believed that she owned the fence. Photographs from the record additionally show a partial wooden fence running along a portion of defendant's driveway that neighbored Theresa's property. The partial wooden fence seemingly stopped at defendant's garage. The partial wooden fence did not obstruct the view of defendant's pool from Theresa's backyard.

¶ 5 Defendant installed his pool in 1987. The pool was an oval-shaped, above-ground pool located in defendant's backyard. It was approximately 18 by 32 feet in size. The pool contained an approximately four and a half feet shallow end and, due to an expandable liner, an approximately six and a half feet deep end. In order to create the deep end, the ground had been dug out below the pool. There was nothing separating the shallow end from the deep end. There were no signs identifying the varying depths of the pool. The pool did not have a diving board or a slide. A wooden deck was attached to the shallow end of the pool with a ladder extending from the deck into the pool. The deep end of the pool contained "a ledge" that allowed a swimmer "to stand so it's shallow." Two warning stickers were posted on the sides of the pool. One stated "No Diving" and "Shallow Water" with a picture of a diver hitting his head on the bottom of a pool. The other sign stated "Prevent Drowning" and "Watch Children At All Times" with a picture of an "adult" watching a swimmer in a pool.[2]

¶ 6 There was no fence surrounding the pool nor was there a fence surrounding defendant's entire property. The property was fenced only on three sides—separating the rear alley and separating the adjacent neighbors' properties on either side. The rear alley fence had a gate with a handle that provided access from defendant's backyard only. The gate could not be opened from the alley. Defendant also installed a locked gate on the western edge of his property, which was the opposite side from Theresa's property, to separate his front yard and his backyard. Defendant's backyard and his pool, which was situated behind his garage, were openly accessible via his driveway and a walkway along the garage adjacent to Theresa's property.

[2] It seems from the testimony that the two warning stickers were placed in two different locations on the pool.

¶ 7 Jason Poortenga, a neighbor from across the alley, used the pool with his family, including his 12-year-old daughter, Emily. On a number of occasions, Jason also hosted parties for his girls' softball team in defendant's pool. On the date in question, Jason and two or three other adults were using the pool with his softball team starting around 4 p.m. Dejia recognized Emily and some of the other girls in the pool. Dejia asked Jason if she could swim in defendant's pool. Jason responded that she was required to have her own adult supervision to swim.

¶ 8 When defendant arrived home from work early that evening, he entered his backyard and observed Jason and members of Jason's girls' softball team in his pool. At the time, Dejia was in her backyard with Kristian and her friend, Jacqulynn Vails. Dejia, who was wearing a bathing suit, asked defendant if she, Kristian, and Jacqulynn could use his pool. Defendant reminded Dejia that she could use the pool if her mother approved and if an adult family member supervised her. Dejia asked if Jason could supervise the group. Defendant replied in the negative, stating that the adults already at the pool were not responsible for Dejia. Dejia then inquired if her babysitter could be the supervisor, but the babysitter refused. Dejia finally asked if a 16-year-old that was not present could be the supervisor and defendant stated that the group required an adult supervisor over the age of 21. After the conversation with Dejia, defendant told Jason that he was going into his house. Defendant also told Jason that he denied Dejia's request to use his pool until an adult member of her family was available to supervise her group.

¶ 9 Dejia then called her mom, who was not at home at the time, to ask permission to use defendant's pool. Theresa said the group could not swim. When Theresa arrived back home around 5 p.m., Dejia again asked if the group could swim in defendant's pool. Theresa inquired whether there were adults in the pool and Dejia responded that there were three adults at the

pool. According to Theresa, defendant never advised her of his rule that an adult family member was required to supervise his or her children in defendant's pool. Theresa, however, stated that she did not allow her children to swim without adult supervision. Theresa instructed Dejia and the others to put on their swim clothes and advised them that she would be outside shortly. The group of three complied and went outside in their swimsuits. Theresa proceeded to her bedroom to change. She could view a portion of defendant's pool from her bedroom window. Theresa observed three adults in the pool. She did not see Dejia, Kristian, or Jacqulynn. As she was about to walk out of the house, Theresa received a phone call and was delayed.

¶ 10 While Theresa was inside her house, Dejia, Kristian, and Jacqulynn entered defendant's backyard. According to Dejia, the group gained access by walking from Theresa's backyard, around her chain link fence, and into defendant's backyard. They did not climb or jump the fence. Shortly after they arrived at defendant's pool, the three adults and two children that remained from Jason's pool party left the area. Dejia, Kristian, and Jacqulynn were the only remaining people in defendant's pool. Dejia informed the other two that they needed to leave the pool. Kristian and Jacqulynn, however, responded that they wanted "one more swim." Dejia remained seated on the wood deck at the shallow end of the pool while Kristian and Jacqulynn swam. Theresa testified at her deposition that Dejia did not know how to swim, but qualified Kristian as a swimmer after having observed him diving and flipping in a pool one week prior to the accident. According to Lansing Police Officer Todd Yonker's deposition testimony and the police reports,[3] it was reported that Jacqulynn proceeded into the deep end and was having

[3] Both the deposition and the police reports were attached to plaintiff's reply in support of her motion to reconsider. Defendant did not move to strike and did not object to this deposition or the police reports; therefore, any hearsay objection to the evidence has been waived and it may be "considered and

difficulty returning to the shallow end of the pool, so Kristian assisted Jacqulynn to safety. Dejia did not observe Kristian assisting Jacqulynn. Kristian, however, remained in the deep end of the pool. Dejia then observed Kristian under water and not moving. Dejia and Jacqulynn attempted to reach Kristian, but they were unsuccessful. The girls ran to get help from Theresa and defendant. Defendant arrived and jumped in the pool to retrieve Kristian. Defendant stated that he retrieved Kristian from the bottom of the deep end of the pool. Kristian was unresponsive and subsequent attempts to revive him by both defendant and Theresa were unsuccessful.

¶ 11 Defendant testified at his deposition that he applied for a permit with the Village of Lansing prior to installing the pool in question. The village performed an inspection and provided a certification of completion. According to defendant, approximately four or five years prior, a neighborhood girl entered his pool without adult supervision. When defendant learned of the incident, the offending girl was barred from using his pool for three to four weeks. Defendant recalled Dejia asking to swim in his pool on two prior occasions, but her father denied her permission both times. Defendant did not know Kristian. According to defendant, neither Kristian nor Dejia had ever been in his pool. Defendant stated that he never directly spoke to Kristian nor informed him that an adult family member was required to supervise him if he wished to swim in defendant's pool.

¶ 12 Dejia testified at her deposition that she lived with Theresa and her two younger foster brothers. At the time of the accident, Kristian had been staying at her house for approximately one week. Dejia said she had been over to defendant's pool one time approximately one or two

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given its natural and probative effect." *Rodriguez v. Frankie's Beef/Pasta & Catering*, 2012 IL App (1st) 113115, ¶ 14 (failure to object to admission of police reports on summary judgment).

years prior to the accident. During that initial visit, Dejia only sat on the deck and put her feet in the water. She did not swim.

¶ 13 Jason testified at his deposition that, on one unrelated occasion in the past, a neighborhood girl entered defendant's pool without supervision while Jason's wife was swimming with his daughter and another individual. Jason's wife instructed the girl to exit the pool and reported the incident to defendant.

¶ 14 Jason's wife, Jennifer, testified at her deposition that she began using defendant's pool in 2004 with Jason and Emily. Emily was four years old at the time. Jennifer confirmed defendant's rule that children in his pool required adult supervision the entire time they swam. According to Jennifer, defendant would sometimes socialize with people in his pool, but he never stood in his backyard to supervise the pool. Jennifer stated that Jason could reach over defendant's rear alley fence to grab the handle on the gate and gain access to defendant's backyard. She added that she and Emily had been able to reach the handle as well by stepping on a piece of wood and reaching over the gate. Defendant was aware the Poortengas were doing so. Jennifer testified that there had been numerous softball pool parties at defendant's pool throughout the years. On the date in question, Jennifer originally was not at defendant's pool. Jennifer only stepped in to supervise when Jason had to leave. She gathered the remaining two girls from the pool and proceeded to her house across the alley to have popsicles with the team. Jennifer never observed Kristian, Dejia, or Jacqulynn in defendant's backyard. Jennifer did observe Kristian in Theresa's backyard. Jennifer did not know him and was not familiar with Theresa.

¶ 15 Emily testified at her deposition that she had used defendant's pool before the date in question. Emily said she was one of nine girls on her softball team that swam in defendant's pool

on that day. She recalled seeing three pool noodles in the pool, but no other flotation devices. Before that day, Emily had never met Kristian, but had met Dejia. Dejia had played on Emily's swing set at her house on a "couple" of occasions. Emily stated that she obtained access to defendant's backyard by stepping on something on the rear alley fence to reach over the gate and unlock it. According to Emily, defendant permitted her to unlock the gate from the alley, but she had never observed another child do so. On the date in question, Emily recalled hearing Kristian ask defendant, Jason, and other softball players if he could swim. Defendant responded that Kristian needed an adult family member to supervise him while he swam. According to Emily, she and her teammates left the pool to eat popsicles at her house across the alley. Approximately five minutes later, Emily and a few softball players returned to defendant's pool. At that time, Kristian, Dejia, and Jacqulynn were in their bathing suits in Theresa's backyard. Kristian continued asking to swim in the pool. The softball players quickly began to leave because their parents had arrived to pick them up, leaving only Emily and one other softball player. Emily testified that Jennifer was in the alley talking to other parents, and Emily and the final remaining softball player got out of the pool. While she was standing on the wood deck, Kristian, Dejia, and Jacqulynn entered defendant's backyard by jumping over the fence. The group announced that their grandma was going to supervise them. Emily and the softball player left defendant's backyard and heard splashing while they were in the alley. The softball player was picked up by her mom and Emily returned home.

¶ 16 On July 3, 2013, plaintiff filed, *inter alia*, a negligence claim against defendant[4] on behalf of Kristian's estate. In the complaint, plaintiff alleged, in relevant part, that defendant's

[4]Plaintiff's complaint additionally named Theresa as a defendant. Theresa is not a party to this appeal.

pool contained "very deep areas, several feet higher than any of the minors, including the minor Decedent" and there were no "visual warnings identifying the deeper areas of the pool." Plaintiff further alleged that Kristian successfully assisted Jacqulynn to the safety of the shallow end of the pool after she had slid to the deep end and was having trouble returning to the shallower area; however, he became submerged in the water and drowned. Plaintiff alleged defendant was negligent for, *inter alia*, failing to supervise Kristian in the pool, failing to provide other adult supervision, failing to inquire into Kristian's swimming ability, failing to install a rope or cord to visually distinguish the shallow and deep ends of the pool, and failing to warn Kristian of "the hidden deeper area of the pool and the slippery nature of the pool floor when he knew that [Kristian] would not have expected or appreciated the danger given his age and relative immaturity."

¶ 17 In defendant's answer to plaintiff's complaint, he provided that he "lacked sufficient information to form a belief as to the truth or falsity of the allegations" regarding Kristian assisting Jacqulynn from the deep end to the shallow end and becoming submerged under the water and dying as a result. Defendant additionally denied that he negligently failed to, *inter alia*, "install or place a rope or cord that would have visually distinguished the shallower and deeper areas of the pool" and "to warn [Kristian] of the hidden deeper area of the pool and the slippery nature of the pool floor when he knew that [Kristian] would not have expected or appreciated the danger given his age and relative immaturity."

¶ 18 Defendant subsequently filed a motion for summary judgment, arguing that he did not owe Kristian a duty to protect against injuries where his swimming pool was an open and obvious condition that necessarily precluded a negligence claim. Defendant added he did not

owe a duty to warn or protect against obvious harm where Kristian understood the risk of drowning in his pool and was aware of defendant's rule that swimmers were required to be supervised by an adult family member. Defendant further argued that there was no evidence that the pool was a dangerous condition, that the change in depth was hidden, or that the condition of the pool was the proximate cause of Kristian's drowning. To his summary judgment motion, defendant attached the following: (1) plaintiff's complaint; (2) defendant's answer; (3) deposition transcripts of Dejia, defendant, Jason, Jennifer, Emily, and Theresa; and (4) photographs of his property.

¶ 19 In response to defendant's motion for summary judgment, plaintiff argued that the pool was not an open and obvious danger. More specifically, plaintiff argued there were approximately nine children of Kristian's similar age in the pool with adult supervision, thereby demonstrating the pool was not an open and obvious danger to Kristian. Additionally, plaintiff argued that defendant owed Kristian a duty of care where it was foreseeable that Kristian would enter the pool unsupervised after defendant learned of Kristian's desire to use the pool and defendant knew there was no adult family member present to supervise the group. Plaintiff further argued defendant's insistence that he did not maintain a supervisory role did not absolve him of responsibility in light of his policy of allowing the neighborhood to use his pool without requiring express permission. Plaintiff argued in the alternative that, if the pool was an open and obvious danger, the deliberate encounter exception precluded the entry of summary judgment where the benefit of swimming in the pool outweighed any risks, especially where Kristian was aware of some form of adult supervision because Jason was supervising other children and defendant was on the property. Plaintiff further argued defendant's property violated the

village's code requiring that it be completely enclosed or fenced in.[5] In support, plaintiff attached the deposition testimony of T.J. Grossi, the village building commissioner.

¶ 20 In his reply to plaintiff's response to the summary judgment motion, defendant maintained that the pool was an open and obvious danger where the risk of drowning is a recognized open and obvious danger, and where Kristian could see the water, yet entered the pool voluntarily. Defendant additionally argued Kristian's conduct of entering and remaining in the pool without supervision was not foreseeable especially where Dejia was clearly instructed that the children were not permitted to do so without an adult family member. Defendant added that, in contrast to the facts of *T.T. by B.T. v. Kim*, 278 Ill. App. 3d 11 (1996), "plaintiff has failed to show how the risk of drowning in this case was somehow hidden or concealed."

¶ 21 On June 28, 2016, the trial court entered an order granting defendant's motion for summary judgment. In so doing, the trial court found defendant's pool was an open and obvious condition as a matter of law and "the danger posed by the pool is what caused the minor's death." The court acknowledged the exception to the open and obvious doctrine "where there exists some latent danger unappreciable to those encountering the body of water." After citing *T.T. by B.T.*, *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418 (1998), and *Ward v. Mid-American Energy Co.*, 313 Ill. App. 3d 258 (2000), the court found that, in this case, there existed no dangerous condition other than the pool itself. The court rejected plaintiff's argument regarding the deliberate encounter exception, finding it "logically flawed, entirely untenable, and *** contrary to the [applicable] body of law" to accept plaintiff's position that swimming on a hot

[5] On appeal, plaintiff has abandoned her arguments regarding the deliberate encounter exception and the imposition of a duty due to the village pool ordinance. As a result, we need not include the parties' arguments in their pleadings related thereto.

summer day outweighed the risk of drowning. The trial court additionally found the village ordinance was inadmissible to establish negligence where there was no evidence the ordinance had been violated under the facts presented.

¶ 22 Plaintiff filed a motion to reconsider the trial court's summary judgment ruling, arguing the court failed to consider defendant's violation of the village ordinance requiring fencing around the property or pool. Plaintiff additionally argued that, after finding the pool was an open and obvious condition, the trial court failed to conduct a foreseeability analysis using the traditional duty factors. Plaintiff cited *Jackson* in support of her argument that, even if there is an open and obvious risk, a trial court is still required to perform a traditional duty analysis because a duty to warn still may be imposed. Plaintiff posited "[Kristian] drowned while in the act of trying to save a young girl from drowning herself. While a swimming pool does generally present a risk of drowning, the specific risk of drowning while trying to save another's life is not an expected risk."

¶ 23 In response, defendant argued that plaintiff's motion to reconsider raised the same arguments as those presented in plaintiff's response to the motion for summary judgment. Defendant additionally argued that there was no evidence in the record to support plaintiff's allegation that Kristian was trying to save Jacqulynn's life when he drowned. Defendant insisted the allegation was improper and should not be considered. Defendant acknowledged *Jackson* and distinguished it as involving a latent danger unappreciable to those encountering the body of water there. Defendant stated "[t]here is no such hidden or latent danger involved in this case. The pool in question presented an open and obvious risk of drowning." Defendant, therefore, argued the *Jackson* traditional duty analysis did not apply to the facts before the court. Defendant

further argued that the trial court did consider the foreseeability of harm when it considered plaintiff's deliberate encounter exception argument.

¶ 24 Plaintiff filed a reply in support of her motion to reconsider. Plaintiff argued that there was evidence establishing Kristian was saving Jacqulynn when he drowned. Plaintiff cited the deposition testimony of Lansing Police Officer Todd Yonker for support, which she attached to the response.

¶ 25 In his deposition, Officer Yonker testified that he was called to defendant's pool in relation to a drowning. When he arrived on the scene, he was told "one of the girls went too far, too deep, into the pool and was struggling to get out. [Kristian] saved her, and he ended up drowning." Officer Yonker read from his police report, which also was attached to plaintiff's reply in support of her motion to reconsider and which indicated that he spoke to Dejia, Jacqulynn, and defendant. Pursuant to the report, Dejia stated that Kristian swam under the water toward the deep end of the pool and, after several minutes of not surfacing, she and Jacqulynn ran to get help. As recorded in the police report, Jacqulynn stated that she accidentally went too far into the deep end of the pool and struggled to return to the shallow end. Kristian helped Jacqulynn to safety in the shallow end, but then became submerged under the water. Pursuant to Officer Yonker's police report, defendant confirmed that he found Kristian submerged in the deep end of the pool. Officer Yonker further testified that defendant repeatedly said the kids had used his pool many times in the past, but were not allowed to swim without supervision from an adult family member. A second police report authored by Lansing Police Officer Walter Weeden provided that Dejia stated "[Jacqulynn] accidentally swam into the deep end and she went under.

[Kristian] tried to help her and went into the deep end. She was able to swim out to safety but [Kristian] could not."

¶ 26 The trial court denied the motion. In its November 10, 2016, written order, the trial court explained that plaintiff's motion was improper where the arguments contained therein were either previously made or previously available. The trial court found there was no evidence demonstrating the village ordinance was applicable to the case and it was not foreseeable for defendant to expect that an invitee would proceed to encounter a known and obvious danger. In a separate order, the trial court entered language consistent with Supreme Court Rule 304(a) (eff. Feb. 26, 2010), such that there was no just reason to delay enforcement or appeal of the orders.

¶ 27 This appeal followed.

¶ 28 ANALYSIS

¶ 29 Plaintiff contends the trial court erred in granting summary judgment where there were genuine issues of material fact regarding whether defendant's pool posed an open and obvious danger and whether defendant had a duty to warn foreseeable users of the pool.

¶ 30 Summary judgment is a drastic means of disposing of litigation that is appropriate only where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). The purpose of summary judgment is not to try an issue of fact but, rather, to determine whether a triable issue of fact exists. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). We review the granting of summary judgment *de novo*, meaning we perform the same analysis that the trial court performed. *Bowman v. Chicago Park District*, 2014 IL App (1st) 132122, ¶ 45.

¶ 31 To establish a negligence action, the plaintiff must plead and prove the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately resulting from the breach. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. Whether a duty exists is a question of law for the court to determine. *Id.*, ¶ 13. In a duty analysis, our courts are asked whether the plaintiff and the defendant stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff. *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 18. There are four factors to consider in determining whether the relationship established a duty: (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 to be given the four factors depends on the circumstances of the case. *Id*.

¶ 32 Generally, the duty to keep a child safe lies with his or her parents rather than the owners of the property on which the child is injured. *Mt. Zion State Bank & Trust v. Consolidated Communications, Inc.*, 169 Ill. 2d 110, 116 (1995). A parent's failure to supervise his or her child is not foreseeable, and the law does not require a landowner to anticipate negligence on the parent's part and guard against it. *Englund v. Englund*, 246 Ill. App. 3d 468, 476 (1993). That said, a duty may be imposed upon a landowner to exercise due care to remedy a dangerous condition on the land or to otherwise protect children from injury resulting from it where: (1) the landowner knew or should have known that young children habitually frequent the property; (2) a dangerous condition was present on the property; (3) the dangerous condition was one that was likely to cause injury to children because of their inability to appreciate the risk involved; and (4) the burden of remedying the condition was slight compared to the risk to children.

Mt. Zion State Bank & Trust, 169 Ill. 2d at 116-17; see *Kahn v. James Burton Co.*, 5 Ill. 2d 614, 625 (1955); see also Restatement (Second) of Torts § 339, at 197 (1965) (liability to trespassing children for artificial conditions on the land). Consistent with the Restatement, it is the reasonable foreseeability of harm that determines liability in negligence actions involving injury to children. *Id*. at 117.

¶ 33 The "open and obvious" doctrine, however, provides that " 'a party who owns or controls land is not required to foresee and protect against an injury if the potentially dangerous condition is open and obvious.' " *Bruns*, 2014 IL 116998, ¶ 16 (quoting *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 44 (2003)). Section 343A of the Restatement (Second) of Torts, which has been adopted by our supreme court, provides that 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." Restatement (Second) of Torts § 343A, at 218 (1965); see *Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430, 434-36 (1990) (adopting sections 343 and 343A of the Restatement (Second) of Torts). "Obvious" means "both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of a visitor, exercising ordinary perception, intelligence, and judgment." Restatement (Second) of Torts § 343A cmt. b., at 219 (1965). The law assumes that individuals will recognize the danger and take care to avoid the risk. *Suchy v. City of Geneva*, 2014 IL App (2d) 130367, ¶ 22.

¶ 34 Open and obvious dangers include fire, height, and bodies of water. *Mt. Zion State Bank & Trust*, 169 Ill. 2d at 118. Swimming pools have been held to be open and obvious dangers as a matter of law. See *Englund*, 246 Ill. App. 3d at 477. "In addition, the water's danger is considered to be apparent not only to experienced swimmers [citation], but even to very young

children [citation].” *Jackson.,* 185 Ill. 2d at 426. Cases that have addressed the open and obvious danger of water have been premised on the notion that bodies of water pose two types of risk: the risk of drowning and the risk of injury from diving into shallow water. *Id*. In order for the open and obvious doctrine to apply, the condition, by its very nature, must carry its own warning of potential harm. *Suchy*, 2014 IL App (2d) 130367, ¶ 23. Whether a condition is open and obvious depends on the objective knowledge of a reasonable person confronted with the same condition, not on a person’s subjective knowledge. *Duffy v. Togher*, 382 Ill. App. 3d 1, 12 (2008). The question of whether a dangerous condition is open and obvious could present a question of fact. *Bruns*, 2014 IL 116998, ¶ 18. However, where there is no dispute regarding the physical nature of the condition at issue, determining whether a danger is open and obvious is a question of law. *Choate*, 2012 IL 112948, ¶ 34.

¶ 35 Plaintiff argues there were genuine issues of material fact regarding whether defendant’s pool was an open and obvious danger. More specifically, plaintiff argues Kristian drowned as a result of the latent danger created by defendant’s dug out, underground deep end that was not obvious in appearance when viewing the above-ground pool. Plaintiff adds that Kristian became submerged in the deep end of defendant’s pool after assisting Jacqulynn from the deep end. Defendant responds that plaintiff forfeited review of her hidden-danger argument as it was not raised in the trial court. Defendant argues that, in summary judgment proceedings, a plaintiff cannot rely on the mere allegations of the complaint. According to defendant, plaintiff failed to present evidence providing that the depth of the pool was what caused Kristian to drown. Defendant insists there was no admissible evidence that Kristian was attempting to save Jacqulynn when he drowned. Instead, defendant maintains Kristian drowned due to the water in

the pool, which was open and obvious. In response, plaintiff argues that defendant failed to satisfy his initial burden of production as the movant on his summary judgment motion. In the alternative, plaintiff argues forfeiture should be relaxed and we should review her argument.

¶ 36 Generally, a party that fails to raise an issue in the trial court forfeits the issue and may not raise it for the first time on appeal. *Johnson v. Fuller Family Holdings, LLC*, 2017 IL App (1st) 162130, ¶ 27. Plaintiff's complaint, however, claimed defendant failed to warn Kristian of "the hidden deeper area of the pool and the slippery nature of the pool floor when he knew that [Kristian] would not have expected or appreciated the danger given his age and relative immaturity." Moreover, although not expressly challenged in her response to defendant's motion for summary judgment, review of the pleadings demonstrates that the parties contested whether the risk of drowning in this case was hidden or concealed, or latent, due to the condition of defendant's pool. In fact, the trial court's June 28, 2016, order granting summary judgment in favor of defendant acknowledged the exception to the open and obvious doctrine "where there exists some latent danger unappreciable to those encountering the body of water," but distinguished those cases involving latent conditions, *i.e.*, *T.T. by B.T.*, *Jackson*, and *Ward*. The court found that, in this case, there existed no dangerous condition other than the pool itself. As a result, we find forfeiture does not apply.

¶ 37 The question that remains, however, is whether defendant satisfied his burdens under the summary judgment motion. Defendant, as the movant in his summary judgment motion, was required to meet the burden of proof and the initial burden of production. *Medow v. Flavin*, 336 Ill. App. 3d 20, 28 (2002). To meet the initial burden of production, defendant could have either: (1) affirmatively shown that some element of the cause of action must be resolved in his favor;

or (2) demonstrated that plaintiff cannot produce evidence necessary to support her cause of action. *Id*. In order to meet his burden, defendant was required to produce evidence that would clearly entitle him to judgment as a matter of law. *Id.* As established below, based on our review of the pleadings, depositions, and photographs of defendant's property, we conclude that defendant was not clearly entitled to judgment as a matter of law.

¶ 38 Plaintiff primarily relies on *Jackson* and *Duffy* to support her argument that genuine issues of material fact prevented the entry of summary judgment because the danger of defendant's pool was not open and obvious as a matter of law.

¶ 39 In *Jackson*, a swimmer dove into a man-made lake, hit his head, suffered injuries, and died. *Jackson*, 185 Ill. 2d at 420-21. The supreme court held there was a question of fact precluding summary judgment regarding how the swimmer was hurt where there was evidence that he hit his head on a submerged plastic pipe which the premises owner had placed in the lake. *Id*. at 424. The pipe was "black in color and approximately two inches in diameter. It was not anchored down, its location was variable, and it did not always remain in the water." *Id*. at 422. The evidence demonstrated the pipe ran along the shore then extended into the deep end of the lake from a point near where the decedent dove in the water. After running along the shore, the pipe disappeared from view. *Id*. In finding summary judgment was not proper as a matter of law, the *Jackson* court did not disturb prior findings that water, whether natural or artificial, clear or murky, generally was deemed to present an open and obvious danger. *Id*. at 425. Instead, the *Jackson* court distinguished its facts from those cases where the risks of diving into shallow water were open and obvious. *Id*. at 426. The *Jackson* court focused on the danger caused by the presence of the submerged pipe whose location was variable and could not be detected by

swimmers. *Id*. "The existence of that hazard had nothing to do with the inherent characteristics of bodies of water; it stemmed solely from [the defendant's] conduct." *Id*.

¶ 40 In *Duffy*, the plaintiff dove into an in-ground pool and suffered injuries resulting in quadriplegia. *Duffy*, 382 Ill. App. 3d at 3. The pool was designed with the deepest part in the middle and the shallow areas on the ends. *Id*. at 4. The plaintiff's expert opined that the pool was "very unusual" and unsafe for the ordinary pool user expecting a shallow end and a deep end. The expert added that there was an optical illusion of a deep end and shallow end resulting from the placement of a ladder at one side of the pool and steps on the opposite end of the pool, which were characteristics typically associated with deep and shallow pool ends. The expert finally stated that the pool liner was dark in color and uniform in texture and pattern, making the pool depth difficult, if not impossible, to assess. *Id*. at 9-10. This court held that the record created a genuine issue of material fact regarding whether the defendant knew there was a danger and failed to warn of that danger. *Id*. at 7. The *Duffy* court refused to grant summary judgment based on the open and obvious doctrine where there was a material issue of fact as to whether a shallow bottom in the "deep end" section of the pool was a nonobvious danger. *Id*. at 8, 10.

¶ 41 The *Duffy* court distinguished its facts from those in *Barham v. Kneckrehm*, 277 Ill. App. 3d 1034, 1038-39 (1996), where the appellate court held that an above-ground pool with a uniform depth of 3.5 feet was an open and obvious danger to a reasonable 13-year-old. The pool in *Duffy* was not above-ground or uniform in depth. *Id*. at 10. The *Duffy* court expressly stated that "depth is usually more obvious in an aboveground pool than in an in-ground pool." *Id*. The court, however, clarified that "the obviousness of the danger and the duty to warn are decided not based on plaintiff's own subjective perception but by an objective standard." *Id*. The court found

that the unusual danger, namely, the "optical illusion" of depth, was submerged like the submerged pipe in *Jackson*. *Id*. at 11. Ultimately, this court held that it could not conclude as a matter of law that the danger of the pool was obvious. *Id*.

¶ 42 In this case, we find there is a material question as to the obviousness of the danger in defendant's pool, *i.e.*, the above-ground swimming pool with an unobservable deep end. This pool did not comply with the general statement made by the *Duffy* court that "depth is usually more obvious in an aboveground pool than in an in-ground pool." *Duffy*, 382 Ill. App. 3d at 10. Instead, here, plaintiff's pool appeared to have a consistent depth of approximately 4.5 feet, which was the depth of the shallow end. Defendant, however, had dug out underneath the pool and used the extended pool liner to create an approximately 6.5 feet deep end to the pool. The evidence submitted by the parties demonstrated there were no signs indicating the varying depths of the pool, there was no partition separating the shallow end from the deep end, there was no diving board, slide, or set of stairs typically associated with a deep end, there were no defining or varied lines, colors, or patterns on the bottom of the pool providing notice of a difference in depth, nor were there warning signs posted notifying swimmers of a deep end. The warning stickers that were present on the side of the pool warned of no diving due to the shallow nature of the pool and warned adults to watch children at all times to prevent drowning. The risk of drowning sticker did not provide any notice of the varying pool depths.

¶ 43 We conclude, based on the pleadings, affidavits, and other evidence, it is not evident that, as a matter of law, the danger of the unobservable deep end of defendant's pool was open and obvious. The risk was not that of simply drowning, which consistently has been found to be an open and obvious risk when swimming in any body of water (*Englund*, 246 Ill. App. 3d at 476

(above-ground swimming pool presented a blatantly apparent danger to three-year-old); *Cope v. Doe*, 102 Ill. 2d 278, 289 (1984) (landowner not liable for the death of a child who fell through ice on a pond where open water was clearly visible); *Stevens v. Riley*, 219 Ill. App. 3d 823, 831 (1991) (17.5 month old child who fell into a creek partially hidden by prairie grass was likely to observe water either through the grass or over it)); instead, there is a question here for the jury to determine whether the danger of defendant's pool was latent or obvious.

¶ 44 The condition, by its very nature, did not carry its own warning of potential harm. See *Jackson*, 185 Ill. 2d at 426; *Suchy*, 2014 IL App (2d) 130367, ¶ 23. In contrast, the condition, which was unusual and deceptive because the pool appeared to be of uniform depth, is comparable to the dangerous condition in *Duffy* where the expert opined that the combination of shallow and deep ends in a nontraditional pool design was unsafe for an ordinary pool user. *Duffy*, 382 Ill. App. 3d at 9-10. Similarly, like the condition in *Jackson*, there at least is a question that the dangerous condition in this case was not the inherent characteristic of the water, but stemmed solely from defendant's conduct in creating the unobservable deep end to the pool. *Jackson*, 185 Ill. 2d at 426. "Where there is a doubt, the obviousness of the danger is for the jury to determine." *Klen v. Asahi Pool, Inc.*, 268 Ill. App. 3d 1031, 1044 (1994). We, therefore, conclude there was a genuine question of material fact regarding whether defendant's pool posed an open and obvious danger. See also *T.T. by B.T.*, 278 Ill. App. 3d at 17 (finding an in-ground swimming pool that had been covered by a tarp, which had accumulated leaves, dirt, and water over the winter, was not an open and obvious danger that young children would be expected to recognize or appreciate even though the children were told a pool was in the defendant's backyard and were warned not to swim).

¶ 45 However, even if there was no question of fact as to the danger in defendant's pool being open and obvious, that finding by itself would not have been enough to grant summary judgment. See *Duffy*, 382 Ill. App. 3d at 11. "Illinois law does not view the existence of an open and obvious condition as an automatic or *per se* bar to the finding of a legal duty on the part of the defendant who owns, occupies, or controls the area in which the injury occurred." *Bucheleres v. The Chicago Park District*, 171 Ill. 2d 435, 449 (1996). Rather, "[e]ven if a risk is considered open and obvious, a duty to warn may still be imposed." *Schellenberg v. Winnetka Park District*, 231 Ill. App. 3d 46, 53 (1992). We, therefore, must apply the traditional duty analysis to this case. *Jackson*, 195 Ill. 2d at 425; *Duffy*, 382 Ill. App. 3d at 11.

¶ 46 Turning to the first factor, *i.e.*, the likelihood of injury, generally this is slight where a condition is deemed open and obvious because it is assumed that individuals encountering the condition will appreciate and avoid the risk. *Suchy*, 2014 IL App (2d) 130367, ¶ 33. "However, where a danger is concealed or latent, the likelihood of injury increases because the person will not be readily aware of the danger." *Id*. Here, the deep end of defendant's pool was unobservable to anyone looking at the seemingly uniform above-ground pool. Without any signage identifying or notifying swimmers of the underground change in depth, the likelihood of injury weighed in favor of imposing a duty to warn.

¶ 47 The second factor, *i.e.*, the foreseeability of harm to others, is dependent on the degree of obviousness of the risk associated with the condition. *Bezanis*, 2012 IL App (2d) 100948, ¶ 28; *Bucheleres*, 171 Ill. 2d at 456 (reasonable foreseeability "may be greater or lesser depending on the degree of obviousness of the risks associated with the condition"). The risk here of encountering an unmarked, unobservable deep end was not obvious. The only warning stickers

notified swimmers of shallow, and not deep, water and advised adults to supervise children while in the water in order to prevent drowning. These notifications did not warn of varying depths in the pool. Moreover, defendant had created an open-door policy for use of his pool, even when he was not at home. Defendant acknowledged at his deposition that a number of his neighbors taught their children to swim in his pool. Although defendant imposed the requirement that children be supervised by their parents, he was aware of at least one occasion wherein a neighborhood child violated his supervision policy. Defendant additionally was aware that Kristian wanted to use the pool that day and no adult appeared willing to provide supervision for him and the group. Under these circumstances, we find it was reasonably foreseeable that Kristian would fail to appreciate the risk of swimming in defendant's pool. This factor, therefore, weighed in favor of imposing a duty to warn.

¶ 48 The third and fourth factors, *i.e.*, the magnitude of the burden and the consequences of placing the burden on the defendant to warn individuals of the unobservable deep end, also weigh in favor of imposing a duty on defendant under the circumstances of this case. The burden here simply would be to install and maintain warning signs and visual demarcations notifying swimmers of the deep end of the pool. See *Duffy*, 382 Ill. App. 3d at 12 (failure to install warning signs provided to the defendant when he purchased the in-ground pool, in part, created a genuine issue of material fact). The magnitude of such a burden is small and the consequence of placing that burden on defendant is minor. *Cf. Bezanis*, 2012 IL App (2d) 100948, ¶ 29-30 (the magnitude of the burden to warn of diving into shallow water far from the shore and the consequences of imposing such a burden on the public agency were high where the practical and financial burdens might curtail the public's access to the lakes).

¶ 49 Based on application of the four traditional duty factors to the circumstances of this case, we find there were genuine issues of material fact as to whether defendant owed a duty to warn Kristian of the dangerous hidden deep end of his above-ground pool. See *Kahn*, 5 Ill. 2d at 625 (1955). Our finding is similar to that in *Ward*. In *Ward*, two teenage boys were playing catch on the banks of a body of water adjacent to and which flowed into the Mississippi River. *Id*. at 259. The boys' ball entered the water in an area located below a dam and, when they attempted to retrieve it, they were swept up in dangerous currents and died. *Id*. The *Ward* court recognized that the risk of drowning is inherent in bodies of water and that dangers associated with water are obvious. *Id*. at 261. The court, however, applied the traditional duty factors and concluded that the defendant owed the boys a duty to warn against the dangerous underwater currents allegedly produced by its dam where: (1) the underwater man-made currents were not apparent from the surface; (2) the defendant knew that the dangerous currents were in a popular swimming and wading area and that the danger was not apparent, especially when six individuals previously drowned in the area; and (3) the burden of guarding against injuries was small and the consequence of imposing that burden on the defendant was minor where the defendant only needed to place and maintain signs warning of dangerous underwater currents. *Id*. at 261-62. We, therefore, conclude the trial court erred in granting summary judgment on the issue of whether a duty exists as a matter of law.

¶ 50 CONCLUSION

¶ 51 Because we find the trial court erred in granting summary judgment in favor of defendant as a matter of law on the issue of whether defendant owed a duty, we reverse the court's June 28, 2016, and November 10, 2016, orders and remand this case for further proceedings.

¶ 52 Reversed; remanded.