2018 IL App (1st) 172675-U

SIXTH DIVISION
July 20, 2018

No. 1-17-2675

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GEORGIA CHRISTAKES,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 15 L 11549
	)	
SP PLUS CORPORATION,	)	Honorable
	)	John P. Callahan, Jr.,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court erred in granting summary judgment where there exists a genuine issue of material fact as to whether the bollard plaintiff tripped over was open and obvious, and whether the distraction exception applies; reversed and remanded.

¶ 2 Plaintiff, Georgia Christakes, appeals from the trial court's grant of summary judgment, with prejudice, in favor of defendant, SP Plus Corporation, pursuant to section 2-1005 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1005) (West 2014)). Plaintiff filed a premises liability case against defendant for injuries she allegedly sustained after running into a short steel pole (bollard) in a parking garage managed and maintained by defendant. Plaintiff alleged that defendant failed to protect or to warn her of the danger presented by the bollard,

which she failed to see because she was distracted and because the large crowd exiting the venue concealed it. The trial court found the bollard to be open and obvious, and granted defendant's motion for summary judgment. On appeal, plaintiff contends that the trial court erred in granting summary judgment where there existed a genuine issue of material fact as to whether the bollard was an open and obvious hazard, and if it was, whether plaintiff injured herself running into the bollard due to a foreseeable distraction that would defeat the open and obvious defense. For the following reasons, we reverse and remand.

¶ 3 BACKGROUND

¶ 4 On November 12, 2015, plaintiff filed a single count complaint alleging premises liability against defendant. In her complaint, plaintiff alleged that on August 23, 2015, while leaving a concert at Soldier Field, she ran into a bollard in a parking garage, which caused her to trip and fall and sustain injuries.

¶ 5 Plaintiff alleged in her complaint that defendant "controlled, managed, and/or maintained certain property located at or near 1410 S. Museum Campus Drive" in Chicago, which was commonly known as the North Garage. Plaintiff stated that the North Garage primarily served as a multi-level parking garage for events at Soldier Field and the Field Museum. Plaintiff further stated that on the third floor of the North Garage, there was an elevator bank known as the West Elevators, and near those elevators, a parking area designated as 3B. Plaintiff alleged that between the West Elevators and 3B, there were bollards, which "served primarily as a barrier to ensure vehicles in the parking garage could not enter the West Elevator area."

¶ 6 Plaintiff claimed that defendant had a duty to maintain the property in a condition that was reasonably safe for persons lawfully on or about its property, and that it was negligent by maintaining its bollards "at an unsafe height dangerous to pedestrians, particularly in an event

setting," and failing "to warn of the presence of the bollards when it knew or should have known that pedestrians would fail to appreciate them, particularly in an event setting." Plaintiff alleged that as a proximate cause of this negligence, she sustained injuries when she tripped and fell over a bollard.

¶ 7 Defendant answered the complaint, denying it breached any duty owed to plaintiff and pleading the affirmative defense of contributory negligence.

¶ 8 Discovery ensued, which included the depositions of plaintiff, plaintiff's sister, Maria Pudliner, defendant's senior facility manager, Nick Stasinopoulous, and three of defendant's supervisors: Nicholas Ricci, Juan Cerritos, and Pavle Zivovich. Defendant produced the contract between defendant and SMG, the entity that runs Soldier Field, and plaintiff produced an affidavit from one of its expert witnesses, John Van Ostrand.

¶ 9 Plaintiff testified in her deposition that on the night in question she was with her sister, Maria Pudliner, her sister Deborah Hristakos, her two nieces, a family friend, Carol Cichocki, and Chicocki's two daughters. They parked in section 3B of the North Garage, and then took the elevators out to the concert. When asked whether it was true that she would have encountered the yellow bollard in question on the way to the elevators, plaintiff stated, "True. I suppose." After the concert ended, she walked back to the parking garage with her group. They wanted to take the elevator to section 3B, but there were too many people, so they took the stairs. Plaintiff testified that the elevator doors opened as they were exiting the stairs and there was confusion as to which way people were going to go. Her nieces and their two friends were in front of her at the time. Plaintiff stated that she did not see the bollard she tripped over because "the crowd was exiting, my nieces were in front of me with their friends, and the traffic from the parking garage,

people were exiting, I was trying to keep my eyes on the girls and the traffic to make sure that they weren't going to get hit by a car." Plaintiff testified that the bollard was 20 to 25 inches tall.

¶ 10 Defendant's senior facility manager, Nick Stasinopoulous, testified in his deposition that the North Garage was "probably only at about 60 to 70 percent capacity" on that night. He testified that he did not know of anyone else ever tripping or falling over the bollards in question.

¶ 11 Nicholas Ricci, one of defendant's supervisors, testified in his deposition that section 3B was very close to the event exit, which therefore saw "the majority of the foot traffic returning to the garage" after the concert. Ricci stated that it was fair to say that there was "heavy traffic" when he arrived at the scene, and that one of his employees helped keep foot traffic away from plaintiff after she was injured. Juan Cerritos, also a supervisor for defendant, testified in his deposition that there was heavy foot traffic on the night in question, and that the concert was a busy event.

¶ 12 According to the plaintiff's expert John Van Ostrand, an expert on design concepts in commercial parking garages, the bollard at issue was located in an area that "foreseeably would handle high volumes of foot and vehicular traffic." Ostrand opined that due to its low height, the bollard would not be visible in a crowd, rendering it a hazard.

¶ 13 On February 21, 2017, defendant filed a motion for summary judgment, pursuant to section 2-1005 of the Code (735 ILCS 5/2-1005 (West 2014)). In its motion, defendant stated that it managed the parking facility in which plaintiff fell, and that SMG managed the entire facility on the premises pursuant to a management agreement between SMG and the Chicago Park District. Defendant asserted that the trial court should grant its motion for three reasons: (1) defendant did not have actual or constructive notice of the alleged "hazardous condition" of the

bollard; (2) defendant had no responsibility for the placement, location, or maintenance of the bollard; and (3) the bollard was open and obvious.

¶ 14 Plaintiff filed a response to defendant's motion for summary judgment, contending that she did not see the bollard because of its short height, the crowd, and vehicle traffic, and because she was trying to keep an eye on the young girls in her group. Plaintiff further stated that she broke her tibia and wrist as a result of her fall. Plaintiff argued that while defendant could not make structural changes to the parking garage, it could take steps to make sure a hazard was safe until the issue was addressed. Plaintiff cited the case of *Ward v. K Mart Corp*., 136 Ill. 2d 132, 136 (1990), in which our supreme court found that K mart owed a duty of reasonable care to protect against the risk of a person colliding with a post while carrying a large item. Plaintiff argued that defendant also owed a duty of reasonable care in this case, and that it was breached when defendant failed to warn her of the dangers of the short bollard in a crowded environment.

¶ 15 A hearing was held on defendant's motion for summary judgment on June 9, 2017. The court pointed to several instances in plaintiff's deposition where she noted that she was distracted by watching the young girls in her group. Plaintiff's counsel directed the court to other instances where plaintiff specifically stated in her deposition that she did not see the bollard because of the crowd, and noted that "at this stage of the litigation where everything must be taken in my client's favor and against the Defendant, it would be inappropriate to discard her testimony where [she] says [she] didn't see the bollard because of the crowd." After hearing argument, the trial court stated that it had looked at pictures of the bollard and "[t]here's no doubt in this Court's mind that it's open and obvious, without question." The court then addressed the issue of distraction and stated that after reviewing plaintiff's deposition testimony, it was clear that "plaintiff had nothing in her hands. She had her glasses on – or her contacts. She did not have a

purse with her. There's nothing in her hands." The court stated that "it's clear to this Court that it was in essence a self-created distraction because [plaintiff] was trying to watch these girls. It's nothing that's foreseeable for the Defendant in this particular case. I don't think the distraction exception applies." The trial court then granted defendant's motion for summary judgment.

¶ 16 On July 10, 2017, plaintiff filed a motion for reconsideration of the trial court's order granting defendant's motion for summary judgment. Plaintiff argued that the court erred in declaring the bollard open and obvious by looking at pictures of it in an empty parking garage, because on the night in question there was heavy foot traffic and there were several distractions present. Plaintiff further argued that the trial court erred in relying on plaintiff's testimony that she was watching her nieces, while ignoring her testimony that there was also a crowd. Plaintiff contended that causation was a question for the jury to resolve.

¶ 17 Defendant maintained that the trial court did not err in finding the bollard to be open and obvious. A hearing was held on the motion to reconsider, at the end of which the trial court stated that it felt "confident in [its] original ruling," and denied the motion. Plaintiff timely appealed.

¶ 18 ANALYSIS

¶ 19 On appeal, plaintiff contends that the trial court erred in granting defendant's motion for summary judgment because there exists a genuine issue of material fact as to whether plaintiff was distracted from noticing the bollard, and whether the bollard was concealed by the crowd. Defendant responds that the bollard was open and obvious and that the distraction exception does not apply.

¶ 20 Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

that the nonmoving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). A genuine issue of material fact exists "where the material facts are disputed or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Bagent v. Blessing Care Corp*., 224 Ill. 2d 154, 162-63 (2007). "Summary judgment is a drastic means of disposing of litigation and should only be allowed when the right of the moving party to judgment is free and clear from doubt ***. The court should construe the evidence strictly against the movant and liberally in favor of the nonmovant." *Waters v. City of Chicago*, 2012 IL App (1st) 100759 ¶ 7. We review a grant of summary judgment *de novo*. *Bagent*, 224 Ill. 2d at 163.

¶ 21 The elements of a cause of action for negligence are: (1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty; and (3) an injury proximately caused by the breach. *Alqadhi v. Standard Parking, Inc*., 405 Ill. App. 14, 16 (2010). Plaintiff claims that defendant owed her a duty to warn against the dangers of the bollard. The factors used to determine the existence of a duty include: (1) the likelihood of injury; (2) the reasonable foreseeability of such injury; (3) the magnitude of the burden of guarding against injury; and (4) the consequences of placing that burden on the defendant. *Id*. at 16-17. Whether defendants owed a duty of reasonable care is a question of law for the court. *Id*. at 17.

¶ 22 Defendant contends that the bollard was open and obvious, negating any alleged duty owed to plaintiff. The open and obvious doctrine is an exception to the general duty of care owed by a landowner and in Illinois is based on the Second Restatement of Torts:

> "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to

them, unless the possessor should anticipate the harm despite such knowledge or obviousness." Restatement (Second) of Torts § 343A(1) (1965).

¶ 23 Our supreme court has held that the doctrine implicates the first two factors of the traditional duty analysis: likelihood of injury and foreseeability. *Sollami v. Eaton*, 201 Ill. 2d 1, 15, 17 (2002). Where a condition is deemed open and obvious, the likelihood of injury is generally considered slight because it is assumed that people encountering potentially dangerous conditions that are open and obvious will appreciate and avoid the risks. *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 456 (1996). A condition is open and obvious where a reasonable person in the plaintiff's position exercising ordinary perception, intelligence, and judgment would recognize both the condition and the risk involved. *Deibert v. Bauer Brothers Construction Co*., 141 Ill. 2d 430, 435 (1990).

¶ 24 Normally where there is no dispute about the physical nature of the condition, the question of whether a condition is open and obvious is a legal one for the court. *Wilfong v. L.J. Dodd Construction*, 401 Ill. App. 3d 1044, 1053 (2010). But "where there is a dispute about the conditions' physical nature, such as its visibility, the question of whether a condition is open and obvious is factual." *Id*. 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.' " *Duffy v. Togher*, 382 Ill. App. 3d 1, 8 (2008) (quoting *Klen v. Asahi Pool, Inc*., 268 Ill. App. 3d 1031, 1044 (1994)).

¶ 25 "The distraction exception to the open and obvious rule applies 'where the possessor [of land] has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it.'" *Peters v. R. Carlson & Sons, Inc*., 2016 IL App (1st) 153539, ¶ 17 (quoting *Sollami*, 201 Ill.

2d at 15).”A distraction is a circumstance reasonably foreseeable by a defendant that requires a plaintiff to divert his attention from the open and obvious danger or otherwise prevents him from avoiding the risk.” *Id*. Distractions created wholly by the plaintiff are not reasonably foreseeable. *Id*.

¶ 26 Here, the trial court found as a matter of law that the bollard was open and obvious, based on its review of pictures of the bollard. It then went on to state that the distraction exception would not apply since watching after the kids in the group was a “self-created” distraction. We disagree.

¶ 27 We find our supreme court’s analysis in *Ward*, 136 Ill. 2d 132, to be instructive. In *Ward*, the plaintiff sued K mart Corporation for injuries he sustained when he walked into a concrete post located just outside a customer entrance to the one of the defendant’s department stores. *Ward*, 136 Ill. 2d at 135. At the time of his injury, the plaintiff was carrying a large mirror which he had purchased from the defendant. *Id*. At trial, the evidence presented showed that just outside of a customer entrance were two concrete posts, painted dark brown, that stood approximately five feet high. *Id*. at 137. Both posts were approximately “19 inches from the outside wall of the K mart building, and [were] presumably intended to protect the doorway from damage or interference by the backing or parked vehicles.” *Id*. The plaintiff testified at trial that he subconsciously noticed the posts when he entered the store. *Id*. A K mart employee who worked in the Home Center department, where the plaintiff bought the mirror, testified that on any given day, “from [1] to 50 people would use the door through which plaintiff exited,” and that he had “seen some people brush up against the post, but that prior to the incident in question, he had never seen anyone injured as a result of colliding with the post while leaving through the customer entrance door.” *Id*. at 139.

¶ 28 At the conclusion of the trial, the jury found for plaintiff and assessed his damages at $85,000. The jury also found that the plaintiff was 20% comparatively negligent, resulting in a verdict of $68,000. *Id.*

¶ 29 The circuit court then granted K mart's motion for a judgment notwithstanding the jury's verdict on the ground that defendant had no duty to warn plaintiff or otherwise protect him from the risk of colliding with the post. *Id.* The circuit court concluded that K mart had no reason to expect that the plaintiff's attention would be distracted when he exited the door or that the plaintiff would forget about the posts outside the door. *Id.* The circuit court stated that the posts "were not inherently dangerous and that they became dangerous only when acted upon by some external force," and that the only distractions involved in the case were "those induced by [the] plaintiff himself." *Id.*

¶ 30 On appeal, the appellate court, with one justice dissenting, affirmed the judgment notwithstanding the verdict and held that K mart owed no duty to the plaintiff under the circumstances of the case because K mart could not "reasonably have been expected to foresee that [the] plaintiff, while carrying the mirror, would fail to see or remember the post, which was an obvious condition on [K mart]'s premises and which [the] plaintiff had previously encountered." *Id.* at 136. The plaintiff appealed and our supreme court reversed, holding that K mart's duty to exercise reasonable care extended to the risk that one of its customers would collide with the post while leaving the store carrying a large, bulky item. *Id.*

¶ 31 Our supreme court noted that the crux of the issue before it was whether K mart's general duty of reasonable care extended to the risk encountered by the plaintiff. The court opined that the "only sound explanation for the 'open and obvious' rule must be either that the defendant in the exercise of reasonable care would not anticipate that the plaintiff would fail to

notice the condition, appreciate the risk, and avoid it [citation], or perhaps that reasonable care under the circumstances would not remove the risk of injury in spite of foreseeable consequences to the plaintiff." *Id*. at 147. Our supreme court stated:

> "Turning to the specific facts of the present case, we agree with defendant and the trial court that there is nothing inherently dangerous about the post. It is just an ordinary post. The proper question, however, is not whether, under the facts of this case, it was unreasonably dangerous. This question generally cannot be answered by merely viewing the condition in the abstract, wholly apart from the circumstances in which it existed. There may be many conditions on a person's premises which are in fact dangerous, but not 'unreasonably' so for any of a number of reasons. For example, as discussed above, the defendant may have no reason to anticipate that an entrant on his premises will fail to see and appreciate the danger. But there may also be conditions which, though seemingly innocuous enough in themselves, indeed present an unreasonable danger under certain circumstances. For example, it may be said that there is ordinarily no unreasonable danger in an ordinary flight of stairs [citation], but stairs may indeed be unreasonably dangerous if, under the circumstances of a particular case, the defendant in the exercise of reasonable care should anticipate that the plaintiff will fail to see them. [Citation]." *Id*. at 152.

¶ 32 Our supreme court went on to explain that a party need not anticipate the negligence of others. Rather, "[t]he inquiry is whether the defendant should reasonably anticipate injury to those entrants on his premises who are generally exercising reasonable care for their own safety, but who may reasonably be expected to be distracted, as when carrying large bundles, or

forgetful of the condition after having momentarily encountered it." *Id*. The court noted that if in fact the plaintiff was "also guilty of negligence contributing to his injury, then that is a proper consideration under comparative negligence principles." *Id*.

¶ 33 The court in *Ward* noted that the post was not a hidden danger, that the plaintiff walked past the post when entering the store, and that the plaintiff admitted that he was at least subconsciously aware of its presence. *Id*. at 153. However, it found that under the circumstances of that particular case, "it was reasonably foreseeable that a customer would collide with the post while exiting defendant's store carrying merchandise which could obscure view of the post." *Id*. at 153-54. The court noted that the defendant had reason to anticipate that customers shopping would, even in the exercise of reasonable care, momentarily forget the presence of the posts that they may have previously encountered. *Id*. at 154. The court stated that it was also reasonably foreseeable that a customer carrying a large item that he had purchased in the store might be distracted and fail to see the post upon exiting through the door. *Id*. The court found that the burden on the defendant of protecting against this danger would be slight – a simple warning or a relocation of the post may have sufficed. *Id*. The court noted that there were no windows or transparent panels on the customer entrance door to allow viewing of the posts from the interior of the store, and that the defendant's clerk testified that he had seen people brush up against the post while exiting the store. *Id*.

¶ 34 Our supreme court specifically held that the defendant's duty of reasonable care encompassed the risk that one of its customers, while carrying a large, bulky item, would collide with the post upon exiting through the customer door. *Id*. at 157. The court explained:

> "Our holding does not impose on defendant the impossible burden of rendering its premises injury-proof. Defendant can still expect that its customers will exercise

> reasonable care for their own safety. We merely recognize that there may be certain conditions which, although they may be loosely characterized as 'known' or 'obvious' to customers, may not in themselves satisfy defendant's duty of reasonable care. If the defendant may reasonably be expected to anticipate that even those customers in the general exercise of ordinary care will fail to avoid the risk because they are distracted or momentarily forgetful, then his duty may extend to the risk posed by the condition. Whether in fact the condition itself served as adequate notice of its presence or whether additional precautions were required to satisfy the defendant's duty are questions properly left to the trier of fact. The trier of fact may also consider whether the plaintiff was in fact guilty of negligence contributing in whole or in part to his injury, and adjust the verdict accordingly." *Id* at 156-57.

¶ 35 With *Ward* in mind, we turn to the case at hand. The evidence revealed that in the area where plaintiff was injured, between the elevators and the parking spaces, there are two bollards to prevent cars from driving into that area. The bollard plaintiff tripped over was somewhere between one and a half and three feet high. There was heavy foot traffic on the night in question because the concert had just ended. Plaintiff testified that when she arrived at section 3B, she was distracted by attempting to watch the young girls in her group and was trying to keep an eye on them in the crowd, when she fell over the bollard. Plaintiff testified that she did not see the bollard because of the crowd of people around her. The senior facility manager, as well as several supervisors, testified in their depositions that there was heavy foot traffic that night. Plaintiff's expert testified that the bollard was located in an area that foreseeably would handle

high volumes of foot and vehicular traffic, and that due to its low height it would not be visible in a crowd.

¶ 36 The trial court, in making its decision, stated that it had looked at the pictures of the bollard in question and there was no doubt in its mind that "it's open and obvious, without question." However, as the court stated in *Ward*, the question of whether the bollard was unreasonably dangerous cannot be answered by "merely viewing the condition in the abstract, wholly apart from the circumstances in which it existed." *Ward*, 136 Ill. 2d at 152. The *Ward* court further stated, "there may [] be conditions which, though seemingly innocuous in themselves, indeed present an unreasonable danger under certain circumstances." *Id*. While the trial court briefly addressed the issue of distraction by stating that plaintiff had nothing in her hands, she was wearing her contacts, and she did not have a purse with her, the trial court specifically did not acknowledge the evidence that there was heavy foot traffic despite counsel's repeated efforts to highlight plaintiff's deposition testimony that she was distracted by the crowd. Thus, after viewing the evidence in a light most favorable to the plaintiff, we find that there remains a genuine issue of material fact as to whether the bollard presented an unreasonable danger under the circumstances of the night in question. See *id.* (whether in fact the condition itself served as adequate notice of its presence or whether additional precautions were required to satisfy defendant's duty are questions properly left to the trier of fact). Stated differently, we find that it would be reasonably foreseeable that a concert-goer would collide with the short bollard after exiting the stairwell to the nearest parking garage following a concert, while trying to keep an eye on her children amongst heavy foot and vehicle traffic. It further seems to us that the burden on defendant of protecting against this danger would be slight – a simple warning on nights of concerts or big events, when crowds are going to be in attendance.

¶ 37 Accordingly, we find that the trial court's grant of summary judgment, based on its finding that the bollard was open and obvious and that the distraction exception did not apply, was in error.

¶ 38 CONCLUSION

¶ 39 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County and remand for further proceedings.

¶ 40 Reversed and remanded.