2018 IL App (2d) 170707-U
No. 2-17-0707
Order filed September 12, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

TRACEY GROSCH, Individually and as Mother and Next Friend of Riley Grosch, a Minor, Plaintiff and Counterdefendant-Appellant, v. BRIAN ANDERSON, JO ANDERSON, and CARY-GROVE EVANGELICAL FREE CHURCH, d/b/a Living Grace Community Church of Cary, Defendants and Counterplaintiffs-Appellees.	)	Appeal from the Circuit Court of Kane County. No. 14-L-619 Honorable James R. Murphy, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment in favor of defendants because the fire pole was an open and obvious condition and no exception existed, and there were no genuine issues of material fact sufficient to preclude summary judgment.

¶ 2 Plaintiff, Tracey Grosch, individually and as mother and next friend of Riley Grosch, a minor, appeals the judgment of the circuit court of Kane County, granting summary judgment in

favor of defendants, Brian Anderson, Jo Anderson, and the Cary-Grove Evangelical Free Church d/b/a Living Grace Community Church on plaintiff's claims of negligence related to Riley's fall as he was attempting to slide down a fire pole in the Andersons's back yard during an event sponsored by the Church's youth ministry. On appeal, plaintiff argues that the trial court erred in relying on the open-and-obvious doctrine and in concluding that there were no genuine issues of material fact sufficient to preclude summary judgment. We affirm.

¶ 3 I. BACKGROUND

¶ 4 We summarize the pertinent facts. On November 14, 2016, the Andersons were members of the Church; plaintiff's family attended the Church, but were not members. According to Pastor Cory Shreve, quite a few more people attended the Church than were members. Shreve was the youth pastor and was responsible for running and administering the Church's youth ministry. He was in charge of the Radiate program which provided for fellowship and religious mentoring of youths beginning in seventh grade and ending upon high school graduation. Radiate was open to members and attendees, and it incorporated youths from other churches and even the "unchurched" as well. Radiate had contacted the Andersons seeking to hold a bonfire at their home; the group had held a bonfire there previously.

¶ 5 In the Andersons' back yard, Brian had constructed a platform in a tree from which he had removed the upper branches and foliage. The platform was about 25 feet above the ground. The platform was reached by a ladder tied to the tree. The platform had a rail around it, but no other fall protection. The platform had a triangular hole in it, and through the hole, was a metal "fire pole." The pole was made out of sprinkler pipe, was affixed in concrete at the base, and was 3½ inches in diameter. The surface of the pole had oxidized. The ground around the pole was grass covered, and no force-absorbing material, such as sand or wood chips, had been placed

around the bottom of the pole.

¶ 6 Brian explained that he built the platform and fire pole for his children. Both Brian and Jo testified in deposition that between 150 to 200 people had used the pole, all without injury. Brian testified that he was a construction contractor and was familiar with fall protection for working above the ground and had employed it in his work; no fall protection was installed or available on the platform. Brian testified that he did not research or follow any building codes for the platform and fire pole.

¶ 7 On the day of the Radiate event, Shreve arrived 15-30 minutes before the announced start of the event. Some of the parents stayed to socialize, others dropped their children off. Plaintiff dropped off Riley and then went shopping nearby, intending to finish shopping and then return for the balance of the event. Jo was inside the house for the event, and she monitored the food and drinks, making sure that there was plenty for all of the guests. She also socialized with the other parents. Brian was also inside socializing. Shreve was monitoring the bonfire. At one point, he intercepted one of the youths who tried to jump over the bonfire and explained to the youth why that was not a wise decision. At the time of Riley's accident, Shreve had gone inside.

¶ 8 Riley, the Andersons, and Shreve all testified that it was a cool or cold evening, estimating the temperature was anywhere from the 20s to the 40s. According to Shreve and Brian, the point of the event was the bonfire and indoor fellowship; the youths attending were not expected to play in the back yard, but were expected to roast marshmallows in the bonfire and to play in the basement, where pool, basketball, and board games were available. After about an hour outside, Shreve went inside, planning to steer the event towards worship. One of the youths came inside and alerted Shreve and the adults that Riley was hurt.

¶ 9 Riley testified that he climbed up the ladder. The ladder had metal rungs, so his hands

became cold. At the top, on the platform while waiting for his turn, he put on gloves. Riley testified that the gloves were like ski gloves, and believed they were slick, possibly made of nylon. Riley testified that he awaited his turn along with several other youths. On that day, Riley was 13 years of age. He grabbed the pole with his hands, but he did not wrap his arms or legs around the pole. As Riley began his descent, he lost control, grabbed for the edge of the platform but could not hang on, and he plummeted the rest of the way to the ground. Riley suffered a comminuted fracture of his left femur and broke several long bones in his right foot. Riley's femur was repaired surgically, and he had a rod emplaced in the bone. There is a possibility that the rod may have to be removed at a future date. Riley also developed a foot drop following his fall from the platform.

¶ 10 The adults came out to investigate after they were notified. One of the youths, an Eagle Scout, obtained a rigid table top, and after they had ascertained that Riley had no apparent head or spinal injuries, placed him on the table top and moved him inside. Their purpose was to get him off of the cold ground; Riley apparently was complaining of resting on the cold ground. Plaintiff was informed and told to return to the Andersons' house. According to Brian, she arrived in minutes; plaintiff and other deponents testified that it was closer to 20 minutes. Eventually, an ambulance was called. It appears that plaintiff made the call for an ambulance as the other adults wanted to defer to her wishes. The ambulance took Riley to the hospital where he was treated for his injuries.

¶ 11 Shreve and the Andersons testified that, when the plans were made to use the Anderson property for the Radiate bonfire, they did not conduct an inspection of the property to determine if there were any unsafe conditions. Rather, Brian testified that he had a safe house, including the fire pole, because nobody had been injured using it up to that time.

¶ 12 Plaintiff's expert, Alan Caskey, a park and recreation planner and consultant, testified that the fire pole was too wide, too high, and the landing area was too hard. Caskey opined that the width of the pole, being almost twice the diameter that industry standards allowed in playground equipment, contributed to Riley's injury, because the excessive width of the pole decreased the strength of the user's grip of the pole. Caskey did not, however, offer any opinion about the effect of Riley's gloves on his ability to grip the pole, but noted that any effect would depend on the type of glove, which he could not recall. Caskey also specifically noted that the fall height was much greater than industry standards allowed (five feet is the norm), and the landing area did not contain any force-mitigating substances, and these circumstances caused or contributed to the likelihood and severity of injury. Caskey also opined that the darkness could have contributed to Riley losing his grip on the pole because it obscured the size of the pole and its texture. However, Caskey admitted that these were assumptions on his part, and he conceded that there was no testimony specifically addressing these issues.

¶ 13 As to the procedural posture of this case, on December 15, 2014, plaintiff timely filed her initial complaint; on February 19, 2015, plaintiff filed the first amended complaint at issue in this case. On April 28, 2016, the Andersons filed their motion for summary judgment followed on June 29, 2016, with the Church's motion for summary judgment. The motions were stayed while plaintiff procured her expert testimony. In November 2016, defendants filed their counterclaims against plaintiff.

¶ 14 On March 16, 2017, plaintiff filed a motion for leave to file a second amended complaint, which the trial court granted. On March 31, 2017, the Church, joined by the Andersons, filed a motion to vacate the trial court's grant of leave to file the second amended complaint. On April 6, 2017, the trial court vacated its order granting leave to file the second amended complaint and

reinstated the briefing schedule on defendants' motions for summary judgment.

¶ 15 On May 15, 2017, the trial court apparently heard the parties' arguments regarding defendants' motions for summary judgment. On that date, the trial court continued the cause until June 2, 2017, for ruling. On June 2, 2017, the trial court entered summary judgment in favor of defendants and against plaintiff. The court specifically held that:

> "defendants owed no duty to plaintiff based on the open and obvious nature of the subject condition [(the platform and fire pole)] on the property; there being no proximate cause between the condition on the property and the injury to [Riley]; and there being no question of material fact raised by plaintiff."

The trial court entered judgment for defendants and dismissed plaintiff's case. No transcripts of either the argument or the pronouncement of judgment were included in the record.

¶ 16 On June 30, 2017, plaintiff filed her motion to reconsider. On August 11, 2017, the trial court denied plaintiff's motion to reconsider, and plaintiff timely appeals.

¶ 17 II. ANALYSIS

¶ 18 On appeal, plaintiff argues that the trial court erred in holding that the platform and fire pole presented open and obvious conditions precluding the imposition of a duty. Plaintiff specifically contends that the design flaws in the construction of the platform and the fire pole and the lack of lighting rendered the dangers hidden rather than open and obvious; alternatively, plaintiff argues that the distraction doctrine should apply. Plaintiff also contends that there is a genuine issue of material fact regarding "the true cause" of Riley's fall. We consider the arguments in turn.

¶ 19 A. General Principles

¶ 20 This case comes before us following the trial court's grant of summary judgment in favor of defendants. In deciding a motion for summary judgment, the court must determine whether the pleadings, depositions, admissions, and affidavits in the record 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 5/1005(c) (West 2016). The purpose of summary judgment is not to try a factual issue but to determine if a factual issue exists. *Monson v. City of Danville*, 2018 IL 122486, ¶ 12. While summary judgment provides an expeditious means to resolve a lawsuit, it is also a drastic means of disposing of litigation. *Id.* Because of this, the court must construe the record strictly against the moving party and favorably towards the nonmoving party, and the court should grant summary judgment only if the moving party's right to judgment is clear and free from doubt. *Id.* We review *de novo* the trial court's judgment on a motion for summary judgment. *Id.*

¶ 21 Here, plaintiff alleged that defendants were negligent regarding the platform and fire pole. In a negligence action, the plaintiff must plead and prove that the defendant owed the plaintiff a duty, that the defendant breached the duty owed, and that an injury proximately resulted from the breach. *Bujnowski v. Birchland, Inc.*, 2015 IL App (2d) 140578, ¶ 12. The existence of a duty is a question of law and may properly be decided by summary judgment. *Id.* If the plaintiff cannot demonstrate the existence of a duty, no recovery by the plaintiff is possible, and summary judgment in favor of the defendant must be granted. *Wade v. Wal-Mart Stores, Inc.*, 2015 IL App (4th) 141067, ¶ 12. With these general principles in mind, we turn to plaintiff's contentions.

¶ 22 B. Open and Obvious

¶ 23 Plaintiff argues the trial court erred in determining that the platform and the fire pole were open and obvious conditions precluding the finding of a duty on the part of defendants. As

a general matter, the owner or possessor of land owes a visiting child the duty to keep the premises reasonably safe and to warn the visitor of dangerous nonobvious conditions, but if the conditions are open and obvious, the owner or possessor has no duty. *Friedman v. Park District of Highland Park*, 151 Ill. App. 3d 374, 384 (1986). The analysis of duty with respect to children follows the customary rules of negligence. *Id.* This means that a dangerous condition on the premises is deemed one that is likely to cause injury to a general class of children, who, by reason of their immaturity, might be unable to appreciate the risk posed by the condition. *Id.* However, the open-and-obvious doctrine may preclude the imposition of a duty. *Id.*

¶ 24 Recently, this court gave a thoroughgoing analysis of the open-and-obvious doctrine, how exceptions to that doctrine are accounted for, and, ultimately, how duty is imposed in these types of cases. *Bujnowski*, 2015 IL App (2d) 140478, ¶¶ 13-46.[1] We concluded that, in cases in which the open-and-obvious doctrine applies, the court will consider whether any exception to the doctrine applies, such as the distraction exception (*id.* ¶ 18 (discussing *Ward v. K mart Corp.*, 136 Ill. 2d 132, 149-50 (1990) (it is reasonably foreseeable to the defendant that the plaintiff's attention might be distracted so that the plaintiff will not discover or will forget what is obvious)) or the deliberate-encounter exception (*id.* ¶ 32 (discussing *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 391 (1998) (it is reasonably foreseeable to the defendant that the plaintiff, generally out of some compulsion, will recognize the risk but nevertheless proceed to encounter it because, to a reasonable person in the same position, the advantages of doing so outweigh the apparent risk)).

[1] *Bujnowski* involved an adult plaintiff who was injured diving into a lake. In light of *Friedman*'s acknowledgment that the duty analysis is the same for children and adults, the *Bujnowski* analysis is fully applicable here even though the injured party is a minor.

When no exception applies, the court proceeds to the general four-factor test for imposing liability: (1) whether an injury was reasonably foreseeable; (2) the likelihood of injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing that burden on the defendant. *Id.* ¶ 19 (quoting *Ward*, 136 Ill. 2d at 151).

¶ 25 We held that the case law had developed into two approaches in applying the four-factor duty test. In one approach, the first two factors will favor the defendant (because the danger is open and obvious), and the court must consider the third and fourth factors which could, at least theoretically, counterbalance the first two factors. *Id.* ¶ 46. Under the second approach, which we deemed to be more consistent with section 343A of the Restatement (Second) of Torts (Restatement (Second) of Torts § 343A (1965)) on which our supreme court had relied, the last two factors could never outweigh the first two factors, so even if the burden and consequences were minimal, the defendant necessarily would not have any duty to the plaintiff. *Bujnowski*, 2015 IL App (2d) 140478, ¶ 46.

¶ 26 Generally, falling from a height is among the dangers deemed to be open and obvious and appreciable even by very young children. *Qureshi v. Ahmed*, 394 Ill. App. 3d 883, 885 (2009). The risk that confronted Riley as he clambered up to the platform and attempted to use the fire pole was simply a fall from a height, and thus, was an open and obvious risk. We next turn to whether there is an available exception to the open-and-obvious doctrine.

¶ 27 Plaintiff first argues that the distraction exception applies here. The distraction exception had its genesis in *Ward*, 136 Ill. 2d 132. In that case, a shopper exited the store carrying large mirror he had just purchased and was injured when he walked into a concrete post. *Id.* at 135. The court explained that, even though the post was an open and obvious condition, harm was nevertheless reasonably foreseeable because the store had reason to expect that its customer's

attention may have been distracted so that the customer would not have discovered what is obvious, or would have forgotten what was discovered, or would have failed to protect himself. *Id.* at 149-50.

¶ 28 In support of her argument that the distraction exception should apply, plaintiff cites only *Ward* and *Sollami v. Eaton*, 201 Ill. 2d 1, 15-16 (2002). *Ward* gave several examples of circumstances in which the distraction exception could apply. As an example, stairs are generally not unreasonably dangerous, but they may be so if, under the circumstances, the plaintiff may fail to see the stairs. *Ward*, 136 Ill. 2d at 152. Additionally, an open and obvious condition may nevertheless be unreasonably dangerous if it exists in an environment in which the plaintiff is attending to his or her assigned workplace duties and encounters the condition. *Id.* at 153. For example, a builder carrying roof trusses steps into an open hole in the floor, or a dock worker unloading a truck steps off of a lowered dockplate while unloading a truck, or a customer falls when he or she misses the step off of the stoop at the entrance to the store, are all instances in which the defendant should have foreseen the risk of harm caused by the otherwise open and obvious condition.

¶ 29 *Sollami*, by contrast, involved a child "rocket jumping" on a trampoline with several other children when she injured her knee after being "rocketed" to a greater-than-usual height and landing on the surface of the trampoline. *Sollami*, 201 Ill. 2d at 4. After briefly discussing the parameters of the distraction exception (*id.* at 15-16), the court held that there was no evidence to show that the child was distracted while jumping on the trampoline (*id.* at 16). In other words, the child was using the trampoline as she intended to, and she was fully aware of the danger jumping on it may have presented.

¶ 30 Considering the evidence in the record, we conclude that there was no evidence of distraction presented in the record. Riley climbed up the ladder to the platform, some 25 feet above the ground. Once there, he waited in a line for the fire pole. He did not testify that any of the other persons in the line bothered or distracted him as he prepared to slide down the fire pole. Instead, he put on slick nylon gloves and attempted to slide down the pole by grasping the pole with only his hands. As he began his descent, he lost control, attempted to arrest his descent by grabbing the deck of the platform, failed, and fell from a height onto the ground. There is nothing in the evidence in the record to support a conclusion that Riley was distracted. He was not going about his profession or avocation as in the examples in *Ward* when he encountered the condition. Rather, he was participating in using the fire pole as he intended, as in *Sollami*. Indeed, Riley attributed his fall to losing his grip when he attempted to slide down the pole using only his hands and not wrapping his arms and legs around the pole. Accordingly, we hold the distraction exception does not apply here.

¶ 31 Plaintiff argues that the darkness of the evening distracted Riley from perceiving the width of the fire pole and the height of the drop from the platform. We disagree. Riley had to have been acutely aware of the height of the platform, having climbed every inch of the 25-foot height up the ladder. As to the width of the pole, Riley would have perceived it as he grasped it. Brian Anderson testified that everyone he had observed use the pole had instinctually wrapped their arms and legs around it. Riley testified that he attempted to use only his hands to grip the pole for his descent, despite the fact that a number of other children had used the pole before him and he apparently had the opportunity to observe them while waiting his turn.

¶ 32 We also note that there is no evidence that Riley stepped through the opening while trying to use the fire pole, which would, perhaps, have brought the circumstances within the

examples in *Ward* in which workers encountered a condition that was otherwise open and obvious while performing work-related tasks. Instead, Riley testified that he was able to negotiate his way to the pole and grasp it to begin his descent. Thus, there is no evidence that he simply stepped into the opening which went unperceived due to the darkness of the evening. Likewise, there is no evidence that one of the persons waiting for a turn distracted him so he stepped into the opening and fell. There is no evidence of distraction evident, so we reject plaintiff's contention that Riley was distracted by the darkness and the other children, or that the presence of darkness and other children were sufficient to demonstrate a factual issue in the absence of any evidence that these purported distracting circumstances contributed in Riley's fall.

¶ 33 The deliberate-encounter exception is usually raised in cases in which an economic compulsion (such as employment) causes the plaintiff to encounter the dangerous condition because, to a reasonable person in that position, the advantages of doing so outweigh the apparent risk. *Sollami*, 201 Ill. 2d at 15-16. Plaintiff does not contend that the deliberate-encounter exception is applicable to the circumstances. While the deliberate-encounter exception may not be limited to circumstances of economic compulsion, there is no evidence that Riley was under any compulsion, such as peer pressure, to attempt to slide down the fire pole. Because there is no evidence, we hold the deliberate-encounter exception does not apply.

¶ 34 In the *Bujnowski* analytical framework, we now turn to the four-factor duty test. Because the condition was open and obvious, namely falling from a height, Riley's injury was not reasonably foreseeable, because falling from a height is among the risks that even very young children (and Riley was not a very young child but 13 years of age) are capable of appreciating

and avoiding that risk. *Qureshi*, 394 Ill. App. 3d at 885. Likewise, the likelihood of injury is small because the risk was apparent. Thus, the first two factors strongly favor defendants.

¶ 35 The remaining factors appear to be split between plaintiff and defendant. The burden of guarding against the injury appears relatively slight. Defendants could have forbidden the children to use the platform and fire pole. The consequences of placing the burden on defendants are perhaps greater. The Andersons testified that they erected the structure for the amusement of their children. They also testified that of hundreds of users and uses, no one had ever been injured, from young children to older adults. (Plaintiff testified that one of the Andersons told her that one of their children had been injured using the fire pole; the Andersons denied making this statement and denied that any of their children had been injured using the fire pole.) The consequences of forbidding the structure's use that evening would have been miniscule; the consequences of forbidding access altogether would have been much greater. Even if this calculus on the final two factors favors plaintiff, we cannot say that, in light of the open and obvious nature of the hazard, that they outweigh the first two factors. See *Bujnowski*, 2015 IL App (2d) 140578, ¶ 55 (no published case has held both that the open-and-obvious doctrine applied without any exception being present and the defendant still owed a duty to the plaintiff). Accordingly, we hold that defendants did not owe Riley any duty in this case.

¶ 36 Plaintiff argues that the hazard in this case was not open and obvious. Plaintiff argues first that the fire pole, being almost twice the diameter recommended in the industry, was a hidden and dangerous condition. We disagree. The risk posed by the structure was a fall from a height, and the evidence shows that Riley made the climb up to the platform and fell when he had donned slick nylon-shelled ski gloves and did not wrap his arms and legs around the pole.

¶ 37 Plaintiff argues that the darkness of the evening concealed the width of the pole from Riley. Riley did not testify that he fell through the opening because it was too dark to see. Rather, he testified that he fell when he tried to slide down without wrapping his arms and legs around the pole and when his slick gloves caused his grip to fail. We reject plaintiff's contentions.

¶ 38 Plaintiff contends that, due to the construction of the structure and the darkness of the evening, the dangers associated with it were not obvious to Riley. We disagree. Riley climbed up to the platform, so he knew that he was very high above the ground. The risk of a fall from a height was therefore clearly apparent, as even very young children are deemed to appreciate the risk of a fall from a height. *Qureshi*, 394 Ill. App. 3d at 885. We therefore reject plaintiff's contention and persist in holding that the risk was open and obvious.

¶ 39 As plaintiff has neither convinced us that the risk was not open and obvious nor that any exception to the open-and-obvious doctrine was applicable, we affirm the judgment of the trial court on this point.

¶ 40 C. Factual Issues

¶ 41 Plaintiff argues there is a factual issue whether Riley's slick gloves or the 3½-inch diameter of the pole caused Riley's fall. Plaintiff contends that Caskey testified that the pole was so wide that Riley had inadequate grip strength to descend safely (perhaps implying the converse that, if the pole were narrower, Riley's grip strength would have been adequate). Plaintiff concludes that there is a factual issue regarding the mechanism of Riley's fall, and this issue should have precluded summary judgment.

¶ 42 We disagree. Even conceding a factual issue in the mechanism of Riley's fall, defendants did not owe Riley any duty because the risk of a fall from a height was open and obvious, no

exception to the open-and-obvious doctrine applied, and the final two factors of the four-factor duty test did not outweigh the first two factors. Thus, the factual issue regarding the mechanism of Riley's fall was not material in the absence of a duty.

¶ 43 Plaintiff also contends that defendants owed a duty to instruct Riley on the use of the pole. While this contention is perhaps structurally misplaced in plaintiff's argument, it is unavailing. The danger of the structure to Riley was open and obvious: a fall from a height. If, as plaintiff appears to contend, Riley did not know how to descend a fire pole, the risk of a fall from a height was still something he could appreciate. Under the law, then, Riley is deemed to be able to appreciate and avoid that risk, including his own limitations on using the fire pole to descend from the height. Accordingly, we reject plaintiff's contentions.

¶ 44 We close with the following observation from *Bujnowski*: "[t]ragic as the facts of this case are, they are not extraordinary in a legal sense and do not call for a result that would appear to be without precedent." *Bujnowski*, 2015 IL App (2d) 140578, ¶ 55.

¶ 45 III. CONCLUSION

¶ 46 For the foregoing reasons, we affirm the judgment of the circuit court of Kane County.

¶ 47 Affirmed.