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ILLINOIS LAW MANUAL

CHAPTER V
PREMISES LIABILITY

D. OPEN AND OBVIOUS CONDITIONS

1. Basic Law

"A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land where danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." Ward v. K-Mart, 136 Ill. 2d 132 (1990). In Sollami v. Eaton, 201 Ill. 2d 1 (2002), the Illinois Supreme Court held that the open and obvious doctrine applied to trampoline use. The court, in Sollami, held that it is apparent that, when one is propelled higher than normal on a trampoline, contact with the trampoline mat when coming down from the greater height will cause a considerable impact to the jumper's legs. The court also held that the danger of falling from a height has been held by this court to be open and obvious to any child old enough to be allowed at large. Sollami, 201 Ill. 2d at 18-19; citing, Corcoran v. Village of Libertyville, 73 Ill. 2d 316, 327 (1978); Restatement 2d of Torts, Section 339, Comment j, at 203; Mt. Zion State Bank v. Consol. Communications, Inc., 169 Ill. 2d 110, 118 (1995).

The court, in Sollami, further held that the fact that a trampoline mat may react differently and that injury may occur when two or more persons are jumping on the trampoline at one time, "as opposed to a single jumper," is "apparent." Sollami v. Eaton, 201 Ill. 2d 1, 7 (2002); Ford v. Nairn, 307 Ill. App. 3d 296, 302 (4th Dist. 1999) (also holding that the dangers of multiple people jumping on a trampoline were open and obvious to a teenager).

Conditions, though seemingly innocuous, may present an unreasonable danger under certain circumstances. The possibility that an entrant, even in the general exercise of reasonable care, will be distracted or momentarily forgetful must be considered. A major concern is whether the defendant could reasonably have foreseen injury to the plaintiff. Ward v. K-mart, 136 Ill. 2d 132 (1990). As such, the existence of an open and obvious condition is not a *per se* bar to a finding of a legal duty on the part of the premises owner or occupier. Sollami v. Eaton, 201 Ill. 2d 1 (2002). Although the known-and-obvious-risk rule is still viable, it is subject to certain conditions. Courts will no longer find an owner or occupier free of a duty of reasonable care under all circumstances where the conditions are known or obvious. Moore v. Kickapoo Fire Protection District, 210 Ill. App. 3d 736 (1991). There are two major exceptions to the rule, those being: (1) the distraction or forgetfulness exception, and (2) the deliberate encounter exception.

2. Analysis

a. Distraction/ Forgetfulness Exception

Under the current state of the law, the courts must examine not only whether the condition causing harm was open and obvious, but also whether an invitee may reasonably be expected to be distracted or forgetful of the condition after having momentarily encountered it. Ward, 136 Ill. 2d at 134.

A property owner owes a duty of due care if there is reason to expect that the invitee's attention may be distracted so that he will not discover what is obvious, will forget what he has discovered, or will fail to protect himself against it. Sollami v. Eaton, 201 Ill. 2d 1, 15-16 (2002).

In Ward v. K-Mart, the Illinois Supreme Court held that, although a concrete post is an open and obvious condition, the defendant had reason to anticipate that customers shopping in the store would, even in the exercise of reasonable care, momentarily forget the presence of the post, which they may have previously encountered when they entered the premises. The court also found that a customer might be distracted and fail to see the post because of the large, bulky item they were carrying. The court stated that the burden on the defendant to protect against this danger would be slight as the post was located immediately outside the entrance to the home center section of the defendant's store. As such, the storeowner had a duty of reasonable care, which extended to the risk that a customer could walk into the post when leaving the store with a large bulky item. In Rexroad v. Springfield, 207 Ill. 2d 33 (2003), the Illinois Supreme Court held that it was reasonably foreseeable for a student to become distracted or forgetful when he stepped into a large hole in the school's parking lot while bringing a helmet from the locker room to the football field. It was foreseeable that the student's direction would be focused on the player to whom he was to deliver the helmet and not on the ground. In addition, the burden on the school to barricade the hole (which it had done on previous days) was slight.

In Deibert v. Bauer Brothers Construction Co., Inc., 141 Ill. 2d 430 (1990), the plaintiff recovered for injuries sustained as a result of tripping over a tire rut after exiting a portable bathroom. The plaintiff, while working at a construction site, left the bathroom and looked up to see whether construction materials were being thrown off of a balcony above and near the bathroom. Workers had, in the past, thrown plasterboard and other construction materials off the

balcony. As the plaintiff was looking upward, he took only a few steps from the bathroom before stepping into one of several tire ruts in the ground. The court ruled that, even though the rut was an "obvious" danger, the injury was foreseeable since the defendant had reason to anticipate that the plaintiff, while exiting the bathroom, would be momentarily distracted. In addition, the defendant would not suffer an intolerable burden if it moved the portable bathroom to another location or provided warning.

However, the First District Appellate Court in analyzing Rexroad and Deibert refused to apply the "distraction" exception. It noted that where Illinois courts have applied this exception, the landowner clearly created, contributed to, or was responsible in some way for the distraction which diverted the plaintiff's attention from the open and obvious condition. See Sandoval v. The City of Chicago, 357 Ill. App. 3d 1023 (2005). In Richardson v. Vauqhn, 251 Ill. App. 3d 403 (1993), a distinction is made between an entrant's momentary distraction or forgetfulness and inattention to his surroundings. The plaintiff was injured at a company picnic. The plaintiff, while eluding co-workers with water balloons, observed a cable two to three feet off the ground when only five yards away. Sensing that he was unable to stop, the plaintiff made the decision to jump, but upon landing, came down on an uneven spot, fell and was injured. The court, under these specific circumstances, ruled that the defendants owed plaintiff no duty to warn or otherwise safeguard him from potential harm posed by an obvious condition. The court found that plaintiff's injuries resulted not from a distraction, which could reasonably be anticipated by the defendants, but instead were the result of plaintiff's own inattentiveness in running a considerable distance without looking ahead for the presence of potential obstacles. A plaintiff, who through his own inattention has subjected himself to potential injury, may not assert that a defendant should have anticipated that he might be "distracted." See also Wreglesworth v. Arctco, Inc., 317 Ill. App. 3d

628 (2000) (a reasonable person would recognize the risk of injury resulting from colliding with a visible pier on a jet-ski at high speed, regardless of whether the pier was padded or not).

In Bonner v. City of Chicago, 334 Ill. App. 3d 481 (2002), the court held that it was not reasonably foreseeable that a plaintiff would be so distracted by the threat of being robbed that he would trip over a light pole base with extruding bolts on a sidewalk that was open and obvious. In Bonner, the distraction exception to the open and obvious rule did not apply.

In two cases dealing with bodies of water, the Supreme Court recognized the applicability of the open and obvious doctrine. In Mt. Zion State Bank & Trust v. Consolidated Communications, Inc., 169 Ill. 2d 110 (1995), the court reaffirmed the wellestablished common law principle that landowners owe no duty to protect trespassing children, allowed to be at large by their parents, from dangers presented by open and obvious dangers (swimming pool) on their property.

In Bucheleres v. Chicago Park District, 171 Ill. 2d 435 (1996), the Supreme Court held that the park district owed no duty to the plaintiffs, who were injured after diving off a seawall into Lake Michigan, because the danger was open and obvious. The park district owed no duty to warn of or guard against the risk of injury posed by this open and obvious condition because the defendant could have reasonably expected the plaintiffs to appreciate the risk associated with diving into water of unknown depth and shifting currents and sands, with or without the posting of warning signs. The court distinguished the facts of this case from Ward and Deibert, supra, in that the plaintiffs in Bucheleres were not distracted or forgetful of the lake's existence when they decided to dive off the seawalls. See also, Bier v. Leanna Lakeside Property Ass'n, 305 Ill. App. 3d 45 (1999)(no duty to protect a swimmer from the open and obvious danger of a rope swing from which the swimmer fell and struck his head on the lake bottom. The burden of removing the

rope swing was minimal, but the swimmer should have been able to appreciate the risk involved with the use of the rope swing, given its height and the surrounding water, and chose to undertake the risk).

In another case dealing with an open body of water, the Supreme Court held that the open and obvious doctrine did not apply. In Jackson v. TLC Associates, Inc., 185 Ill. 2d 418 (1998), an experienced swimmer dove into the water and was injured when he struck a submerged and unmarked pipe that was not visible from the surface. The court held that there was no reason for the swimmer to have reasonably anticipated the presence of the underwater obstruction or the injuries it could produce. Because the lake was designed for recreational swimming and the defendant opened the facility up to the public for that purpose, patrons had the right to assume that the lake was properly prepared for their use and that the defendant had taken proper steps to make it safe. Furthermore, in Ward v. Mid-America Energy Co., 313 Ill. App. 3d 258 (2000), a child drowned while retrieving a ball in water near the defendant's dam. The court held that the defendant owed a duty to warn of the current created by the dam. In doing so, it differentiated between the open and obvious dangers associated with water and the increased risks caused by man-made currents hidden beneath the surface.

The most recent development in this area occurred with the First District's opinion in Green v. Jewel Food Stores, Inc., 343 Ill. App. 3d 830 (2003), wherein the holding in Ward was extended. The court decided, under the facts of this case, to apply an exception to the open and obvious rule. In Green, a patron, who was exiting the store, saw a cart rolling down a slope toward the parking lot. The patron reached out and grabbed the cart by the handle. She then tripped on a small bump in the walkway and fell. Under the open and obvious doctrine, the business owner would not have been responsible for the bump because the condition and the risk are obvious to the ordinary

person. However, the court ruled that the business owner should have foreseen that a customer would have been distracted by unattended shopping carts and could have fallen on that small bump. Therefore, the court found that the patron proved the duty requirement of a negligence case and, in so doing, further limited the applicability of the open and obvious rule.

b. Deliberate Encounter Exception

In LaFever v. Kemlite Co., 185 Ill. 2d 380 (1998), the Illinois Supreme Court acknowledged that generally a landowner is not liable to invitees for an open and obvious hazard. The court found, however, that if a landowner has reason to expect that the invitee will proceed to encounter the known or obvious danger, because to a reasonable man in his position the advantage of doing so outweighs the apparent risk, then a duty exists. In LaFever, the plaintiff was injured when he slipped and fell on waste material near a compactor container on the manufacturer's premises. The plaintiff was forced to walk through a hazardous area surrounding the compactor in order to complete his job duties. Consequently, the court held that the manufacturer could have foreseen the risk and thus owed a duty to the plaintiff. See also Wreglesworth v. Arctco, Inc., 317 Ill. App. 3d 628 (2000) (the deliberate encounter exception applies only when a landowner has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk).

Economic compulsion, such as loss of employment, lies at the root of the invitee's decision to deliberately encounter the obvious danger. LaFever v. Kemlite Co., 185 Ill. 2d 380 (1998). In Kotecki v. Walsh Construction, 333 Ill. App. 3d 583 (2002), no such compulsion existed. In Kotecki, the plaintiff, a painter, was injured when he lost his footing when descending a ladder that he had placed in that spot himself. The plaintiff assumes he was injured because of an uneven surface created by a dock leveler on the job site. The court refused to find that an exception to the

open and obvious rule applied and refused to find that the landowner owed him a duty. In Kotecki, there was an absence of evidence as to the cause of the fall, or whether the plaintiff was distracted or merely inattentive to his surroundings. In addition, the plaintiff offered no evidence that he made a reasonable decision to deliberately encounter an obvious danger. In fact, the evidence showed that the plaintiff had the right to paint at a different time of day if distracted.

In contrast, the First District, in Largosa v. Ford Motor Company, 303 Ill. App. 3d 751 (1999), held that a landowner did not create a foreseeable danger to motorists by locating its bungee-jumping business close to the highway, even if bungee-jumping was a startling distraction. In Largosa, the court held that the landowner did not owe a duty to the motorist who was injured when she attempted to avoid another driver who was distracted by the bungee-jumping activity.

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