

2026 IL App (2d) 250335
No. 2-25-0335
Opinion filed October 16, 2026

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

TERRI STOUT, Plaintiff-Appellant,

v.

COSTCO WHOLESALE CORPORATION, Defendant-Appellee.

Appeal from the Circuit Court of Lake County.
Honorable Joseph V. Salvi, Judge, Presiding.
No. 23-LA-35

JUSTICE BIRKETT delivered the judgment of the court, with opinion.
Justices Schostok and Mullen concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff, Terri Stout, tripped and fell while stepping over the gas hose she was using to fill her car at a gas station operated by defendant, Costco Wholesale Corporation. She appeals the judgment of the circuit court of Lake County, granting summary judgment in favor of defendant, because (1) the condition was not open and obvious, or if it was open and obvious, an exception applied; (2) the court failed to perform the requisite duty analysis; (3) defendant's motion for summary judgment was silent as to the breach element of her negligence claim; (4) the "court properly rejected defendant's notice argument and erred if it did not"; and (5) the court could not properly enter summary judgment on the issue of contributory negligence where defendant imperfectly pleaded it as an affirmative defense and defendant's motion for summary judgment

was silent on that issue. We find the issue of whether the condition was open and obvious to be dispositive, and we affirm.

¶ 2

I. BACKGROUND

¶ 3 On March 22, 2022, plaintiff fell at defendant's gas station in the Village of Mettawa and sustained significant injuries. The fall occurred as she stepped over the gas pump hose she was using to refuel her husband's pickup truck.

¶ 4 Plaintiff described the circumstances of her fall in her discovery deposition. She and her husband drove to defendant's store. Plaintiff was a Costco member and had been to that location before for both shopping and gas. The hoses on the pumps at a Costco gas station are long enough to access a car's fuel port even if it is on the other side of the car relative to the pump. Plaintiff drove and her husband rode in the passenger seat. They waited in line for an open pump. Plaintiff's husband questioned whether the wait was worth the price they would pay.

¶ 5 When it was their turn, plaintiff pulled next to the pump, turned off the vehicle, and exited the car, with her husband remaining in the car. The pickup's fuel port was on the driver's side of the vehicle, and it was next to the gas pump. Plaintiff noticed that the hose was "very long" and did not seem to retract despite her efforts. Once she saw the hose would not retract, she "didn't think about it," placed the nozzle into the filler tube, and began pumping gas. Plaintiff was positioned toward the rear of the vehicle with the hose between her and the driver's door.

¶ 6 It was a rainy day, and the hose was wet and likely dirty. She decided to tell her husband the price of the gas but did not want to leave the gas flowing unattended if she walked around the rear of the vehicle. Plaintiff decided to step over the hose, beginning with her right foot. She cleared the hose with her right foot and tried to bring her left foot over the hose while continuing to move forward. Her left foot caught the hose, and she fell. Plaintiff denied that anything had distracted

her; she was “walking back [to the driver’s side door] to tell [her husband] the price.” However, when examined by her counsel, she also agreed she was distracted by the moisture on the hose.

¶ 7 An approximately 19-second video clip of the incident is consistent with plaintiff’s deposition testimony. It begins by showing plaintiff standing between the pump, which is hidden by a brick post, and the truck, with the gas nozzle inserted into the car’s fuel port and grasped in plaintiff’s right hand. The hose hangs from the nozzle in a “U” shape, with the viewer’s right side of the “U” hidden by the brick post, and with the bottom of the “U” some inches off the ground. Plaintiff is standing behind the hose toward the rear of the vehicle. While holding onto the nozzle, plaintiff shifts her weight onto her left leg, which is also hidden by the post, and lifts her right knee high, her right thigh approximately parallel to the ground, avoiding contact with the hose. Plaintiff steps forward and to her right, bringing her right foot over the hose and placing it closer to the vehicle than it had been before she began the step. Plaintiff clears the hose with her right foot. As she begins to place her right foot onto the ground, her right hand releases the nozzle. Her head is down during this step; her left arm, leg, and foot remain hidden behind the post. As plaintiff begins to bring her weight onto her right leg, her right forearm travels toward the body of the car. By the time her left knee is fully in view, plaintiff appears to place her right forearm against the body of the vehicle. The position of her left arm appears to be along her side with her left hand closed and either resting on the outside of her left thigh or in front of her left hip. Plaintiff’s head remains down and turned a little toward the car. As she begins to bring her left knee forward, her left shin appears to be approximately parallel to the ground. Plaintiff then brings her left knee even or slightly in front of her right knee, with her shin beginning to drop. As she straightens her left leg, her left foot remains behind the hose. As plaintiff begins to stride forward with her left foot, it appears the front of her left ankle catches on the hose, causing plaintiff to fall. As plaintiff falls,

she twists to her left. Her right hand is extended in front of her, and her left hand is not visible. Once plaintiff landed on the ground, she rolled onto her right side and immediately grasped her left arm.

¶ 8 On January 24, 2023, plaintiff filed this negligence action against defendant. Plaintiff specifically alleged that the mechanical retractable device for the hose she was using was broken in violation of the State Fire Marshal's regulations concerning gas pump hoses (41 Ill. Adm. Code 175.450(e), amended at 42 Ill. Reg. 10,476, 10,536 (eff. Oct. 13, 2018)). Plaintiff alleged that this created a dangerous condition and that defendant breached its duty to her by failing to inspect the hose and failing to warn her of the condition before she tripped over it. The case proceeded through discovery with plaintiff and defendant's employees being deposed.

¶ 9 On May 2, 2025, defendant filed a motion for summary judgment. Defendant argued that plaintiff failed to produce sufficient evidence demonstrating that the mechanical retractable device was broken or there was otherwise a defect in the hose or that it had notice of any defect or dangerous condition. Defendant also argued that the condition on which she tripped was open and obvious. Finally, defendant argued that plaintiff's own negligence was the sole proximate cause of her injury. Plaintiff filed a response arguing that, under a traditional duty analysis balancing the applicable factors, defendant owed her a duty. She argued that the condition of the hose was not open and obvious because she did not recognize or appreciate the risk of stepping over a hose when it was pumping gas into a car. Plaintiff also contended that the distraction exception to the open and obvious doctrine might be applicable in this case. Last, plaintiff disputed defendant's proximate causation argument.

¶ 10 The trial court granted defendant's motion for summary judgment. It accepted defendant's arguments regarding lack of defect and lack of notice and found that plaintiff presented insufficient

evidence to sustain her complaint. Regarding the application of the open and obvious doctrine, the court stated:

“Nonetheless, while there is a duty of reasonable care on behalf of [defendant], there is no duty to protect against potentially dangerous conditions that are open and obvious. Here, Plaintiff did not inadvertently trip over the hose.

Rather, she saw it, knowingly attempted to step over it, and caught her foot on the hose as she was completing her final step. The video shows that, in fact, she had her right hand on the gas nozzle as she’s pumping the gas. She steps over the hose with her right foot. As she’s making contact with the ground, she lets go of the nozzle with her right hand. She brings her left foot forward and it catches on the hose as she falls.

Plaintiff had knowledge of the hose, its location, and in her opinion, that it was low-hanging. A reasonable person would appreciate the danger of that and stepping over the hose, one might catch their foot on the hose if they did not lift their foot high enough, causing them to fall.

This is not a case where there was no better alternative available to Plaintiff. She could have chosen another route to get back into her vehicle to speak with her husband, but she elected not to. The fact that it was raining and she wanted to take the shortest route to get into the truck to talk to her husband, [sic] is not a distraction. The hose and its location were clearly visible and known to her as she elected to traverse over it.”

¶ 11 Plaintiff timely appeals.

¶ 12 II. ANALYSIS

¶ 13 On appeal, plaintiff challenges the trial court’s judgment that the condition of the hose was open and obvious. She also argues that the court erred in other aspects of its judgment, contending

that (1) it did not properly weigh the factors bearing upon whether defendant owed plaintiff a duty; (2) defendant's motion for summary judgment was flawed because it did not address the breach element of her negligence claim; (3) the court properly rejected defendant's argument that it had not received notice of the condition and, alternatively, erred if it accepted defendant's argument; and (4) the court jumped the gun on contributory negligence. We find the application of the open and obvious doctrine to be dispositive.

¶ 14

A. Standard of Review

¶ 15 Plaintiff appeals the trial court's grant of summary judgment in favor of defendant. Summary judgment is proper when 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 moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2024). Summary judgment is a drastic means of resolving litigation and should be granted only if the moving party's right to judgment is clear and free from doubt. *Lee v. Rock Corner Marathon*, 2026 IL App (2d) 250004, ¶ 20. We review a trial court's judgment to determine whether a genuine issue of fact was raised and, if none exists, whether judgment was proper as a matter of law. *Id.* Thus, we construe the evidence in the record strictly against the moving party and in the light most favorable to the nonmoving party. *Id.* We review *de novo* the court's grant of summary judgment. *Id.*

¶ 16

B. Application of the Open and Obvious Doctrine

¶ 17 Plaintiff contends that the trial court's determination that the gas hose was an open and obvious condition was erroneous and presents at least a factual issue. We disagree.

¶ 18 The common law rule regarding an open and obvious condition meant that a landowner was not required to foresee and protect against an injury if the potentially dangerous condition was

open and obvious. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 16. This rule is also reflected in section 343A of the Restatement (Second) of Torts, which 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 (1965). “Obvious” means that both the potentially dangerous condition and its associated risk are apparent to, and would be recognized by, a reasonable person in the same position as the visitor exercising his or her ordinary perception, intelligence, and judgment. *Bruns*, 2014 IL 116998, ¶ 16. The rationale of the open and obvious doctrine provides that any person who encounters the potentially dangerous condition will take care to avoid any danger posed by the condition; thus, the open and obvious nature of the condition gives warning because a person is expected to appreciate and avoid the danger, rendering any risk of harm slight. *Id.*

¶ 19 However, determining a condition to be open and obvious is not a *per se* or automatic bar to finding a legal duty on the part of a defendant. *Id.* ¶ 19. Instead, the court is required to conduct the traditional duty analysis but applied to the particular facts of the case. *Id.* Finally, whether a potentially dangerous condition is open and obvious may present a factual issue that will preclude summary judgment. *Id.* ¶ 18. If no dispute exists regarding the physical nature of the condition, the issue of whether the condition is open and obvious presents a question of law. *Id.*

¶ 20 We hold that the obstacle of the gas hose was open and obvious as a matter of law. First, plaintiff herself placed the gas nozzle and hose into the fuel port of her vehicle. Plaintiff testified that, previously, she had visited defendant’s gas station and purchased gasoline. The hose hung from the truck as any gas hose hangs from the driver’s-side fuel port to the gas pump, in a “U” shape. There was no question of visibility and no testimony that the hose was somehow unable to be perceived. The height of the bottom of the “U” is not discerned, but it is unquestioned that it

was low enough for a person to step over. That plaintiff appreciated that it was an obstacle is demonstrated by the fact that she attempted to step over it, lifting her right thigh roughly parallel to the ground before stepping over the hose with her right foot. That she still appreciated that it was an obstacle is demonstrated by the fact that she held her left shin up roughly parallel to the ground as she attempted to step over it. Moreover, had plaintiff not appreciated the obstacle posed by the hose, she would not have taken the high steps over it and would have simply walked normally. Finally, plaintiff herself created the obstacle by placing the nozzle and hose into the fuel port and beginning to pump gas into her vehicle; from this act, plaintiff unquestionably knew of the existence of the obstacle, and her actions demonstrated she appreciated the risk of falling as she tried to traverse it.

¶ 21 A determination that a condition is open and obvious does not end the inquiry. We must also consider whether defendant owed plaintiff a duty of reasonable care. *Id.* ¶ 19. We note that the trial court held that plaintiff had failed to present sufficient evidence to sustain her case, so it did not conduct a formal duty analysis. Nevertheless, because we are reviewing this matter *de novo*, because we are reviewing a question of law (*Pence v. Northeast Illinois Regional Commuter R.R. Corp.*, 398 Ill. App. 3d 13, 16 (2010) (the existence of a duty is a question of law to be resolved by the court)), and because a reviewing court reviews the lower court's judgment, not its rationale (*City of Chicago v. Holland*, 206 Ill. 2d 480, 491-92 (2003)), we may undertake the analysis.

¶ 22 In assessing whether a defendant owes a duty, we consider four factors: the reasonable foreseeability of the injury, the likelihood of the injury, the magnitude of the burden of guarding against the injury, and the consequences of placing that burden on the defendant. *Bruns*, 2014 IL 116998, ¶ 14. The circumstances of the case inform the weight to be given each factor. *Id.* Where

a condition is open and obvious, the weight given to the first two factors is minimal, because it is expected that the open and obvious nature of the condition will inspire caution and the foreseeability of injury is slight; likewise, because an individual is expected to avoid the danger, the likelihood of injury is also slight. *Id.* ¶ 16.

¶ 23 Here, the balance of the factors weighs against imposing a duty on defendant. The dangerous condition of the hose was open and obvious, and plaintiff was aware of the risks and dangers attendant to that condition. Therefore, defendant could not reasonably foresee that plaintiff would abandon caution and encounter the open and obvious danger. Likewise, the risk of injury is slight because a reasonable person in plaintiff's position would exercise her experience and judgment to avoid the risk of tripping over the hose. These two factors weigh very strongly against imposing a duty on defendant. The magnitude of the burden to guard against the injury is relatively heavy. Defendant would need to task an employee to warn and prevent customers from stepping over the hoses. This would prevent a gas station employee from fulfilling other needful tasks related to the gas station or other areas of the store. Dedicating an employee or employees to this task every shift and every day would be a heavy burden on the Mettawa store. The consequences of this burden would not simply be local to the Mettawa store but would extend to all of defendant's stores that included a fuel station. Across defendant's entire organization, this would indeed be a heavy burden. Balancing the factors leads us to conclude that defendant did not owe plaintiff a duty in this case.

¶ 24 Plaintiff argues that the height of the hose was key, and its indeterminacy reveals a factual issue sufficient to preclude summary judgment. The video belies her argument. Plaintiff was clearly aware that the height of the hose was sufficient to require her to take a high step over it.

Indeed, she successfully stepped over it with her right foot; she did not step as highly with her trailing left foot and caught it on the hose. This caused her to fall.

¶ 25 Plaintiff supports her factual-issue argument with citations to cases involving the appellate court's determination that a factual issue precluded summary judgment. We find the cases to be distinguishable. In *Buchaklian v. Lake County Family Young Men's Christian Ass'n*, 314 Ill. App. 3d 195, 198-99 (2000), the plaintiff tripped over a mat near the showers in defendant's premises, and the trial court granted summary judgment on the basis that the condition of the mat was open and obvious. This court reversed, holding that—because the evidence in the record showed that the defect in the mat was small, there was lack of significant contrast between the defect and the surrounding mat, and an approaching person would have a short time to discover the defect—there was an issue of fact whether the condition was open and obvious. *Id.* at 202. *Buchaklian* is distinguishable because, here, there was no issue of visibility or discovery of the condition. Indeed, plaintiff created the condition by placing the hose into the fuel port of the vehicle and thereby was clearly aware of the hose in front of her. Further, the video demonstrates her awareness of the condition because she stepped high over the hose.

¶ 26 In *Becker v. Alexian Brothers Medical Center*, 2021 IL App (1st) 200763, ¶ 6, the plaintiff fell over a drainage grate that she perceived generally but was unable to distinguish the slats and holes because they were all rust colored, and the slats were downwardly angled, obscuring their presence. The trial court granted summary judgment because the grate itself was generally open and obvious. *Id.* ¶ 9. The appellate court reversed, holding that the condition presented a factual issue because, in the dim lighting, it was not clear that the downward sloping gaps were open and obvious due to their slope and lack of color contrast. *Id.* ¶ 18. Plaintiff argues that the obscuring orientation of the grate and its gaps in *Becker* are similar to her situation in that, once she stepped

over with her right foot, it was no longer clear to her where the hose was in relation to her left foot—either the height or the position of the hose relative to her trailing left leg. *Becker* is distinguishable because plaintiff was entirely aware of the hose, its height, and its position because she stepped over it with her right foot. She, as a reasonable person, was aware that she needed to bring her left foot to a similar height as her right foot to successfully navigate the obstacle. That she failed does not transform the obstacle from open and obvious and does not create an issue of fact.

¶ 27 In *Brettman v. Virgil Cook & Son, Inc.*, 2020 IL App (2d) 190955, ¶ 49, the court held that, although the defendants negligently installed temporary traffic lights at an incorrect height, that installation created only the condition for, and was not the cause of, the ensuing accident. We reversed, holding that a fact finder could find that the lights, contrary to the trial court's determination, were not readily visible because of their incorrect height. *Id.* ¶ 99. In reaching this conclusion, we noted that the static picture of the intersection, showing the lights to be visible, did not reflect “the perspective of a driver moving in a vehicle with a certain field of view.” *Id.* Plaintiff argues that the video does not capture her personal perspective of the hose, its height, or its location relative to her body. *Brettman* is inapposite, dealing with an issue of condition versus cause, not whether a potentially dangerous condition was open and obvious. That aside, plaintiff's contention misses the mark. The video demonstrates her personal awareness of the hose by the fact that she stepped high over the hose with her right foot. Plaintiff suggests that “remembering where the hose was in relation to her body after she stepped is a very different question.” We disagree. She attempted to take a high step over the hose with her trailing foot, thus indicating her awareness of the hazard and risks presented by the hose. Her lack of success does not change the hose from an open and obvious condition or inject a factual issue into this matter.

¶ 28 Plaintiff argues that the uncertainty of the hose’s height or where it was in relation to her trailing left foot after she had successfully completed the step over it with her right foot should be sufficient to preclude summary judgment. The precise height is not a material factual issue sufficient to preclude summary judgment. Plaintiff successfully stepped over the hose with her right foot; she knew she had to raise her left to at least the same height. Whether the hose was 24 inches above the ground or 15 inches is immaterial.

¶ 29 Plaintiff changes tack and argues that, rather than the height, she misjudged where her foot was in relation to the hose, bringing her foot down before it had cleared the hose, and this caused her fall. That risk, however, is fully baked into stepping over an obstacle—something she appreciated, as demonstrated by her successful right step. Plaintiff argues that *Wright v. Waukegan Community Unit School District 60*, 2022 IL App (2d) 210334, ¶ 29, admonishes a court to consider how the condition might be perceived by the plaintiff. *Wright*, however, involved a child who could not appreciate the danger posed by the roller gate fence he was playing on. *Id.* ¶ 30. Plaintiff, by contrast, is an adult, and was certainly aware that a risk of stepping over an obstacle is tripping over it. Her failure to successfully step over the hose does not raise a factual issue regarding whether it was open and obvious. Plaintiff argues that the height of the hose varied across the “U” shape and accurately judging where in the “U” she was would be a difficult task. Again, this does not inject a factual issue into the matter—plaintiff, as a reasonable adult, created the obstacle, appreciated its risk as evidenced by her first step, and was ultimately unsuccessful in her endeavor, as evidenced, unfortunately, by her fall.

¶ 30 Plaintiff argues that the video is insufficient to allow us to decide as a matter of law that the hose was an open and obvious hazard, relying on *Yersich v. City of Chicago*, 2023 IL App (1st) 220598-U, ¶ 28, for the proposition that a potentially dangerous condition cannot be determined

to be an open and obvious condition, as a matter of law, from a photograph. There, the record included a photograph of a pothole in a crosswalk, there was testimony that the pothole was filled with water and appeared to be only a puddle, and the injured party was a four-year-old child riding a scooter under the supervision of his mother. *Id.* ¶¶ 10, 19. *Yersich* is inapposite because plaintiff, unlike the injured party in *Yersich*, is not a child but an adult with the experience and judgment to appreciate the dangers posed by the obstacle. We reject plaintiff’s contentions.

¶ 31 Plaintiff next argues that the trial court conflated the foreseeability inquiry with contributory negligence. Plaintiff notes that the court, in granting defendant’s motion for summary judgment, stated that she “did not inadvertently trip over the hose,” and she “knowingly attempted to step over [the hose].” According to plaintiff, this indicates that the court was measuring her comparative fault instead of determining whether a customer stepping over a hose was foreseeable to defendant. We disagree. When placed into context, the court was discussing whether the potentially dangerous condition—the obstacle of the hose—was open and obvious. Understood in this context, the court was commenting on plaintiff’s awareness and appreciation of the hazard posed by the obstacle of the hose hanging between her vehicle and the gas pump. We further emphasize that our focus on plaintiff’s actions, with respect to creating the obstacle she would later attempt to traverse, is not a commentary on defendant’s duty, and specifically, whether defendant could reasonably foresee plaintiff’s action with respect to the hose. See *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 148 (1990) (a defendant’s duty is not determined by reference to the plaintiff’s actions; the focus must be on the defendant). Rather, we emphasize plaintiff’s action in creating the obstacle to demonstrate that the condition itself was open and obvious and that plaintiff knew of its existence and general properties, including any attendant risks to safely walking through its location. See *Bruns*, 2014 IL 116998, ¶ 16 (discussing that an “obvious” condition requires the

plaintiff to recognize both the condition itself and its associated risks). We reject plaintiff's claim that the court was improperly finding her comparative fault to be such that no liability could accrue to defendant.

¶ 32 Plaintiff again changes tack and argues that it was foreseeable that a customer would take the shortest route from the fuel port to the driver's door—stepping over a gas hose. However, as discussed above, particularly where the customer created the obstacle him- or herself, the condition is open and obvious and will be fully appreciated for its risks and dangers by the customer. Plaintiff notes that one of defendant's employees had witnessed customers stepping over gas hoses hanging between their vehicles and the gas pumps "certainly every day." This misses the mark. The issue is whether the hanging gas hose was an open and obvious condition, and the fact that other customers step over them does nothing to change that status. The fact that it is open and obvious means that the reasonable person in plaintiff's circumstance would avoid the danger, making the foreseeability that a person would deliberately encounter the danger and its risks slight. The trial court's comments were directed at plaintiff's reasonable perceptions of the condition and its risks and dangers. We reject the argument.

¶ 33 **1. Distraction Exception**

¶ 34 Next, plaintiff argues that the trial court erred in determining that the distraction exception to the open and obvious doctrine did not apply. She contends that this is a "textbook distraction exception case" because she testified in her deposition that she did not want to get the moisture from the hose on her clothes, and this concern distracted her. We disagree.

¶ 35 The distraction exception applies where the landowner has reason to expect that the visitor's attention may be distracted, so that the visitor will not discover what is obvious, will forget what he or she has discovered, or will fail to protect him- or herself against it. *Id.* ¶ 20. Our supreme

court further noted that the distraction exception will apply only where there is evidence in the record from which a court could infer that the plaintiff actually was distracted. *Id.* ¶ 22.

¶ 36 Additionally, a precise definition of what constitutes a distraction under the distraction exception has not been formulated. *Id.* ¶ 23. However, the contours of what constitutes a distraction consist of circumstances that require a plaintiff to divert his or her attention from the open and obvious danger. *Id.* ¶ 28. For example, in *Ward*, 136 Ill. 2d at 153-54, and *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 46 (2003), the plaintiffs were distracted by their tasks as they encountered the open and obvious condition: in *Ward*, carrying a bulky package out of a store, and in *Rexroad*, running an errand for a high school football coach to retrieve a helmet for a player. *Bruns*, 2014 IL 116998, ¶ 28. Similarly, in *Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430, 439 (1990), and *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14, 28-29 (1992), the plaintiffs diverted their attention from the open and obvious danger to protect themselves against other dangers presented by the circumstances: in *Deibert*, by watching for falling debris as the plaintiff traversed deeply rutted ground upon exiting from a portable restroom at a construction site, and in *American National Bank*, by watching his footing on a billboard walkway, despite the presence of power lines immediately above the sign as the plaintiff stepped over the sign from the walkway to a ladder. *Bruns*, 2014 IL 116998, ¶ 28. Moreover, the distraction must also be reasonably foreseeable by the defendant. *Id.* ¶ 29. In an inherently dangerous location, such as at a construction site or on a billboard immediately under power lines, it was reasonably foreseeable to the defendants that the workers would need to take their attention away from the open and obvious danger to guard their safety from other imminent dangers (falling debris or falling from a height). *Id.* Likewise, in each task, the distraction was

reasonably foreseeable because the defendant created the task (sold the bulky merchandise being carried from its store or ordering a student to fetch equipment as quickly as possible). *Id.*

¶ 37 Here, plaintiff's distraction does not resemble those described in *Bruns*. Plaintiff was not intent on avoiding another danger, such as approaching traffic or other cars seeking refueling. Likewise, she was not completing a task created by defendant, like carrying away packages it sold her or running an errand assigned by one of defendant's employees. In fairness, however, this case bears a small resemblance to *Ward*, in that defendant provided the pumps and hoses for defendant to fill her truck with gas, and hoses will necessarily hang in a "U" shape if the fuel port is next to the pump. However, plaintiff stated she wished to avoid the moisture on the hose, and she did this by stepping over the hose, thereby potentially encountering the very condition she claimed she was seeking to avoid. We cannot say that such behavior was reasonably foreseeable by defendant.

¶ 38 Indeed, the circumstances plaintiff presents here are closer to *Whittleman v. Olin Corp.*, 358 Ill. App. 3d 813, 814 (2005), in which the plaintiff contacted overhead, energized power lines with a metal conduit and was injured. The plaintiff pleaded only that he was distracted by his work, and the trial court dismissed the case on the defendants' motion. *Id.* at 815. The appellate court held that a "plaintiff should not be allowed to recover for self-created distractions that a defendant could never reasonably foresee" because the "law cannot require a possessor of land to anticipate and protect against a situation that will only occur in the distracted mind of his invitee." *Id.* at 817-18. Here, plaintiff sought to avoid a self-determined hazard—getting her clothes dirty and wet if she touched the gas pump hose—by stepping over the hose, which only brought her closer to the hazard she claimed she wanted to avoid. Accordingly, we hold that the trial court did not err in determining that the distraction exception was inapplicable to the circumstances here.

¶ 39 Plaintiff relies on *Ward* and *American National Bank* to argue that she was distracted by the potential of getting the wet and dirty hose on her clothes. As discussed, this is the sort of self-created distraction that the courts will not countenance. See *Bruns*, 2014 IL 116998, ¶ 31 (agreeing with *Whittleman*). Plaintiff also relies on *Yersich*, 2023 IL App (1st) 220598-U, ¶¶ 35-36, for the proposition that a distraction need not be created by the defendant. *Yersich*, however, is inapposite because the distraction was oncoming traffic, as the mother and child rode through a crosswalk with a pothole (*id.* ¶ 34 (distraction of “watching vehicular traffic [as the child] rode his scooter over the pothole and fell” raised a factual issue of whether that behavior was reasonably foreseeable by the defendant)). Plaintiff also relies on *Gardner v. City of Loves Park*, 2026 IL App (4th) 4241627-U ([*sic*])¹, ¶ 40, for the proposition that not wanting to get one’s feet wet is a viable distraction. *Gardner*, however, did not involve the distraction exception but instead involved the deliberate encounter exception. The plaintiff’s desire to avoid wet grass was a factor in assessing whether the grass was a viable alternate route under that exception. *Id.* ¶¶ 39-40.

¶ 40 Plaintiff once again changes course to explain that the “distraction exception” is better viewed as simply impinging on a defendant’s reasonable foreseeability. Plaintiff further argues that where a defendant can reasonably foresee the distracting circumstances, such a consideration weighs in favor of imposing a duty. Plaintiff relies on *Becker*, 2021 IL App (1st) 200763, ¶ 18, for the proposition that a foreseeable distraction means the defect is not obvious in the first place. We distinguished *Becker* above in determining that the hose was, as a matter of law, an open and obvious condition and see no reason to depart from that position. Moreover, plaintiff wrenches her

¹The order can be found under the given public domain citation. The *sic* indicates that the citation is not in the form prescribed by our supreme court for a public domain citation. See Ill. S. Ct. M.R. 10343 (Nov. 21, 2017).

proposition from *Becker* out of context: the passage cited states that reasonable minds could conclude either that the grate was not an open and obvious hazard, or that it was an open and obvious hazard, but the defendant could reasonably foresee pedestrians would be distracted by looking for oncoming traffic. *Id.* Plaintiff also relies on *Studer v. Central Illinois Scale Co.*, 2021 IL App (3d) 200277, ¶¶ 43-44, for the same proposition: foreseeability forestalls a distraction-exception analysis. However, *Studer* held that, because the open manhole was not open and obvious, the court did not need to consider the distraction exception. Plaintiff’s insight, therefore, is little more than restating the open and obvious analysis we have performed above. We reject plaintiff’s contentions.

¶ 41 2. Deliberate Encounter Exception

¶ 42 Plaintiff next argues that the deliberate encounter exception should be applied in the circumstances of this case. Defendant argues that, because plaintiff did not raise the issue before the trial court, it is forfeited. Plaintiff responds that the court “specifically addressed the availability of an alternate path in its ruling.” We agree with defendant.

¶ 43 Defendant is correct in noting that plaintiff did not raise the deliberate encounter exception in her response to its motion for summary judgment. Instead, plaintiff argued in her response that, “[w]here a plaintiff is unable to appreciate the magnitude of a potential hazard, the distraction exception may apply.” Plaintiff also relied on *Deibert* to support this contention, and *Deibert* dealt only with the distraction exception. See *Deibert*, 141 Ill. 2d at 437, 439 (a defendant should have anticipated harm accruing from an open and obvious condition if it has reason to expect the plaintiff’s attention may be distracted, so the plaintiff would not discover the condition, despite its obviousness). Plaintiff did not otherwise argue about or rely on a case involving the deliberate encounter exception.

¶ 44 Plaintiff's reliance on the trial court's reference to "the availability of an alternate path" is misplaced. The court stated:

"This is not a case where there was no better alternative available to Plaintiff. She could have chosen another route to get back into her vehicle to speak with her husband, but she elected not to. The fact that it was raining and that she wanted to take the shortest route to get into the truck to talk to her husband, is not a distraction. The hose and its location were clearly visible and known to her as she elected to traverse over it."

The full context of the court's statement reveals the court was discussing whether the hose was open and obvious and whether the distraction exception applied. The court was not addressing the deliberate encounter exception because it simply had not been raised.

¶ 45 It is well established that, generally, "the theory upon which a case is tried in the lower court cannot be changed on review" and "an issue not presented to or considered by the trial court cannot be raised for the first time on review." *Kravis v. Smith Marine, Inc.*, 60 Ill. 2d 141, 147 (1975). Here, plaintiff raised only the distraction exception before the trial court, and the court considered only the distraction exception in ruling on defendant's motion for summary judgment. Accordingly, plaintiff has forfeited the issue of the deliberate encounter exception for our review.

¶ 46 To the extent, however, that the trial court's utterance on the distraction exception ("She could have chosen another route to get back into her vehicle") incanted magic words that preclude forfeiture, the deliberate encounter exception is nevertheless unavailing under the uncontested facts of this case. Under the deliberate encounter exception, the defendant must reasonably expect that the plaintiff will encounter a known or open and obvious danger because a reasonable person in the plaintiff's position would determine that the advantages of encountering the danger outweigh the apparent risk. *Bruns*, 2014 IL 116998, ¶ 20. However, where an alternate path exists, and it is

no more than a minor inconvenience to the plaintiff, the deliberate encounter exception will generally not apply. *E.g., Davis v. Advocate Health & Hospitals Corp.*, 2024 IL App (1st) 231396, ¶ 26 (deliberate encounter exception inapplicable where the plaintiff experiences only a minor inconvenience in taking an alternative path and there is no outside force, such as economic compulsion driving the plaintiff to encounter the danger). Here, plaintiff could have walked around the vehicle and simply avoided stepping over the hose. This alternate path would have only caused plaintiff a minor inconvenience (and would have avoided the potential transfer of dirt and moisture from the hose to her clothes). Therefore, we conclude the deliberate encounter exception is inapplicable here.

¶ 47 Plaintiff testified that she was unwilling to leave the pump unattended as it was dispensing fuel by taking the alternate path and walking around the car to speak to her husband. Yet stepping over the hose to speak to her husband in the car would have the same effect of leaving the pump unattended. Plaintiff also stated that she wished to avoid getting moisture and dirt from the hose on her clothes, so she stepped over the hose. This action exposed her to the very things she claimed she was trying to avoid—moisture and dirt from the hose. The alternate path around the truck would have completely avoided the possibility of picking up moisture and dirt from the hose. Neither of plaintiff’s stated explanations for encountering the dangerous conditions represent any sort of outside compulsion driving her to run the risk or even make any sort of logical sense.

¶ 48 Plaintiff also relies on *Gardner*, 2026 IL App (4th) 4241627-U ([sic]), ¶ 40, for the proposition that a plaintiff’s personal choice to avoid getting wet constitutes a sufficient driving force for the deliberate encounter exception to apply, and on *Ellis v. ICC Group, Inc.*, 2022 IL App (1st) 211581-U, ¶ 33, for the proposition that, in the absence of a convenient and safe path, an employee will nonetheless encounter the hazard to get the job done. *Gardner*, 2026 IL App (4th)

4241627-U ([sic]), ¶ 41, is inapposite because the court held that the alternate pathway was not reasonable because it presented its own risks. *Ellis*, 2022 IL App (1st) 211581-U, ¶ 33, is inapposite because (1) the plaintiff there was acting under economic compulsion in performing his job, (2) he needed to complete the assigned task as quickly as possible, and (3) any safer pathway to reach the assigned task was inconvenient and time-consuming—all of which are circumstances absent from this case. Accordingly, we hold the deliberate encounter exception is unavailable here.

¶ 49 C. Plaintiff's Remaining Arguments

¶ 50 Next, plaintiff argues that the trial court erred by not completing a duty analysis. As we explained above, the court determined that plaintiff had not presented sufficient evidence to demonstrate that defendant owed a duty; therefore, it did not employ an express analysis balancing the traditional duty factors. We supplied the missing analysis as part of our consideration of whether the condition of the hose was open and obvious. See *Bruns*, 2014 IL 116998, ¶¶ 34-35 (a finding that a condition of the land is open and obvious does not obviate performing the traditional duty analysis). Because the court reached the correct judgment (see *Holland*, 206 Ill. 2d at 491-92 (we review the trial court's judgment, not its rationale)), plaintiff's argument fails.

¶ 51 Plaintiff, properly, also raises arguments addressing the other grounds used by defendant in its motion for summary judgment. Had plaintiff not done so, it is conceivable that we could have summarily determined that one of the grounds presented by defendant was sufficient to support the trial court's judgment and, in the absence of any counterargument by plaintiff, affirmed the judgment on that basis. However, even if plaintiff were to succeed in all her other arguments on appeal, our determination regarding the open and obvious doctrine by itself is sufficient to sustain the trial court's judgment, and, therefore, our judgment would remain unaffected. Accordingly, we need not address plaintiff's remaining contentions on appeal.

¶ 52

III. CONCLUSION

¶ 53 For the foregoing reasons, we affirm the judgment of the circuit court of Lake County.

¶ 54 Affirmed.

Stout v. Costco Wholesale Corp., 2026 IL App (2d) 250335

Decision Under Review: Appeal from the Circuit Court of Lake County, No. 23-LA-35; the Hon. Joseph V. Salvi, Judge, presiding.

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