2022 IL App (4th) 220273-U

NO. 4-22-0273

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 15, 2022
Carla Bender
4th District Appellate
Court, IL

JON J. HOWARD and LANNETTE HOWARD, Plaintiffs-Appellants, v. REBITZER PROPERTIES, LLC, an Iowa Limited Liability Company, and LEMONGRASS CAFÉ, INC., an Illinois Corporation, Defendants-Appellees.	))))))))	Appeal from the Circuit Court of Rock Island County No. 18L141 Honorable James G. Conway Jr., Judge Presiding.

JUSTICE DOHERTY delivered the judgment of the court.
Presiding Justice Knecht and Justice DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in (1) granting defendants summary judgment and (2) refusing to consider plaintiffs' expert report.

¶ 2 Plaintiffs Jon J. Howard and Lannette Howard, husband and wife (the Howards), were engaged in some sort of altercation with a man as they were leaving a tavern. In the jostling, the Howards were somehow propelled into the glass window of the building they were standing in front of. They have filed this action against defendants Rebitzer Properties, LLC (Rebitzer) and Lemongrass Café, Inc. (Lemongrass), alleging negligence due to the existence of the plate glass window and seeking recovery for their injuries. The claims generally contend that maintaining a plate glass window in an area with heavy foot traffic was negligent.

¶ 3 The circuit court granted defendants' motion for summary judgment on all claims, finding that the Howards were not owed a duty of ordinary care as they were trespassers under

premises liability law and that it would be unreasonable to require defendants to guard against the tortious conduct of third parties. The court then denied the Howards' motion to reconsider, finding there was no newly presented evidence. On appeal, the Howards argue the circuit court erred in (1) failing to consider the report of their retained expert, (2) finding that they were trespassers at the time of their injury, (3) finding no exceptions to the duty owed to them as trespassers applied, (4) finding the incident was unforeseeable and placing the burden of guarding against the occurrence on defendants was unreasonable, and (5) failing to apply or analyze *Racky v. Belfor USA Group, Inc.*, 2017 IL App (1st) 153446. For the reasons that follow, we affirm.

¶ 4 I. BACKGROUND

¶ 5 In March 2017, the Broken Saddle Saloon hosted the Howards as patrons. The saloon and Lemongrass Café are immediately adjacent to one another. It is alleged that at some point in the evening, Jon left the saloon and took up a position on the sidewalk area directly in front of the café. Shortly thereafter, Lannette joined Jon in front of the café. It is further alleged that an altercation between the Howards and Antonino Munoz ensued. This altercation resulted in the Howards being propelled toward the plate glass window of the café's storefront. Upon encountering and falling through the plate glass window, the Howards were severely injured.

¶ 6 In October 2018, the Howards filed a six-count complaint against both Lemongrass and the property owner Rebitzer. In count I, Jon alleged negligence against Lemongrass for: (1) failing to exercise reasonable care in maintaining the café premises in a reasonably safe condition, (2) being careless in the maintenance of the premises in failing to install an adequate and safe window in the storefront when Lemongrass was aware of the danger the plate glass window posed to the public when located adjacent to a sidewalk, (3) failing to warn the public of the dangerous condition of the window, (4) failing to take safety measures to protect against the

danger of the window, and (5) allowing the dangerous window to remain where it violated local and international building codes. As a direct and proximate result of these actions, Jon was caused to "fall through the plate glass window ***, causing severe and permanent injury." Count II reiterated the allegations of count I against Rebitzer. In counts III and IV, Lannette claimed negligence against Lemongrass and Rebitzer, respectively, mirroring the allegations made by Jon in the preceding counts. In counts V and VI, Lannette alleged a loss of consortium with Jon against Lemongrass and Rebitzer based on the injuries suffered by falling through the window.

¶ 7 The circuit court granted Rebitzer leave to file a third-party complaint against Munoz. Rebitzer promptly filed a complaint for contribution, and Munoz denied the allegations therein.

¶ 8 In January 2021, Lemongrass filed a motion for summary judgment, arguing that the window complied with all applicable building codes in that it was grandfathered in, and numerous inspections by the municipal building inspector failed to raise any issues with the window. Lemongrass included a section in their motion titled "Statement of Undisputed Facts," contending that "[a]t all times relevant to this case, neither [the Howards] nor *** Munoz were agents, contractors, employees, invitees, licensees, or customers of Lemongrass Café." The affidavit of Prapatson Luangruang, president of Lemongrass, was also filed in support of the motion for summary judgment. Luangruang swore that "[a]t all times relevant to this case, neither [the Howards] nor *** Munoz were agents, contractors, employees, invitees, licensees, or customers of Lemongrass Café." Rebitzer joined in the argument and adopted all authorities presented by Lemongrass that the window complied with local and national building codes.

¶ 9 In their resistance to summary judgment, the Howards included a section titled "Statement of Disputed Facts." Absent from the disputed fact section was any contention that the

Howards or Munoz were agents, contractors, employees, invitees, licensees, or customers of either Lemongrass or the café. The resistance argued that defendants owed them a duty of care and breached that duty. Specifically, they asserted that the violation of building codes was not the sole basis for their negligence claims and that the report of their retained expert, Mark Meshulam, raised genuine issues of material fact. Meshulam's unverified report was attached to the resistance and opined that (1) defendants were negligent in allowing the hazardous plate glass window to remain given the surroundings and that it was easily foreseeable that crowds of inebriated people would pass by or congregate in front of it; (2) the plate glass window was improperly maintained; (3) the glass was old, weathered, and scratched; and (4) defendants' negligence directly resulted in the severe injuries suffered by the Howards. Meshulam based these opinions on his 40 years of experience in the glass and glazing industry in various roles. The Howards did not include an affidavit from Meshulam, nor were sworn copies of the documents relied upon in coming to his conclusions attached to the report.

¶ 10 Lemongrass filed a reply to the resistance, arguing that the Howards' claims were based on an allegedly dangerous condition of the property and were premises liability claims, not simple negligence claims. Further, the Howards were trespassers, entering the café without privilege or consent to do so by the possessor. Pointing to the complaint, Lemongrass argued that there was no dispute that the Howards were trespassers and, accordingly, no duty of ordinary care was owed. Rebitzer also filed a reply, alleging that since the window complied with applicable building codes, it owed no legal duty to the Howards.

¶ 11 A hearing on the motion for summary judgment ensued. The report of proceedings for the hearing is truncated, as it appears that the electronic recording equipment was not activated

until after the parties presented the majority of arguments.[1] What is clear from the proceedings is that the court was of the opinion that both the Howards and defendants ignored Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013) by failing to attach supporting affidavits to the summary judgment pleadings. The court declined to grant summary judgment on the basis that defendants complied with applicable building codes. However, the court took under advisement the argument that the Howards were trespassers and thereby owed no duty of ordinary care. The court noted that the Howards submitted caselaw in support of their arguments at the hearing, namely, *Racky*, 2017 IL App (1st) 153466, and *Eshoo v. Chicago Transit Authority*, 309 Ill. App. 3d 831 (1999).

¶ 12 The court issued a written decision finding in favor of defendants. The court initially granted summary judgment in favor of only Lemongrass. However, Rebitzer filed a motion to modify and expand the court's ruling, arguing that the claims against it were identical to those against Lemongrass. The court agreed, granting Rebitzer's request for summary judgment. The Howards did not file a pleading opposing Rebitzer's motion to modify and expand.

¶ 13 In its written decision, the court framed the operative question in the suit as, "Whether a Plaintiff who is caused by a Third Party's action to cross the border of a defendant's real estate is a trespasser for purposes of analysis of the land occupier's Duty-determination, within the 'premises liability' doctrine of Illinois Negligence law?" The court noted that Illinois follows the Restatement (Second) of Torts approach to premises liability, citing to *Racky*, 2017 IL App (1st) 153446, among others. The court then determined that the Howards were trespassers when considered in the context of the premises liability action. The court disregarded the Howards reliance on *Eshoo*, 309 Ill. App. 3d 831 for the contention that their status as trespassers was a

[1] The Howards filed a motion with this court seeking an extension of the deadline to file a bystander's report of the summary judgment proceedings. We denied that motion, and a supplemental record was not filed. Thus, we address the record as presented.

factual issue for the jury as there was no factual dispute concerning the events resulting in their contact with the window, and there was no evidence to support a contrary finding. As a result of being "tortiously battered," the Howards accidentally entered the café via the window. The court proceeded to find that there was no duty of ordinary care owed based on the facts as pled. Citing once again to *Racky*, 2017 IL App (1st) 153446, ¶ 99, the court explained, "It is completely unreasonable to infer that [Lemongrass] would anticipate this injurious outcome from such an extraordinary intrusion by passerby." The court noted an absence of evidence of other incidents similar to this one and stated that it would be "illogical and unfair" to impose a duty on defendants in the context of this case. Absent a duty of ordinary care, the negligence claims and the derivative loss of consortium claims failed. The court granted defendants summary judgment as a matter of law.

¶ 14 A motion to reconsider followed. The Howards argued that, even if they were deemed trespassers, a duty of reasonable care and liability for negligence may still attach under certain circumstances, pointing to *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432 (1992). The Howards alleged that defendants had reason to know that trespassers may come into contact with the plate glass window given its location next to a busy bar and the presence of inebriated bar patrons milling and congregating in front of the window. The motion to reconsider referenced deposition testimony taken from the Howards, police reports from the incident, and the expert's report. The Howards requested that "[g]iven the newly presented depositions, as well as the expert report with accompanying affidavit," the court should reconsider its ruling and find that there were genuine issues of material fact relating to whether defendants owed them a duty of ordinary care.

¶ 15 Lemongrass filed a resistance to the motion to reconsider, arguing that none of the evidence attached to the motion to reconsider was "newly discovered." Additionally, Lemongrass

opined that it appeared the Howards were attempting to rely on an exception to the general rule that a property owner owes no duty to a trespassing adult except when there is an artificial condition that is highly dangerous to trespassers. In refuting that this exception applied, Lemongrass noted that no court had previously held that an intact plate glass window constituted an artificial condition presenting the risk of death or serious bodily injury. Further, *Lee* was distinguishable as the decision in that case was reached following a jury trial, and at least 10 prior similar incidents were presented. In this case, there was no evidence of previous incidents.

¶ 16 At the motion to reconsider hearing, the court took judicial notice of the geography and landmarks within one square block of Moline, Illinois, encompassing the café. The court also acknowledged there was a large concert on the evening of the occurrence at the TaxSlayer Center nearby. After hearing arguments, the court denied the motion to reconsider as it found there was no newly presented evidence. The court acknowledged the Howards' argument that a duty could arise from an artificial condition involving the risk of great bodily harm or death but found it unpersuasive due to the lack of evidence that defendants could or should have foreseen that a trespasser would enter the café through the window. In distinguishing *Racky*, 2017 IL App (1st) 153446, the court noted that the window in that matter was severely damaged prior to the plaintiff falling through it. There was no evidence properly presented in this case regarding damage to the window. The court denied the motion to reconsider finding the Howards were trespassers and defendants could not reasonably foresee "that they would come flying through the window."

¶ 17 The Howards appeal.

¶ 18 II. ANALYSIS

¶ 19 Before this court, the Howards argue that the circuit court erred by (1) failing to consider the expert report provided in support of both the resistance to summary judgment and the

motion to reconsider, (2) finding they were trespassers at the time of their injuries, (3) "failing to rule or acknowledge" that the plate glass window in this case was an artificial condition involving the risk of death or serious bodily harm, (4) finding that the incident was unforeseeable and the burden of forcing defendants to guard against such an occurrence was unreasonable, and (5) refusing to apply or analyze *Racky*, 2017 IL App (1st) 153446.

¶ 20 Both defendants have filed briefs in this court and generally argue that the assertions made by the Howards are without merit while pointing out procedural forfeiture in certain aspects of the arguments presented.

¶ 21 A. Compliance with Rule 191(a)

¶ 22 Initially, we address the assertion of error relating to the circuit court's treatment of the expert report attached to the resistance to summary judgment. In what appears to be a theme in this appeal, a review of the record below shows an absence of the contention, in either the form of written or oral argument, that the circuit court erred by failing to consider the report for noncompliance with Rule 191(a). Rather, the Howards effectively conceded their error by attempting to correct it when submitting the same report with verification in support of the motion to reconsider. It is axiomatic that arguments not raised in the circuit court may not be raised for the first time on appeal. *Parks v. Kownacki*, 193 Ill. 2d 164, 180 (2000).

¶ 23 Even if we were to consider the argument, it is without merit. Rule 191(a) provides in pertinent part:

> "Affidavits in support of and in opposition to a motion for summary judgment *** shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all

> documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013).

¶ 24 The Howards argue that they substantially complied with Rule 191, an argument reviewing courts of this state have rejected numerous times. See, *e.g.*, *Selby v. O'Dea*, 2020 IL App (1st) 181951, ¶ 138 (finding that substantial compliance is insufficient to satisfy the strictures of Rule 191); *Lucasey v. Plattner*, 2015 IL App (4th) 140512, ¶ 21 (emphatically rejecting arguments seeking to lessen the strict compliance requirement of Rule 191). Defendants correctly point out that the Illinois Supreme Court, in *Robidoux v. Oliphant*, 201 Ill. 2d 324 (2002), announced a strict compliance requirement regarding Rule 191. The Howards declare *Robidoux* is factually distinguishable and that they cured any defect in submitting their expert report by resubmitting the report in conformance with the rule for the motion to reconsider. We reject the Howards' substantial compliance argument and conform to our previous rulings requiring strict compliance with Rule 191. Undeterred, the Howards present additional contentions on this topic for the first time in their reply brief. We refuse to entertain those arguments. See Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020) (stating arguments raised for the first time in a reply brief are forfeited). Accordingly, the circuit court did not err in refusing to consider the expert report in granting summary judgment.

¶ 25 B. Circuit Court's Grant of Summary Judgment

¶ 26 Turning to the circuit court's disposition of the motion for summary judgment, the Howards present numerous contentions of error. They argue that genuine issues of material fact concerning their status as trespassers precluded summary judgment. Further, they contend the

court gave inadequate consideration to the argument that the window was a dangerous artificial condition. Moreover, they assign error to the court's finding that the accident in this case was not foreseeable and that it would be unreasonable to impose a duty on defendants when the court did not explicitly analyze *Racky*, 2017 IL App (1st) 153446.

¶ 27 "Summary judgment is appropriate [when] the pleadings, depositions, admissions, and affidavits on file establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Gillespie v. Edmier*, 2020 IL 125262, ¶ 9 (citing 735 ILCS 5/2-1005(c) (West 2018)). A plaintiff is not required to prove his or her case to survive a motion for summary judgment but must present a factual basis that would arguably entitle the plaintiff to a judgment in their favor. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. If the plaintiff fails to establish any element of their claim, summary judgment for the defendant is proper. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008).

¶ 28 "When examining whether a genuine issue of material fact exists, a court construes the evidence in the light most favorable to the nonmoving party and strictly against the moving party." *Johnson v. Armstrong*, 2022 IL 127942, ¶ 31. "A genuine issue of material fact precluding summary judgment exists where the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts." (Internal quotation marks omitted.) *Monson v. City of Danville*, 2018 IL 122486, ¶ 12. "Genuine" in the context of genuine issues of material fact means that there is evidence to support the position of the nonmoving party. *Pekin Insurance Co. v. Adams*, 343 Ill. App. 3d 272, 275 (2003). Summary judgment is not meant to try an issue fact but rather to determine whether one exists. *Monson*, 2018 IL 122486, ¶ 12. We review a circuit court's judgment on a motion for summary judgment *de novo*. *Id.*

¶ 29 When a plaintiff seeks recovery based on a cause of action for premises liability, as is the case here, the plaintiff must plead and prove the existence of a duty owed to the plaintiff by the defendant and a breach of that duty. *Carney v. Union Pacific R.R. Co.*, 2016 IL 118984, ¶¶ 26-28. Whether a duty exists is a question of law appropriate for summary judgment. *Id.* ¶ 26. A failure to establish a duty owed by the defendant precludes recovery by the plaintiff as a matter of law. *Id.*

¶ 30 Illinois principles of premises liability law divide entrants upon land into three classifications, invitees, licensees, and trespassers, dictating that a landowner owes a duty of care corresponding to the classification. *Rhodes v. Illinois Central Gulf R.R.*, 172 Ill. 2d 213, 227-28 (1996).

> "An invitee is defined as one who enters the premises of another with the owner's or occupier's express or implied consent for the mutual benefit of himself and the owner, or for a purpose connected with the business in which the owner is engaged. [Citation]. A licensee is one who enters upon the premises of another with the owner's or occupier's express or implied consent to satisfy his own purpose. [Citation]. A trespasser is one who enters upon the premises of another with neither permission nor invitation and intrudes for some purpose of his own, or at his convenience, or merely as an idler. [Citation]." *Id.* at 228 (citing *Rodriguez v. Western Ry. Co.*, 228 Ill. App. 3d 1024, 1038 (1992)).

¶ 31 Generally, a landowner owes no duty of care to a trespasser except to refrain from injuring them in a willful or wanton manner. *Choate v. Indiana Harbor Belt R.R. Co.*, 2012 IL

112948, ¶ 25. An entrant's classification is determined at the time the injury occurred. *Quiroz v. Chicago Transit Authority*, 2022 IL 127603, ¶ 14.

¶ 32 1. *Status as Trespassers*

¶ 33 We begin by determining whether the Howards were trespassers and whether genuine issues of material fact prevented summary judgment on this issue. Based on the record before the court at the time of its judgment, there is no factual basis to conclude that the Howards were ever invitees of defendants. As they were not invitees, the classification that best describes them here is that of trespassers, even if involuntary.

¶ 34 Once again, we are compelled to note that the Howards never substantively challenged their classification as trespassers prior to the motion to reconsider based on this record. See *Vantage Hospitality Group, Inc. v. Q Ill Development, LLC*, 2016 IL App (4th) 160271, ¶¶ 46-47 (holding an argument made for the first time in a motion to reconsider is forfeited for purposes of appeal). When an appellant seeks review of a court's summary judgment ruling, they "may only refer to the record as it existed at the time the trial court ruled, outline the arguments made at that time, and explain why the trial court erred in granting summary judgment." *Rayner Covering Systems, Inc. v. Danvers Farmers Elevator Co.*, 226 Ill. App. 3d 507, 509-10 (1992). As noted above, a significant portion of the report of proceedings for the hearing on the motion for summary judgment is missing. The remaining portion lacks argument regarding the classification of the Howards as entrants on defendants' premises. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (noting it is the burden of the appellant to provide a record on appeal sufficient to support a claim of error and any doubts which arise from the incompleteness of the record will be resolved against the appellant).

¶ 35 Further, in reviewing the written arguments, Lemongrass included a section in their motion for summary judgment titled "Statement of Undisputed Facts" claiming that "[a]t all times relevant to this case, neither [the Howards] nor *** Munoz were agents, contractors, employees, invitees, licensees, or customers of Lemongrass Café." This assertion was then followed by an affidavit of Luangruang making the same assertion. No counter-affidavit was filed, and the Howards did not address this contention in the disputed facts section of their resistance. See *Enbridge Pipeline (Illinois), LLC v. Temple*, 2017 IL App (4th) 150346, ¶ 83 (noting that if a party moving for summary judgment files supporting affidavits containing well-pleaded facts, the material facts set forth in the movant's affidavits stand as admitted if the party opposing the motion files no counter-affidavits). The only evidence that *any* argument was raised on this issue is the fact that the circuit court made clear in its order that the Howards relied on *Eshoo*, 309 Ill. App. 3d 831, for the contention that their status as trespassers was a factual issue for the jury. The Howards cite the circuit court's summary judgment ruling in their briefing to support their assertion that they raised numerous arguments on this point, but a review of the order does not support that contention. Accordingly, we address only the narrow issue of whether their status as trespassers was a question of fact or could be determined as a matter of law.

¶ 36 In *Eshoo*, the appellate court found that whether a minor child was an invitee or trespasser was a question of fact for the jury to decide. *Id.* at 836. The minor child had purchased a ticket to ride a train with his friends but left the platform and was electrocuted by the third rail. *Id.* at 832. The court found that the inferences in that case supported the argument that the minor had exceeded the scope of his invitation and became a trespasser. *Id.* at 836. However, the inferences were not so persuasive that the issue should have been taken away from the jury. *Id.*

¶ 37 Unlike the situation in *Eshoo*, there is no allegation in the arguments or pleadings that the Howards were invitees or held a privilege to enter the premises, only to exceed the scope of that invitation or privilege. Lacking in this case is a factual basis supporting the argument that the Howards were invitees or licensees, entering the premises via the window with defendants' express or implied consent. It is undisputed they were thrown into the window against their will. There is an absence of evidence in this case that would lead reasonable minds to differ that the Howards were trespassers. Defendants challenged the Howards' classification and provided a factual basis to support the argument the Howards should be considered trespassers. The record does not reveal a factual rebuttal.

¶ 38 Nonetheless, the Howards argue it is unclear whether they were ever inside the café, stating in their reply brief that they never entered defendants' premises at all. This assertion stands in stark contrast to the allegations in the complaint, wherein the Howards claim that as a direct result of defendants' negligence, they were caused to "fall through the plate glass window ***, causing severe and permanent injury." The complaint itself appears to establish there are no genuine issues of material fact as to the Howards' classification, as they claim their injuries were a result of falling *through* the window. The window is part of defendants' premises; if the Howards were in contact with the window, they were in contact with the premises.

¶ 39 The Howards also argue that they were injured by encountering the window but while remaining on the public sidewalk and before entering the premises. Further, they suggest that the sidewalk outside the café was arguably under defendants' control. These speculative assertions without any evidentiary support are insufficient to survive summary judgment. See *In re Estate of Frakes*, 2020 IL App (3d) 180649, ¶ 21 (noting mere allegations that genuine issues of material fact exist without evidentiary support fails to create an issue of material fact). As noted

above, the window is part of defendants' premises, so the case is plainly about a condition *on the premises*. The Howards cannot advance a claim of premises liability if they were not on the premises. Additionally, the argument that defendants exercised dominion over the sidewalk outside the café has been forfeited twice as it was not presented in the circuit court and then presented for the first time on appeal in the reply brief.

¶ 40 We find further support that the Howards' classification as trespassers was properly decided as a matter of law by turning to the Restatement (Second) of Torts § 329 (1965). Section 329 defines the term "trespasser," stating that for purposes of premises liability, an individual will be classified as a trespasser regardless of intentional, negligent, or purely accidental entry onto the premises. The determining fact is whether there was a privilege to enter and "the status of an accidental trespasser is still that of a trespasser." *Id.* An illustration of this definition at work follows.

> "Without any negligence on his part A, standing on the platform of a subway station of the X Company, slips and falls onto the tracks. While there he is run over by the train of X Company, and injured. A is a trespasser, *** notwithstanding the accidental character of his intrusion." *Id.*

¶ 41 Here, it is undisputed that the Howards entered the premises *accidentally*. They argue, however, that the illustration is imperfect as subject A was not injured until on the tracks, whereas they were injured by the glass window first and then became trespassers. This assertion contradicts the allegations of the complaints where the act of first breaking *through* the glass and then being cut by the shards was the proximate cause of the injury. Even if the window were the

outer boundary of the premises, the Howards literally broke that boundary. There is no evidence of an injury prior to breaking through defendants' plate glass window.

¶ 42 Accordingly, based on the facts presented, the material facts in this matter are undisputed and reasonable minds could not differ as to the Howards' classification as trespassers. The Howards offer no evidence that contradicts defendants' assertions—or their own in the complaint—that they entered upon the premises without invitation or privilege. The question of the Howards' status as trespassers is not one of fact for the jury and was appropriately decided as a matter of law. Note that our holding today does not apply to cases in which injury occurs to a plaintiff on a public sidewalk adjoining the subject premises as a result of debris falling onto the public sidewalk. See, *e.g.*, *Jackson v. 919 Corp.*, 344 Ill. App. 519, 526 (1951). This is not such a case, as the injuries at issue here are alleged to have been sustained because the Howards did not confine themselves to the sidewalk, and instead made contact with—and possibly entered into—defendants' premises.

¶ 43 2. *Artificial Conditions Highly Dangerous to Known Trespassers*

¶ 44 Determining that the Howards were properly classified as trespassers does not end our inquiry. Illinois has adopted certain exceptions to the general rule that property owners only owe trespassers a duty to abstain from willfully or wantonly injuring them. Relevant here, the Illinois Supreme Court adopted section 337 of the Restatement (Second) of Torts (1965), titled "Artificial Conditions Highly Dangerous to Known Trespassers," which provides:

> "A possessor of land who maintains on the land an artificial condition which involves a risk of death or serious bodily harm to persons coming in contact with it, is subject to liability for bodily harm caused to

trespassers by his failure to exercise reasonable care to warn them of the condition if

(a) the possessor knows or has reason to know of their presence in dangerous proximity to the condition, and

(b) the condition is of such a nature that he has reason to believe that the trespasser will not discover it or realize the risk involved." Restatement (Second) of Torts § 337 (1965).

¶ 45 The Howards argue that this exception applies here and that the circuit court erred in failing to find so. In making this argument, the Howards rely almost exclusively on *Lee*, 152 Ill. 2d 432. Again, we must note that a review of the record shows that this argument was not raised until the motion to reconsider and is forfeited. *Vantage Hospitality Group, Inc.*, 2016 IL App (4th) 160271, ¶¶ 46-47. Even if it had been timely raised, we find the argument unpersuasive.

¶ 46 In *Lee*, the court adopted section 337 of the Restatement and found that the Chicago Transit Authority (CTA) had reason to know of pedestrians trespassing on its tracks and owed a duty of ordinary care to properly warn the trespassers of the dangerous artificial condition of an electrified third rail located at street level adjacent to a busy street and public sidewalk. *Lee*, 152 Ill. 2d at 451-52. Evidence presented during the jury trial showed at least 10 prior electrocutions of individuals by the third rail. *Id.* at 450. The court in *Lee* found that the third rail was a hidden and latent dangerous condition. *Id.* at 452-53. Accordingly, the CTA owed a duty of ordinary care to warn the trespasser of the dangerous condition. *Id.*

¶ 47 While the Howards were not required to prove their case in order to survive the motion for summary judgment, they were required to present a factual basis that would arguably entitle them to judgment in their favor. *Robidoux*, 201 Ill. 2d at 335. As previously mentioned, the

circuit court properly refused to consider the expert report. Absent that report, there was not even a scintilla of evidence presented to support the contention that (1) the window was a dangerous artificial condition, (2) defendants knew or had reason to know that members of the public would be propelled toward and through the window by a third party, or (3) the Howards did not realize the risk involved in being propelled toward and breaking through the window. In light of the lack of evidentiary support for the application of section 337 of the Restatement and apparent procedural forfeiture, the circuit court did not err.

¶ 48 3. *Traditional Duty Analysis*

¶ 49 The Howards also take issue with the circuit court's finding that their injuries and the dangerous condition of the window were not foreseeable. In making this argument, they appear to depart from the premises liability theory and pivot to a simple negligence claim, essentially asking the court to find the existence of a duty by applying the traditional duty analysis.

¶ 50 A legal duty analysis requires an examination of the relationship between the defendant and the plaintiff to determine whether the law will impose an obligation of reasonable conduct on the defendant for the benefit of the plaintiff. *Carney*, 2016 IL 118984, ¶ 27. The analysis of this relationship is guided by four factors: "(1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant." *Quiroz*, 2022 IL 127603, ¶ 13. An injury that is foreseeable is one that is objectively reasonable to expect and does not include every injury that conceivably might occur. *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14, 29 (1992).

¶ 51 In analyzing foreseeability, the Howards appear to concede there was no actual knowledge on the part of defendants regarding this type of incident, as there were no previous

incidents of a similar nature introduced. They contend, however, that defendants should have foreseen an individual could have entered upon the premises by being thrown through the window following an altercation given defendants' knowledge from business dealings as property and restaurant owners, the crowds from the bar and concert venue resulting in inebriated bar patrons on the sidewalk abutting the window, and the possibility of physical altercations. We disagree. This case presents a highly unusual fact pattern. While it is conceivable a drunken patron could be propelled through the window of the café; it is also conceivable that a car could jump the curb, strike another bar patron, and propel them into the café window. Just as the hypothetical is conceivable, it is just as objectively unreasonable to require defendants in this case to foresee and guard against as the injury in this case.

¶ 52 Moreover, "while the foreseeability of an injury is an important factor in determining whether a duty exists, the existence of a legal duty is not to be bottomed on the factor of foreseeability alone. Instead, we must balance the foreseeability of the harm against the burdens and consequences that would result from the recognition of a duty." *Hutchings v. Bauer*, 149 Ill. 2d 568, 571 (1992). If a duty exists in this case, it would mean that urban business owners would effectively be required to eschew the glass windows that have become ubiquitous in our cities and towns; their choice would be to install more protective tempered glass windows or face the possibility of being responsible for any person injured by a broken window, no matter how odd or unusual the circumstances. We note that the evidence of record shows that the city of Moline did not require such an upgrade.

¶ 53 Further, courts of this state have on numerous occasions rejected the contention that there is a general duty to guard against the negligent acts of others. See, *e.g.*, *Dunn v. Baltimore & Ohio R.R. Co.*, 127 Ill. 2d 350, 366 (1989); *Gouge v. Central Illinois Public Service Co.*, 144 Ill.

2d 535, 547 (1991); *Ziemba v. Mierzwa*, 142 Ill. 2d 42, 52-53 (1991). Moreover, a landowner generally has no duty to protect individuals from criminal acts of third parties on the premises absent a special relationship. Restatement (Second) of Torts § 314 (1965); *Osborne v. Stages Music Hall, Inc.*, 312 Ill. App. 3d 141, 147 (2000). Here, the Howards had *no* relationship with defendants, as the evidence is that neither one of them had ever been a customer of the café. The undisputed facts demonstrate that the acts of the third party in propelling the Howards toward the window of the café were at least negligent and probably criminal. It is not objectively reasonable to impose on defendants the burden of providing a soft landing for passersby who are impelled into their storefront as a result of a scuffle.

¶ 54 Throughout their arguments on appeal, the Howards contend that *Racky*, 2017 IL App (1st) 153446, is directly on point and the circuit court erred in failing to apply *Racky* or acknowledge that there was a plate glass window in that case damaged in a similar manner as the one here.

¶ 55 In *Racky*, a strip mall abutted a public sidewalk. *Id.* ¶ 12. The strip mall had previously caught fire, and the defendant was hired to perform remediation on the property. *Id.* ¶ 5. Several months later, while the property was still in the process of rehabilitation, a bicyclist attempting to transition from the street to the sidewalk in front of the strip mall reached out to balance himself, placing his hand on a plate glass window. *Id.* ¶¶ 5, 12. The window gave way, and the cyclist later succumbed to his injuries. *Id.* ¶ 12. Evidence presented at the bench trial established that prior to the accident the window had at least three two- to three-foot cracks emanating from the lower left corner of the window in a " 'tree-like pattern,' " and at least one, possibly two holes from being shot with a BB gun. *Id.* ¶¶ 29, 31, 47. The trial court found that the window was in a dangerous and hazardous condition based on the damage established at trial. *Id.*

¶ 75. The circumstantial evidence established the defendant had the requisite knowledge of the dangerous condition of the window. *Id.* ¶¶ 112, 115.

¶ 56 The assertion that the trial court was required to follow *Racky* and that the failure to analyze the case requires reversal is misplaced. It appears the Howards collapse the traditional duty analysis and requirement under section 337 of the Restatement, essentially arguing that *Racky* stands for the proposition that a plate glass window is a *per se* dangerous artificial condition. That holding is absent from the decision in *Racky*. Rather, the court found that based on the evidence presented, the severely damaged plate glass window, susceptible to collapse from a light touch, was a dangerous condition pursuant to section 343 of the Restatement. Restatement (Second) of Torts § 343 (1965) ("Dangerous Conditions Known to or Discoverable by Possessor"). The Howards failed to advance an argument based on section 343 of the Restatement in their complaint.

¶ 57 Reviewing the record in the light most favorable to the Howards, there is no evidence that the plate glass window in this case suffered from any defects impacting its structural integrity prior to the incident. The Howards again point to the expert report in arguing that the window was old, weathered, and loose in its frame. However, that evidence was not properly before the court and falls well short of making this case and *Racky* analogous. *Racky* is distinguishable, and the circuit court did not err in refusing to apply its reasoning.

¶ 58 Accordingly, based on the facts of this case, the Howards were trespassers, section 337 of the Restatement does not apply, and defendants were only required to refrain from willfully or wantonly injuring those trespassing on the property. Since the Howards' complaint relies on a duty of ordinary care, and there are no allegations of willful or wanton conduct, summary judgment was appropriate.

¶ 59 C. Motion to Reconsider

¶ 60 Before concluding this matter, we are unable to ignore the fact that throughout their briefing, the Howards repeatedly assail the circuit court's ruling on the motion to reconsider. Although they make these assertions at numerous points in both the opening and reply brief, not once is the standard of review or procedural framework for the review of a motion to reconsider on appeal set forth. Defendants correctly point out that a motion to reconsider is "to bring to the trial court's attention (1) newly discovered evidence not available at the time of the hearing, (2) changes in the law, or (3) errors in the court's previous application of existing law." (Internal quotation marks omitted.) (quoting *Simmons v. Reichardt*, 406 Ill. App. 3d 317, 324 (2010), quoting *Stringer v. Packaging Corp. of America*, 351 Ill. App. 3d 1135, 1140 (2004)). Judgment on a motion to reconsider lies within a court's sound discretion. *Simmons*, 406 Ill. App. 3d at 324.

¶ 61 The circuit court did not abuse its discretion in denying the motion to reconsider. The Howards argued in their motion that the court should consider a host of evidence, including depositions, police reports, and the report of their retained expert, as newly discovered evidence. Our review of the evidence directly contradicts that assertion, as all the evidence attached to the motion to reconsider was previously available, but the Howards failed to provide it. The depositions were taken at least a year prior to Lemongrass's motion for summary judgment. This court has consistently held that:

> " ' "Trial courts should not permit litigants to stand mute, lose a motion, and then frantically gather evidentiary material to show that the court erred in its ruling. Civil proceedings already suffer from far too many delays, and the interests of finality and efficiency *require* that the trial courts not consider such late-tendered evidentiary material, no matter what the contents thereof may be." ' " (Emphasis in original.) *Id.* at 325 (quoting

Stringer, 351 Ill. App. 3d at 1141, quoting *Gardner v. Navistar International Transportation Corp.*, 213 Ill. App. 3d 242, 248-49 (1991)).

¶ 62 The circuit court did not abuse its discretion in denying the motion to reconsider.

¶ 63 III. CONCLUSION

¶ 64 For the reasons stated, we affirm the judgment of the circuit court of Rock Island County.

¶ 65 Affirmed.