HEADING

To: Atlas Lawson, Attorney

From: Allison Hendrix, Paralegal

Client Information: Ella B. Trippen, File #2025.0001

Subject: Initial Research and Analysis of Trippen Negligence Cause of Action Viability

Date: 10/22/25

QUESTION PRESENTED

Do the facts of Ella B. Trippen's trip and fall incident support an Illinois negligence claim against Hasard's Garden Center, and would Hasard's anticipated defenses of an open and obvious danger and comparative negligence be likely to bar or limit recovery?

BRIEF ANSWER

Likely yes, Ella B. Trippen has a valid negligence claim against Hasard's Garden Center. We could likely prove the four required elements of negligence (duty of care, breach of duty, proximate cause, and damages) and, as an invitee, may additionally bring a premises liability claim alleging Hasard's owed her a heightened duty of care as a landowner. Hasard's is likely to raise two primary affirmative defenses. First, that the open and obvious doctrine negates any duty of care, which can be countered through analogizing the distraction exception established in *Ward v. Kmart* and alternatively through the deliberate encounter exception. While *Bruns v. City of Centralia* has been shown to limit the distraction exception, Trippen's case is distinguishable by several factors, including that her distraction was created by Hasard's own merchandise rather than any conduct solely within her own control. Second, comparative negligence, arguing that Trippen contributed to her own injury. This defense is unlikely to bar recovery completely, as the facts should demonstrate Trippen is less than 50% liable, though it could reduce any damages ultimately awarded.

STATEMENT OF FACTS

Our client, Ella B. Trippen (28 years old), lives in Grayslake, IL, and works as an Executive Assistant with Hyatt Chicago. She commutes to this job via train and her duties consist of computer and administrative work, with no physical labor component. Trippen had 20/20 vision and no relevant pre-existing medical conditions. Prior to this incident, she was very active, working out three to four times per week.

On Saturday, May 4, 2024, at approximately 8:00 a.m., Trippen arrived alone at Hasard's Garden Center, where she had shopped many times before. The weather was warm and sunny, and Trippen wore casual clothes with new, rubber-soled shoes. Outside the store's main entrance, which is also its main exit, Trippen spent time browsing several plant displays. During this time, Trippen noted and stepped around a small planter box standing alone slightly apart from the plant displays. She also noted a female Hasard's employee was watering plants using a green hose, an activity she had observed on many prior visits. The hose did not obstruct Trippen's path as she entered the store. To the south of the entrance archway, Trippen noted a yellow cone, though it was not positioned near any apparent hazard at that time.

Trippen entered the store and used a cart while browsing for just under two hours. At approximately 9:45 a.m., Trippen chose and purchased a large, moderately heavy pot of dahlias (approximately 12" W x 24" H total), lifted them, and left the cart indoors. Trippen carried the potted flowers with both hands, which obscured her view of the ground directly in front of her, though she was able to observe her surroundings to either side. Trippen's foot caught on an obstacle, causing her to trip. She fell into the nearby planter box, landing on her right shoulder and the right side of her face. After falling, she saw a green hose stretched across the walkway in front of the exit doors.

A female Hasard's employee quickly checked on Trippen and offered to call an ambulance. After Trippen refused an ambulance, the employee gave her a towel for her bleeding face and stayed with her. During this time, the employee disclosed two key facts to Trippen. First, she stated she was surprised Trippen had tripped on the hose, as the employee intentionally used a green hose for visibility. Second, she disclosed that a different employee had been directed to remove the planter box from the walkway following an earlier demonstration, but the planter box had not yet been moved. The same employee accompanied Trippen back into the store and called a manager, who completed an incident report, though no copy was provided to Trippen. The manager again offered to call an ambulance, gave Trippen bandages for her face and chin, and walked Trippen to her vehicle, loading the potted flowers for her.

Trippen sat alone in her car for a period of time before driving to the front of the parking lot. She photographed the store's exterior from her vehicle before leaving; copies are preserved in the client file. After taking the photographs, Trippen drove home. Upon seeing her condition, her boyfriend suggested she go to the hospital. Trippen initially declined, but sought emergency care less than two hours later, as her pain and bleeding had not significantly subsided. Trippen had x-rays taken of her shoulder and face and an MRI of her shoulder; she had a right rotator cuff tear and cuts and bruises to the right side of her face. She received stitches in her chin, was fitted with a sling for her right arm, and was referred to an orthopedic surgeon for her shoulder.

One week later, Trippen underwent rotator cuff repair surgery, followed by four weeks in a sling and seven months of physical therapy. The stitches in her chin were removed within two weeks, though she continued to have pain and difficulty moving her jaw and chin for over two months, and now has a scar on her chin. She was prescribed pain medication for several weeks during recovery from her injuries and surgery. During Trippen's recovery, a claims representative from Hasard's corporate office contacted her. The representative offered her a $10,000 settlement, contingent upon signing a release waiving all claims and liability against Hasard's. Trippen declined and subsequently sought representation from Whitlock & Associates.

To date, Trippen's documented and estimated damages include medical expenses, lost wages, and out-of-pocket costs. Medical expenses are estimated at $50,000. Lost wages total approximately four months at a gross weekly salary of between $1,200 and $1,250, with precise calculation pending. Additional out-of-pocket expenses for ride-share commutes, cleaning, and landscaping services total approximately $5,000.

DISCUSSION

In Illinois, negligence is recognized as the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not, under similar circumstances. This objective "reasonable person standard" compares a defendant's actions to what a reasonable person would have done, without regard to the defendant's subjective beliefs or intentions. A valid negligence claim requires the plaintiff prove four key elements: (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, (3) the breach was the proximate cause of (4) the plaintiff's injuries. *Buchaklian v. Lake Cnty. Family Young Men's Christian Ass'n,* 314 Ill. App. 3d 195, 199 (2000).

1. First Element of Negligence: Duty of Care

The existence of a duty is a question of law, determined by the court and shaped by public policy considerations. *Ward v. Kmart Corp.*, 136 Ill. 2d 132, 140 (1990). Legal duty is a prerequisite to liability, so where there is no legal duty, there can be no liability. *LaFever v. Kemlite Co.*, 185 Ill. 2d 380 (1998). While this may seem straightforward, the Illinois Supreme Court notes, "the concept of duty in negligence cases is involved, complex, and nebulous." *Ward* at 140. This ambiguity, combined with Hasard's probable defenses, is likely to make the question of whether Hasard's owed a duty to Trippen a central and contested issue in this case. Imposing a duty of reasonable conduct depends on the nature of the relationship between parties. *Bezanis v. Fox Waterway Agency*, 2012 IL App (2d) 100948 ¶ 14. Illinois courts have identified four factors in analyzing this relationship: (a) the reasonable foreseeability of injury, (b) the likelihood of injury, (c) the magnitude of the burden of guarding against injury, and (d) the consequences of placing that burden upon the defendant. *Ward* at 140-41.

<u>Duty of Care Factors (1) and (2): Foreseeability and Likelihood of Injury</u>

The first two factors in determining the existence of a duty of care are foreseeability and likelihood of injury. Restatement (Second) of Torts §343 (1965) states: "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger." Illinois courts have relied on this section in interpreting foreseeability and likelihood of injury in their duty analysis. *LaFever* 185 Ill. 2d 380, 389.

To determine whether Hasard's could have reasonably foreseen the risk of injury and anticipated its likelihood, we have several relevant facts from the employee who spoke to Trippen at the time, which can be applied to the three Restatement §343 criteria above. Hasard's employees:

> (a) had actual knowledge of the hose stretched across the exit walkway and the planter box that had been left in the walkway, and demonstrated a realization that those conditions may involve a risk of harm (e.g., through acknowledgment that some hose colors may be more visible and that the planter box should not remain in the walkway indefinitely);
>
> (b) demonstrated an expectation that customers may not discover or realize the danger of these conditions, as seen through the choice of hose color and a direction to move the planter box; and

(c) failed to use reasonable care to protect invitees, demonstrated by failure to use additional warning for the hose such as the easily accessible yellow cone, and failure to move the planter box in a timely manner.

In Trippen's case, point (a) above, knowledge of the condition, weighs heavily in our favor. On point (c), Hasard's may argue that the use of a green hose and the issuance of a direction to move the planter box showed reasonable enough care, without need for further precaution. We should anticipate point (b) as a central point of dispute: whether Hasard's could expect that its customers would discover or realize the dangerous condition. In determining whether they could reasonably foresee a customer's injury, Hasard's will likely argue that the "open and obvious" doctrine applies.

<u>Open and Obvious Doctrine</u>

The open and obvious doctrine is a common law exception to the general duty of care owed by a landowner, based on Restatement (Second) of Torts, §343A:

> "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness."

Using the §343A standard as its foundation, Illinois case law holds that "[a] condition is open and obvious where a reasonable person in the plaintiff's position, exercising ordinary perception, intelligence, and judgment, would recognize both the condition and the risk involved." *Bezanis v. Fox Waterway* Agency, 2012 IL App (2d) 100948 ¶ 16; *Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430, 435 (1990). Additionally, "whether a condition is open and obvious 'depends not on plaintiff's subjective knowledge but, rather, on the objective knowledge of a reasonable person confronted with the same condition.'" *Bezanis* at ¶ 16. Whether a condition presents an open and obvious danger is a question of fact, to be answered by the jury or trier of fact. *Sollami v. Eaton*, 201 Ill. 2d 1 (2002).

A claim of open and obvious primarily affects the first two factors in duty analysis, foreseeability and likelihood of injury. “Where the condition is open and obvious, the foreseeability of harm and the likelihood of injury will be slight, thus weighing against the imposition of a duty.” *Bruns v. City of Centralia,* 2014 IL 116998 ¶ 19. This means the foreseeability of harm to others may be greater or lesser depending on the degree of obviousness of the risks associated with the condition. Other than within the exceptions discussed below, the law does not require persons to protect or warn against possible injuries from open and obvious conditions, which by their nature carry their own “warning” of potential harm. *Bruns* at ¶ 16 citing *Bucheleres v. Chicago Park Dist.*, 171 Ill. 2d 435, 448 (1996). Generally, the law considers the likelihood of injury slight when the condition is open and obvious because it is assumed that those encountering the potentially dangerous condition of the land will appreciate and avoid the risks. In contrast, if a danger is concealed rather than open and obvious, the likelihood of injury increases because people will not be as readily aware of such dangers. *Bucheleres*, 171 Ill. 2d at 456.

In determining whether a duty of care was owed to Trippen, Hasard’s is likely to argue that both the hose and planter box were open and obvious dangers that other customers, reasonable persons confronted with the same condition, had no issue noting and avoiding. Trippen even noticed the presence of a hose on her way into the building, though it was in a different location, and both noticed and maneuvered around the planter box. Hasard’s could additionally argue that the presence of similar obstacles was a regular occurrence at the store, something which Trippen, as a frequent customer, would reasonably know. The open and obvious doctrine is not, however, an absolute bar. The *Ward* court acknowledged, quoting Professor Page Keeton, that “there is perhaps no condition the danger of which is so obvious that all customers under all circumstances would necessarily see and realize the danger.” *Ward v. Kmart Corp.*, 136 Ill. 2d 132, 147 (1990).

<u>Exceptions to Open and Obvious</u>

The existence of an open and obvious condition is not automatically a bar to the finding of a legal duty on the part of a defendant. *Ward v. Kmart Corp.*, 136 Ill. 2d 132 (1990); *Bruns v. City of Centralia*, 2014 IL 116998. Restatement §343A's comment *f* sets forth two exceptions to the open and obvious defense, commonly known as the (1) distraction exception and (2) deliberate encounter exception. Both are situations in which a landowner should anticipate that the dangerous condition will cause harm to the invitee even though it is known or obvious, and so is not relieved of the duty of reasonable care, including the duty to warn or take other reasonable steps to protect against the obvious condition or activity. *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 391 (1998). Where an exception to the open and obvious rule applies, the outcome of the duty analysis with respect to foreseeability and likelihood is "reversed"; whereas application of the open and obvious rule negatively impacts foreseeability and likelihood (the defendant is less likely to have a duty of care), application of an exception to the rule positively impacts both (the defendant is more likely to have a duty of care). *Bruns v. City of Centralia*, 2014 IL 116998 ¶ 20.

a. Distraction Exception to "Open and Obvious"

If Hasard's raises an open and obvious defense, the distraction exception could be a strong response. Under this exception, if a landowner has reason to suspect that invitees may not appreciate the danger because they are distracted or preoccupied, the owner retains a duty of reasonable care. Analogous to Trippen's case is *Ward*, in which carrying a large mirror distracted the plaintiff, preventing him from seeing a concrete post located near a doorway. *Ward*, 136 Ill. 2d 132. See also *Deibert*, in which the Illinois Supreme Court applied the distraction exception even where the plaintiff had done nothing more than fail to observe the ground while walking, demonstrating that the exception is not limited to cases of obvious physical obstruction. *Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430 (1990).

The court in *Ward* wrote that "the 'obviousness' of a condition or the fact that the injured party may have been in some sense 'aware' of it may not always serve as adequate warning of the condition and of the consequences of encountering it." The court drew upon two secondary sources for guidance on whether distraction suffices to overcome an open and obvious defense. Restatement §343A asserts that an owner "is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness*" (emphasis added). Comment *f* of this section goes on to state that reason to foresee harm to visitors from even known or obvious dangers may arise "where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it." Restatement (Second) of Torts §343A cmt. f (1965).

Ward cites the above Restatement comment, then draws on *Prosser & Keeton on* Torts, for the proposition that even where a dangerous condition is known or obvious, "something more in way of precautions may be required"; specifically where "there is reason to expect that the invitee's attention will be distracted, as by goods on display, or that after a lapse of time he may forget the existence of the condition, even though he has discovered it or been warned; or where the condition is one which would not reasonably be expected, and for some reason, such as an arm full of bundles, it may be anticipated that the visitors will not be looking for it." *Ward v. Kmart Corp.,* 136 Ill. 2d 132, 148-150 (1990); Prosser & Keeton on Torts, §61, at 427 (5th ed. 1984).

Drawing on these two secondary sources, *Ward* found it reasonably foreseeable that a customer would collide with a post outside the doors while exiting a store carrying merchandise which could obscure their view of that dangerous condition. The defendant in that case invited customers with the express purpose of purchasing items in its store and specifically invited customers to use the door through which the plaintiff entered and exited. The defendant would have had reason to anticipate that customers shopping in the store would, even in the exercise of reasonable care, momentarily forget the presence of the obstacles (in that case, posts) which they may have previously encountered by entering through the customer entrance door.

The facts and reasoning in *Ward* map closely onto Trippen's situation. Hasard's invited customers with the express purpose of purchasing items in the store, they invited customers to use the door through which Trippen entered and exited, and they would have reason to anticipate that customers shopping in the store might forget the presence of any obstacles previously seen when entering. After Trippen spent nearly two hours in the store, she could not reasonably be expected to remember the exact location of objects outside the store, or to assume everything outside would be in the exact same condition as when she entered. As she exited, Trippen's distraction was created by the goods purchased in Hasard's, analogous to *Ward*, where the distraction was created by carrying out the large mirror just purchased in Kmart.

Bruns v. City of Centralia is particularly relevant here, as it narrowed the definition of what could be considered a distraction, disqualifying "self-created" distractions from use. A distraction "solely within the plaintiff's own creation" is not accepted as one that a defendant could reasonably foresee. "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." *Bruns v. City of Centralia*, 2014 IL 116998 ¶ 31-32. Hasard's is likely to argue that by choosing to carry the pot of flowers out of the store, despite not being able to see over it or to the ground directly in front of her feet, Trippen created her own distraction.

Trippen's case is distinguishable from *Bruns* on several grounds. A strong distinction is that the *Bruns* defendant was a municipality with a broader field of public policy concerns and obligations, while Hasard's, like the defendant Kmart in *Ward*, is a privately-owned business. Bruns's distraction was ultimately "looking elsewhere," a distraction wholly unrelated to the premises or its conditions. Unlike in *Bruns*, Hasard's could reasonably foresee its customers' distractions and therefore a likelihood of injury, because the primary purpose of its business and premises is the sale of goods, some of which are large or bulky. Even if *Bruns* precedent is applied, rendering Trippen's distraction invalid or "self-created," *Buchaklian* establishes that a person walking should not reasonably be expected or required by law to both look up or ahead to avoid other people, while at the same time looking down to prevent tripping over obstacles. *Buchaklian v. Lake Cnty. Family Young Men's Christian Ass'n*, 314 Ill. App. 3d 195, 202-03 (2000). This is particularly relevant if Hasard's argues Trippen would have seen the hose if her view was not blocked by the potted flowers she chose to carry. Even absent the distraction created by the flowers, *Buchaklian* tells us she could not have been expected to look out for all possible obstacles coming from all possible directions.

b. Deliberate Encounter Exception to "Open and Obvious"

The "deliberate encounter" exception is the second recognized scenario in which a landowner is not relieved of their duty to an invitee, even if a dangerous condition is open and obvious. This exception may be argued when the landowner "has reason to expect that the invitee will proceed to encounter the known or obvious dangers because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk." Restatement (Second) of Torts §343A, cmt. f (1965). The bar is high for proving this exception, and Illinois courts have applied it narrowly. While its most successful application has been in cases that involved some economic compulsion, such as encountering dangerous conditions to perform duties required by a job, the Illinois Supreme Court has made clear that the exception is not limited to these situations. *Sollami v. Eaton*, 201 Ill. 2d 1, 16 (2002); *Morrissey v. Arlington Park Racecourse, LLC*, 404 Ill. App. 3d 711, 725–26.

In Trippen's case, there may be an argument for deliberate encounter by analogizing *Morrissey* and *Simmons v. American Drug Stores, Inc.*, 329 Ill. App. 3d 38 (2002). In *Morrissey,* the plaintiff was injured at a racecourse while riding a horse that slipped on soapy water that had accumulated across his path. Just as Trippen had entered and exited Hasard's many times before, Morrissey had used the subject path many times before. Morrissey and Trippen each could or even should have known hazardous conditions such as standing water or hoses might occasionally be present on the premises. However, interpretation of this exception rests on whether the *landowner* could foresee his invitees encountering the open and obvious condition, even if alternatives were available. "Liability under this exception stems from the landowner's knowledge of the premises and what the landowner had reason to expect the invitee would do in the face of the dangerous condition." *Morrissey* at 725. In other words, a defendant is not relieved of duty simply because a plaintiff had some broad knowledge of the premises and its typical condition.

The defendant in *Morrissey* argued (1) the condition of the racecourse path was open and obvious; (2) the deliberate encounter exception did not apply because there was a reasonable (though longer and less direct) alternative; and (3) this exception should only be applied to situations with no reasonable alternative. The First District Appellate Court replied to the argument that only situations with no reasonable alternative were applicable with, simply, "We disagree." *Id.* at 726. Illinois common law has generally upheld the idea that deliberate encounter can apply even if the plaintiff had some small measure of choice regarding the path they took.

Simmons presents facts even closer to Trippen's, making it a strong candidate for analogizing. The plaintiff Simmons was leaving a store where a single doorway provided entrance and exit to its customers, had frequented the store many times previously without incident, was carrying items while exiting, and encountered an obstacle near the exit (cart theft barriers) which led to a trip and fall. The *Simmons* court held that the deliberate encounter exception could apply because customers were required to encounter the barriers in order to exit the premises and proceed to the parking lot. The defendants (the store) would have reason to expect that, to the reasonable customer, the advantages of being able to exit the premises would outweigh the apparent risk presented. *Simmons v. Am. Drug Stores, Inc.*, 329 Ill. App. 3d 38, 45 (2002).

Ward held that a condition need not be inherently dangerous, only that it *could* be unreasonably dangerous under the specific facts of the situation. *Ward v. Kmart Corp.*, 136 Ill. 2d 132, 152 (1990). *Simmons* invokes *Ward* for an important distinction: that recognizing a condition and recognizing its risk are not the same inquiry. A reasonable customer may have noted the presence of a hose or planter box without appreciating that either posed a tripping hazard, particularly when navigating the exit while carrying a large, recently purchased item.

The same reasoning applies to Trippen's facts. Hasard's should expect its invitees to leave the premises after completing a purchase, the culmination of its business invitation. Having designed the premises with a single customer entrance and exit, Hasard's should reasonably have known that all customers, regardless of the condition of the walkway, would use this path to leave. It can be further argued that the dangerous condition was not merely present at the exit, but was specifically created by Hasard's, affecting this single customer entrance and exit pathway.

The *Simmons* defendant argued there was a reasonable alternative for the plaintiff, a nearby accessible exit referred to in the decision as a 'handicap exit,' and Hasard's may similarly argue that if Trippen had been taking reasonable care, she would have shifted her path slightly to avoid the obstacles that led to her injuries. Both *Morrissey* and *Simmons* affirm that the existence of a physical alternative does not automatically preclude applicability of the deliberate encounter exception. Though the *Simmons* appellate judgment did not definitively agree that the deliberate encounter exception applied to these facts, that court found this was a genuine issue of material fact and remanded accordingly. If Hasard's were to file a motion for summary judgment based on open and obvious, as the *Simmons* defendant did, this precedent could offer strong grounds for opposing such a motion.

<u>Duty of Care Factors (3) and (4): Magnitude of Burden and Consequences of Placing Burden</u>

Returning to the four factors of duty analysis, the remaining two are the magnitude of the burden of guarding against injury and the consequences of placing that burden upon the defendant. In Trippen's case, the magnitude and consequences are both slight. The yellow cone was already nearby and could easily have been placed closer. An employee had already been asked to move the planter box and had nearly two hours between Trippen's entrance and exit to accomplish that task, a point discussed further in the premises liability section below. The *Ward* court found the magnitude and consequence similarly low, noting "[a] simple warning or a relocation of the post may have sufficed." Analogously, a simple warning, sign, or cone alerting customers to the presence of the hose, or a simple relocation of the planter box may have sufficed to caution Trippen, without causing other harm or burden to Hasard's. Though there have been other cases that found magnitude and consequences were high (*Bruns, Bucheleres)*, there is as yet no indication within the facts to support anything other than low burden. *Bruns v. City of Centralia*, 2014 IL 116998; *Bucheleres v. Chicago Park Dist.*, 171 Ill. 2d 435 (1996).

<u>2. Second Element of Negligence: Breach of Duty</u>

The second required element for a valid negligence claim is that the defendant breached the duty which was owed. The existence of duty alone is not the equivalent of a breach of duty; a plaintiff must also prove that an owner's efforts to protect invitees from harm were inadequate. *LaFever v. Kemlite Co.*, 185 Ill. 2d 380 (1998); *Deibert v. Bauer Bros. Constr.*, 141 Ill. 2d 430 (1990). A duty is breached when a defendant fails to comply with the applicable reasonable standard of care; that is, when the defendant acted in a way that a reasonable person would not have acted or failed to act when a reasonable person would have taken steps to prevent harm. While duty and breach are distinct elements, the foreseeability analysis for duty above bears directly on breach. If Hasard's could reasonably have anticipated harm to its invitees, its failure to take adequate precautions falls short of the reasonable standard of care.

This is likely to be another strong area of debate in Trippen's case. The central question is what constitutes reasonable care. The only known steps Hasard's took to warn against harm were the employee's use of a green hose and the unexecuted instruction to move the planter box. Trippen has a strong argument that Hasard's failed to take readily available reasonable steps to mitigate the risk of injury, given the availability of a yellow cone that could have been used, the ease with which a verbal warning could have been given, and management's failure to follow up on the planter box instruction within nearly two hours. We would want to gather more information on store policies such as schedules for inspection or cleaning, training of supervisors and employees, and any visible signs or verbal recommendations for how customers could safely carry large purchases out of the store.

Beyond Hasard's direct negligence, the conduct of its employees independently supports a claim under vicarious liability (*respondeat superior*). Illinois common law allows a plaintiff to plead and prove multiple causes of action, *McQueen v. Green*, 2022 IL 126666, meaning Trippen can allege both Hasard's direct negligence and its vicarious liability for the acts or omissions of its employees. To establish vicarious liability, the action or inaction of employees must fall within the ordinary scope of employment; that is, the employee was doing tasks of the job they were hired to perform, in the time and geographic place of employment, and the acts are closely related to the objectives of employment. *Bagent v. Blessing Care Corp.,* 224 Ill. 2d 154, 164 (2007). Though more investigation would be needed into Hasard's supervision and internal policies, even if those company standards would have prevented the Trippen injury had they been followed, it could be argued that at least two known employees, in the scope of their employment, failed to take reasonable care to protect invitees from harm.

3. Third Element of Negligence: Proximate Cause

The third element a plaintiff must prove is that the defendant's actions or failure to act directly led to the plaintiff's injuries "in a near or immediate and related manner." C. William Busse, *The Element of Proximate Cause in a Personal Injury Lawsuit*, Vol. 32.3.M1 IDC Quarterly (status of Illinois case law related to proximate cause). There can be more than one proximate cause for a single incident, but the defendant's negligence must be a contributing cause and be in some direct sequence with the injury, unbroken by intervening or superseding events. "Proximate cause can only be established when there is reasonable certainty that the defendant's acts caused the injury." *Kimbrough v. Jewel Companies, Inc.*, 92 Ill. App. 3d 813, 817 (1981). Proximate cause is ordinarily a question of fact for the jury, though it can be a question of law when "the facts are undisputed and there is no difference in the judgment of reasonable men as to the inferences to be drawn." *McCoy v. McCoy*, 227 Ill. App. 3d 244, 248 (1992).

There are two factors required to prove proximate cause: cause in fact ("actual cause") and legal cause. *Lee v. Chicago Transit Authority,* 152 Ill. 2d 432, 455 (1992). A defendant's conduct may be deemed the actual cause of a plaintiff's injury if, "but for" the defendant's conduct, the injury would not have occurred. If the injury *would* have occurred even without the defendant's actions or inactions, there is no actual cause, therefore no proximate cause. *McCoy v. McCoy*, 227 Ill. App. 3d 244, 248 (1992). In determining actual cause for Trippen, the "but for" standard seems likely to be met: "but for" Hasard's failure to adequately warn customers of the hose across the walkway and "but for" Hasard's failure to ensure the planter box was moved, Trippen's injury would not have happened.

Once actual cause is established, the question is whether the defendant should be held legally responsible for it. This "legal cause" exists if an injury was foreseeable as the type of harm a reasonable person would expect as a likely result of the defendant's negligence; it is not necessary that the defendant should have foreseen the precise injury which resulted. *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 456 (1992). Hasard's may argue that the precise manner of Trippen's injury was not foreseeable. Even allowing this to be true, it is still quite reasonably foreseeable that a person may trip over a hose stretched across a walkway. Per Trippen's account, a Hasard's employee was aware of the risk of tripping, demonstrated by her specific choice of hose color, which strengthens the argument that a trip was reasonably foreseeable by the store.

4. Fourth Element of Negligence: Damages

Finally, a plaintiff alleging negligence must prove they sustained actual injuries and damages. Damages can include physical injury, emotional distress, lost wages, medical bills, or other financial losses. “The wrongful or negligent act of the defendant, by itself, gives no right of action to anyone. Until the defendant’s wrongful or negligent act produces injury to the plaintiff’s interest by way of loss or damage, no cause of action accrues.” *Berry v. City of Chicago*, 2020 IL 124999 ¶ 35.

The injuries and damages sustained by Trippen due to this incident are well-documented. There will be medical records and bills showing her rotator cuff tear, stitches, necessity and completion of rotator cuff surgery, and seven months of physical therapy, all calculable as past medical expenses. To date, Trippen has estimated these medical expenses to be $50,000. More investigation will be needed to determine if future medical expenses would also be recoverable.

As Trippen was unable to work for four months, her lost wages can be calculated according to her average salary: approximately four months at a gross weekly salary of between $1,200 and $1,250. Hasard’s would likely contest whether these particular injuries would have interfered with Trippen’s ability to perform her administrative desk work. Assuming documentation exists for the additional housecleaning, landscaping, and ride-share expenses Trippen incurred, those actual financial damages should be straightforward to calculate and prove; she currently estimates this out-of-pocket total to be approximately $5,000. Hasard’s may also contest whether these additional services were absolutely necessary.

Trippen’s treating physicians can likely speak to her pain and physical limitations throughout her recovery, which strengthens the case for the outside expenses and lost wages claims and supports claims for emotional damages, including loss of normal life and pain and suffering, as well as permanent disfigurement from the chin scar. Trippen's injuries are well-documented, and the medical records and testimony should provide a strong evidentiary foundation for each category of damages.

Premises Liability

The facts of Trippen's incident may also support a premises liability claim. Premises liability is a type of negligence claim; therefore, a plaintiff must first prove each of the four elements of negligence as analyzed above, then three additional factors listed in Restatement (Second) of Torts §343 (1965). A landowner is subject to liability for physical harm caused to his invitees if he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to invitees; (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect them against the danger. Trippen was an invitee to the premises owned and occupied by Hasard's and therefore was owed a particular duty of care.

Specific to premises liability, point (a)'s knowledge requirement is addressed through two legal concepts: "actual" and "constructive" notice. "Actual notice" means the defendant had direct knowledge that the potentially dangerous condition existed; that is, there is evidence to prove that the defendant or its employee had been notified of the dangerous condition prior to the plaintiff's injury. *Haslett v. United Skates of Am., Inc.,* 2019 IL App (1st) 181337 ¶ 52. Due to statements made by the Hasard's employee to Trippen, actual notice is likely provable. This employee knew the hose posed a potential obstacle and knew the planter box *was* an obstacle. A second employee had been directed to move the planter box, so there is presumably also a Hasard's supervisor who gave this direction. All of these facts imply Hasard's knowledge of a potentially dangerous condition.

"Constructive notice" provides an alternative basis for satisfying point (a) of §343. This can be used when the potentially dangerous condition should have been known by the landowner, through the exercise of ordinary care, typically established by showing the condition was present for a long enough time that it should have put the defendant "on notice." Clause *a* of Restatement §343 states, "The plaintiff invitee has the burden of proving that the defendant possessor either knew or had reason to know of the condition, or that by the exercise of reasonable care he would have discovered it. Where the condition is temporary in its nature, this burden may require proof that it has existed for a sufficient length of time to permit the inference that reasonable care would have led to its discovery." The facts support a finding that Hasard's, in the nearly two hours between Trippen's entrance and exit, should have known about and moved the planter box, even if actual notice cannot be established.

The hose and the planter box may be pleaded as two separate, concurrent dangerous conditions, each independently satisfying the notice and reasonable care analysis under §343. This distinction may prevent Hasard's from defeating the premises liability claim simply by explaining away one condition. As to the hose, the employee's deliberate choice of hose color establishes actual notice of the visibility risk, and Hasard's failure to deploy the nearby yellow cone or provide verbal warning to customers demonstrates a lack of reasonable care despite that knowledge. As to the planter box, the supervisor's direction to have it moved establishes actual notice, while its continued presence in the walkway for nearly two hours independently supports constructive notice (a period long enough that reasonable follow-up by management would have led to its removal). The failure of any Hasard's employee to confirm the task had been completed within the two-hour window is strong evidence of lack of reasonable care. Taken together, the two conditions compound one another. A customer navigating around one obstacle in a single entrance and exit pathway was more likely to encounter the other, and Hasard's simultaneous awareness of and failure to address both strengthens the overall foreseeability argument.

<u>Probable Defenses for Hasard's</u>

Hasard's is very likely to raise an affirmative defense of comparative negligence, in which the defendant claims the plaintiff negligently contributed to their own injury. Illinois has adopted a modified form of comparative negligence that could diminish or bar a plaintiff's recovery, depending on the degree of fault attributed to the plaintiff. If the trier of fact finds the plaintiff more than 50% liable, recovery is barred. If the plaintiff is found *less* than 50% responsible, recovery is not barred, but any awarded damages are diminished in proportion to the amount of fault attributable to the plaintiff. 735 ILCS 5/2-1116. At trial, the jury assigns percentages of liability and is explicitly instructed on the 50% threshold. This instruction may work to Trippen's advantage, as it may influence juries toward finding plaintiffs less than 50% liable in order to avoid the complete bar to recovery.

In Hasard's favor for this defense are the facts that Trippen noted both the hose and planter box on her way into the store and that she chose to carry the bulky potted flowers rather than continuing to use a cart, despite not having a clear view of the ground directly in front of her. Trippen can counter, however, that although she did observe the hose, it was in a different location on her way out. Trippen's statement that she had seen employees using hoses to water plants on prior visits does not directly correlate to knowing the exact location of a hose as an obstacle on any one particular day. The location of the planter box may weigh more in Hasard's favor, as it was in the same location on Trippen's entrance and exit. However, *Ward* is instructive on this point, as the court found in favor of the plaintiff even though he had walked past the post that caused injury when entering the store, admitting he was at least "subconsciously" aware of its presence. *Ward v. Kmart Corp.*, 136 Ill. 2d 132, 152-53 (1990).

To avoid a complete bar to recovery, we must show Trippen was less than 50% liable for her own injury. Weighing the above facts, additional considerations favor Trippen. Hasard's created the condition of a hose stretched across the only walkway made available to customers exiting the store. Hasard's was responsible for the obstacle of a planter box in a customer walkway and failed to move the planter box out of the way in a reasonable amount of time. Hasard's failed to use any signage or the available yellow cone to further warn customers of a tripping danger and failed to anticipate that customers exiting the store would likely be carrying bulky purchased items. The facts strongly support a finding that Trippen was less than 50% liable, at a minimum, and may well support attributing her an even smaller share of responsibility, resulting in a larger recovery.

Another likely defense from Hasard's is that the open and obvious doctrine means it owed no duty of care, therefore it is not liable. See the section on open and obvious above (pg. 6) for analysis.

CONCLUSION

Based on all known facts and case law above, Trippen likely has a valid negligence cause of action against Hasard's Garden Center, brought under a theory of ordinary negligence, including a premises liability claim. The most probable areas of contention will be (1) the duty of care element, particularly regarding application of the open and obvious doctrine and its exceptions; and (2) breach of duty, particularly regarding whether Hasard's showed reasonable care to avoid harm to its customers. In anticipation of a comparative negligence defense, additional facts gathered during investigation and discovery will require ongoing analysis to accurately assess allocation of responsibility.