IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 2003

MARRIOTT INTERNATIONAL, INC.,

Appellant/Cross-Appellee,

v.

Case No. 5D02-1624

ZAIRA PEREZ-MELENDEZ,

Appellee/Cross-Appellant.

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Opinion filed September 26, 2003

Appeal from the Circuit Court
for Orange County,
William C. Gridley, Judge.

Marie A. Borland of Hill, Ward & Henderson, P.A., Tampa and John H. Ward of Brown, Ward, Salzman & Weiss, Orlando, for Appellant/Cross-Appellee.

Elizabeth H. Faiella of Elizabeth H. Faiella, P.A., Winter Park and Marcia K. Lippincott of Marcia K. Lippincott, P.A., Lake Mary, for Appellee/Cross-Appellant.

SAWAYA, C.J.

ON MOTION FOR REHEARING, CLARIFICATION AND CERTIFICATION

Marriott International, Inc. (Marriott) has filed a motion for rehearing, clarification and certification with respect to our opinion entered in this appeal on July 25, 2003. Although we deny Marriott's motion, we will address certain of the issues raised therein.

Marriott contends in its motion for rehearing, clarification and certification that this court has misapprehended the proper standard of review because the issue of whether the

condition on the premises is dangerous is a question of law rather than an issue of fact for the jury to resolve. In support of that contention, Marriott cites several cases from this court: City of Melbourne v. Dunn, 841 So. 2d 504 (Fla. 5th DCA 2003); Taylor v. Universal City Property Management, 779 So. 2d 621 (Fla. 5th DCA), review denied, 799 So. 2d 219 (Fla. 2001); Krol v. City of Orlando, 778 So. 2d 490 (Fla. 5th DCA 2001); Rosenfeld v. Walt Disney World Co., 651 So. 2d 811 (Fla. 5th DCA 1995); Gorin v. City of St. Augustine, 595 So. 2d 1062 (Fla. 5th DCA), review denied, 604 So. 2d 486 (Fla. 1992); and Circle K Convenience Stores, Inc. v. Ferguson, 556 So. 2d 1207 (Fla. 5th DCA 1990). Marriott also cites several cases from other courts: Casby v. Flint, 520 So. 2d 281 (Fla. 1988); Schoen v. Gilbert, 436 So. 2d 75 (Fla. 1983); Hoag v. Moeller, 82 So. 2d 138 (Fla. 1955); Aventura Mall Venture v. Olson, 561 So. 2d 319 (Fla. 3d DCA), review denied, 574 So. 2d 142 (Fla. 1990); McAllister v. Robbins, 542 So. 2d 470 (Fla. 1st DCA 1989). Marriott contends that the decision in the instant case directly conflicts with these decisions and that certification of conflict is appropriate. We disagree.

All of the cases cited by Marriott are inapplicable to the instant case because the basis for the ruling in each was the open and obvious danger doctrine, a doctrine not raised in the proceedings before the trial court in the instant case. We have thoroughly reviewed each citation to the record in Marriott's motion where it claims to have raised the open and obvious danger doctrine in the trial proceedings, and it is not there. This court and others have consistently held that an issue that is not raised in the trial court may not be raised for the first time on appeal. Cowart v. West Palm Beach, 255 So. 2d 673 (Fla. 1971) (holding that an appellate court may not consider an issue not presented to the trial judge on appeal from final

judgment on the merits); J.T.A. Factors, Inc. v. Philcon Servs., Inc., 820 So. 2d 367 (Fla. 3d DCA 2002); Keech v. Yousef, 815 So. 2d 718, 719 (Fla. 5th DCA 2002) ("A legal argument must be raised initially in the trial court by the presentation of a specific motion or objection at an appropriate stage of the proceedings.") (citation omitted); Lee v. City of Jacksonville, 793 So. 2d 62 (Fla. 1st DCA 2001); U.S. Sugar Corp. v. Henson, 787 So. 2d 3 (Fla. 1st DCA 2000), approved, 823 So. 2d 104 (Fla. 2002).[1]

Moreover, as we have indicated and as Marriott concedes in these proceedings, Perez presented four theories of liability that included the premises liability theories of failure to warn of a dangerous condition and failure to maintain the premises in a reasonably safe condition. The courts have consistently held that while the open and obvious danger doctrine may in certain circumstances discharge the duty to warn, it does not discharge the landowner's duty to maintain the property in a reasonably safe condition. Knight v. Waltman, 774 So. 2d 731 (Fla. 2d DCA 2000); Kersul v. Boca Raton Cmty. Hosp., Inc., 711 So. 2d 234 (Fla. 4th DCA 1998); Regency Lake Apartments Assocs., Ltd. v. French, 590 So. 2d 970 (Fla. 1st DCA 1991); Hogan v. Chupka, 579 So. 2d 395, 396 (Fla. 3d DCA 1991); Pittman v. Volusia County, 380 So. 2d 1192 (Fla. 5th DCA 1980). In Pittman, this court explained why the doctrine does not extend to the duty to maintain the premises in a reasonably safe condition:

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[1]In most of the cases cited by Marriott and in the vast majority of the other cases we have reviewed that apply the obvious danger doctrine, the issue is raised in the trial court via a motion for summary judgment. In the others cases, the issue is raised in a motion to dismiss, a motion for directed verdict or as an affirmative defense. We have again reviewed the record in the instant case and the doctrine was never raised in the trial proceedings. The trial court, therefore, never had an opportunity to consider whether the doctrine applied to the instant case. Since the doctrine was not raised in the trial court, we will not consider it in this appeal.

> The fallacy is in the premise that the discharge of the occupier's duty to warn by the plaintiff's actual knowledge necessarily discharges the duty to maintain the premises in a reasonably safe condition by correcting dangers of which the occupier has actual or constructive knowledge. To extend the obvious danger doctrine to bar a plaintiff from recovery by negating a landowner's or occupier's duty to invitees to maintain his premises in a reasonably safe condition would be inconsistent with the philosophy of Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973), that liability should be apportioned according to fault.

Pittman, 380 So. 2d at 1193-94 (footnotes omitted); see also Hogan, 579 So. 2d at 396 (citing Pittman). Hence, even if the open and obvious danger doctrine had been raised in the trial proceedings and we could properly consider it here, it would not relieve Marriott of its duty to keep the premises in a reasonably safe condition.

We do not feel it is necessary to burden this opinion with the detailed testimony of Perez's witnesses, including the testimony of her two expert witnesses, who offered testimony regarding the dangerous condition of the drain inlet. Apparently the jury did not accept the testimony of Marriott's expert or at least gave it less weight than the testimony of the witnesses presented by Perez, but that is the prerogative of the jury. It is not for us to weigh the testimony and judge the credibility of the witnesses. Based on our review of the record in light of the appropriate standard of review, we conclude that the trial court did not err in denying Marriott's motion for directed verdict.

We take this opportunity to note that rule 9.330(a), Florida Rules of Appellate Procedure, allows a party to file a motion for rehearing to bring to the court's attention a point of law or fact that the court has overlooked or misapprehended. The purpose of the rule, however, is not to bring to the court's attention an issue that was not properly raised in the trial

court. We have now expended valuable time and effort to review this record a second time in search of the obvious danger doctrine, and what has become quite obvious to us is that it is nowhere to be found. The trial court never considered the doctrine because Marriott never asked it to. If we will not consider the issue during our consideration of this case after submission of the briefs and oral argument, we certainly will not consider the issue in a motion for rehearing.

MOTION FOR REHEARING, CLARIFICATION AND CERTIFICATION DENIED.

PLEUS and MONACO, JJ., concur.