FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-262

SOPHIA COLLIAS, a minor, by and through her parents and legal guardians, JOHN COLLIAS and HELEN COLLIAS, both individually and as parents of Sophia Collias,

Appellants,

v.

GATEWAY ACADEMY OF WALTON COUNTY, INC.,

Appellee.

On appeal from the Circuit Court for Walton County.
David W. Green, Judge.

January 11, 2021

MAKAR, J.

During gym class on a makeshift running course in her private school's indoor auditorium, seven-year-old second-grader Sophia Collias—on her third lap—was distracted and ran into a pedestal table with a glass edge at mouth level, causing the loss of her permanent teeth and resulting in long-term injuries. She and her parents sued the school alleging various negligence theories including: the breach of a legal duty to maintain a safe premises,

creating a hazardous condition by using the auditorium for running and placing the glass top table in the children's running course, failing to warn the children of the risk the table created, failing to properly supervise the children's indoor running class, and so on. After discovery, including the depositions of both Sophia and the PE instructor and an expert affidavit opining on the school's legal duties and shortcomings, the trial judge entered final summary judgment for the school on the basis that the table was an "open and obvious" risk of which Sophia was aware, such that her injury was her fault with no negligence on the school's part. In doing so, the trial judge erred by resolving factual disputes in favor of the school (despite acknowledging divergent testimony), overlooking relevant evidence, and foreclosing alternative negligence theories other than the duty to warn claim.

The standard for summary judgment was recently stated as follows (in a trip and fall case):

> The granting of summary judgment is subject to de novo review. The appellate court is required to 'consider the evidence contained in the record, including any supporting affidavits, in the light most favorable to the non-moving party . . . and if the slightest doubt exists, the summary judgment must be reversed.' In negligence suits particularly, 'summary judgments should be cautiously granted.' 'If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it.' Summary judgment should not be granted 'unless the facts are so crystallized that nothing remains but questions of law.'

Brookie v. Winn-Dixie Stores, Inc., 213 So. 3d 1129, 1131 (Fla. 1st DCA 2017) (internal citations omitted). Based upon this standard of review and the discussion that follows, triable issues exist that require submission to a jury.

At the outset, the trial court resolved the entire case on the basis that the pedestal table was an "open and obvious" hazard for which no duty to warn existed. In doing so, it overlooked that other

negligence theories—ones not reliant on a duty to warn—remained for adjudication. It also jumped the gun on the duty to warn claim.

First of all, courts hesitate to absolve a property owner of liability on an "open and obvious" theory unless the crystalized and undisputed facts establish, as a matter of law, that a plaintiff knowingly undertook an open and obvious risk for which no warning is necessary. In this case, factual issues exist as to whether the pedestal table was so "open, obvious and ordinary" as to make it—as a matter of law—the type of risk that a seven-year-old child engaging in an indoor running exercise would foreseeably perceive and avoid. Unlike *Brookie*, where an adult customer tripped over a pallet as he exited a Winn-Dixie grocery store—a pallet he admitted he saw and walked around and avoided twice beforehand—the seven-year-old student in this case cannot be deemed to have the same degree of knowledge as an adult of the risks the pedestal table presented under the circumstances. That's because it has long been recognized in Florida that "[t]hose who invite children, who have not arrived at the age of discretion,[1] to go upon their premises are required to exercise a relatively higher degree of care for their safety than to adults. That degree of care is commensurate with the attending facts and circumstances of each case." *Burdine's, Inc. v. McConnell*, 1 So. 2d 462, 463 (Fla. 1941); *see also City of Miami v. Ameller*, 472 So. 2d 728, 729 (Fla. 1985) (approving the Third District decision adopting Judge Ervin's opinion in *Alegre v. Shurkey*, 396 So. 2d 247, 249 (Fla. 1st DCA 1981) (Ervin, J., concurring in part, dissenting in part) ("It has long been acknowledged that a child of tender years may be incapable of comprehending a patent risk and that a greater degree of care may be owed to the invitee-child by the business owner than to an adult of normal intelligence.")).

This point is important because the second-graders were *required* to run around the pedestal table despite its potential risk of harm; and the foreseeability of a second-grader becoming

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[1] The "age of discretion" is the "age at which a person is considered responsible for certain acts and competent to exercise certain powers." BRYAN A. GARNER, BLACK'S LAW DICTIONARY 66 (8th ed. 2004).

distracted while running indoors in a confined area with twenty classmates falls squarely within human experience as the type of situation where common sense dictates a duty to exercise reasonable care. *Cf. Brookie*, 213 So. 3d at 1137 (noting it would be improper for every business to insure against "unreasonable inattentiveness of invitees"). Given disputed facts about where the pedestal table was placed, whether it had been on the running course before, and the reasonableness of a seven-year-old's potential distraction under the circumstances, it cannot be said that the pedestal table was "open and obvious" as a matter of law. *See, e.g.*, *Moultrie v. Consol. Stores Int'l Corp.*, 764 So. 2d 637, 640 (Fla. 1st DCA 2000) (concluding that "there appear to be material issues of fact as to whether the pallet was 'open and obvious,' and if so, whether appellee should have anticipated that as a general rule, adult shoppers do not focus on the floor of a store aisle when moving toward merchandise they propose to buy").

Even if the pedestal table was considered an open and obvious danger to a second-grader under the circumstances, it is a separate and independent issue of negligence whether the school created a hazardous condition by using the auditorium for running, placing the glass top table in the pathway of the children's running course, failing to properly supervise the children's indoor running class, and generally failing to maintain a safe premises under the circumstances. Courts statewide have repeatedly held that the "open and obvious danger doctrine" can absolve a property owner on a failure to warn theory, but it does not absolve a property owner's duty to protect invitees from reasonably foreseeable risks, even if the invitees are aware of dangerous conditions, particularly ones they cannot avoid such as entries, passageways, sidewalks, stairs, and so on (here the seven-year-old had no choice but to run close to the pedestal table). *Marriott Int'l, Inc. v. Perez-Melendez*, 855 So. 2d 624, 631 (Fla. 5th DCA 2003) ("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."); *Regency Lake Apartments Assocs., Ltd. v. French*, 590 So. 2d 970, 973 (Fla. 1st DCA 1991) ("The discharge of the duty to warn does not relieve Regency of its duty to maintain the premises in a reasonably safe condition by correcting or eliminating dangers."); *Hancock v. Dep't of Corr.*, 585

So. 2d 1068, 1071 (Fla. 1st DCA 1991) ("As the owner and operator of the premises with knowledge of the condition of the broken handrail, the Department also owed a duty to persons such as Hancock to protect them from reasonably foreseeable risks, even though he was aware of the dangerous condition."); *see also Aaron v. Palatka Mall, L.L.C.*, 908 So. 2d 574, 578 (Fla. 5th DCA 2005) ("When an injured party alleges that the owner or possessor breached the duty to keep the premises in a reasonably safe condition, an issue of fact is generally raised as to whether the condition was dangerous and whether the owner or possessor should have anticipated that the dangerous condition would cause injury despite the fact it was open and obvious.").[2]

It is only when the risk of harm is so "open and obvious" that "no reasonable person would injure himself" under the circumstances that the duty to warn and the duty to make premises safe are simultaneously met. *See, e.g.*, *Brookie*, 213 So. 3d at 1136; *see also K.G. By & Through Grajeda v. Winter Springs Cmty. Evangelical Congregational Church*, 509 So. 2d 384, 385 (Fla. 5th DCA 1987) (finding that "we do not think that a tree with a surrounding brick border constitutes a dangerous condition or concealed peril. There was therefore no duty on the part of the church to warn or take other precautionary measures, such as installing better lighting"). Like the pallet in *Brookie*, uneven pavement, traffic bumps, and steps of which invitees are aware are matters "of common knowledge or every day life." *Moultrie*, 764 So. 2d at 640. As in *Moultrie*, however, "[s]uch is not the case here." *Id.*

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[2] *Pittman v. Volusia County*, 380 So. 2d 1192, 1193 (Fla. 5th DCA 1980) (noting that 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") (footnote omitted). "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 . . . that liability should be apportioned according to fault." *Id.* at 1193–94 (internal citation and footnotes omitted).

In this case, no question exists that the school had a legal duty to make its premises safe for its students including those portions of its facilities used for physical education activities. *See, e.g.*, *Carr ex rel. Carr v. Sch. Bd. of Pasco Cnty.*, 921 So. 2d 825, 826–27 (Fla. 2d DCA 2006) (reversing trial judge's entry of judgment for school board, which overrode jury's verdict of negligence in favor of high school student who was severely injured due to metal bench on edge of outdoor track). In *Carr*, as in this case, the injured student was a non-athlete participating in an on-campus school running event at which he alleged—among other theories—that the school was negligent for creating an unsafe condition (the metal bench) and failing to adequately warn of the potentially dangerous condition. *Id.* at 827.

Like the placement of the metal bench in *Carr*, a key factual dispute in this case centers on the propriety of having a potentially dangerous object—a pedestal table whose glass top is at mouth level—in the midst of the second-graders' indoor running course. Putting aside for a moment the factual disputes about *where* the table was located, two fundamental issues of negligence exist: *whether the auditorium should have been used for indoor running* and *whether the table should have been there at all*. At a basic level, a dispute exists whether the school was negligent in allowing second-graders to be running in a room not designed for such use in the first place; an expert affidavit said the auditorium floor was inappropriate for this purpose ("Running was an inappropriate physical education activity for the room where the incident occurred. Running . . . should occur inside only when there is an appropriate facility such as a gymnasium."). Sophia testified that the thinly carpeted floor of the auditorium was slippery and provided insufficient friction with her athletic shoes to prevent her from stopping and avoiding the table. A jury could conclude that the school was negligent for using an auditorium with slippery, thin carpeting, which is not designed for athletic use, as a facility for indoor running by very young children.

Beyond that, a disputed issue exists as to whether the table should have been in the running course at all (it could have been put on the adjoining elevated stage out of the way of running children). The expert affidavit stated that the presence of the

glass-top pedestal table on the running course was a serious safety concern, and that the PE instructor had an obligation to ensure removal of this type of hazard ("The first thing a physical education instructor should do in preparing for a class is to identify any barriers of safety concerns and remove them prior to the beginning of class. The glass top table that Sophia Collias collided with is certainly a barrier and a safety concern that should have been removed from the area before the beginning of class."). Deposition testimony supported this view: Sophia and her parents testified that the table was a dangerous obstacle that the children were required to run around, having to choose which side to traverse as they ran toward it. Conversely, the PE instructor said she provided a safe environment. On this record, the jury could conclude that the school was negligent for allowing this particular type of obstruction, a mouth-level glass-top pedestal table, to be on the running course. *See, e.g.*, *Ameller*, 472 So. 2d at 729 (reversing dismissal of negligence action where complaint "charged the city with violating playground industry, as well as its own, standards for the proper cushioning ground surface under the monkey bars").

Next, two crucial facts are whether the pedestal table had been on the running course previously and where it was located on the day Sophia was injured. On these points, the testimony diverged markedly. Sophia said she had not seen the table before the day she was injured and that it was away from the stage and in the designated running path such that she and her classmates had to choose which side of it to run around; her PE instructor said the table was used before and that it was "in the same area" as before. Despite the divergent testimony as to whether the table had been used previously and where it was placed, the trial judge concluded that the "testimony of all parties make clear that the table the plaintiff struck was in an open and obvious location and that she was well aware of its presence." On the evidence presented, a jury could conclude that the risk of running into the pedestal table and its mouth-level glass top was a serious one, that the table should have been placed elsewhere, and that Sophia—as a seven-year-old who had not seen the table before and was not warned of its risks—should not be held entirely responsible for the accident on the basis that the table was an "open and obvious" risk that second-graders are expected to understand and avoid.

Sophia said her classmate distracted her, which is foreseeable when twenty second-graders are running in a circle on a makeshift indoor course while being timed. Our supreme court recognized this commonsense point almost ninety years ago:

> Children are necessarily lacking in the knowledge of physical causes and effects which is usually acquired only through experience. *They must be expected to act upon childish instincts and impulses, and must be presumed to have less ability to take care of themselves than adults have*. Therefore, in cases where their safety is involved, more care is demanded than toward adults, and all persons who are chargeable with a duty of care and caution toward them must consider this and take precautions accordingly.

Bagdad Land & Lumber Co. v. Boyette, 140 So. 798, 800 (Fla. 1932) (emphasis added). Telling seven-year-olds to look forward and avoid distractions when running with classmates on a makeshift running course fails to account for the higher duty of care and is insufficient to avoid all liability under these circumstances. That's true even if the seven-year-old was aware of the pedestal table. *Regency*, 590 So. 2d at 973 ("In cases where it can reasonably be expected that a person's attention may be distracted, prior knowledge of the defect by a plaintiff will not preclude recovery."). It is a factor for the jury to consider, but it doesn't absolve the school. *Id*. ("The question of foreseeability of the distraction is generally a question of fact which should not be taken from the jury."); *see Burton v. MDC PGA Plaza Corp.*, 78 So. 3d 732, 735 (Fla. 4th DCA 2012) ("A pothole's obvious nature does not make it, as a matter of law, a reasonably safe condition. Under well-established Florida law, the defendants' duty to maintain the premises in a reasonably safe condition was not discharged by the plaintiff's knowledge of the pothole before she fell.")

For example, in *Carr* a fifteen-year-old high school student was running on an outdoor track when he injured his knee on a fifteen-foot movable aluminum metal bench left near the edge of the track. A jury ruled for the student on the theories that the school board "negligently failed to maintain its property in a reasonably safe condition, failed to correct a dangerous condition

of which it either knew or should have known by the use of reasonable care, or . . . failed to warn [the student] of a dangerous condition concerning which the School Board's employees had, or should have had, knowledge greater than that of [the student]." *Carr*, 921 So. 2d at 827. The trial judge "inexplicably" granted a directed a verdict for the school board, which the Second District reversed on appeal. *Id.*

In doing so, the Second District pointed out that there "was some dispute among the witnesses who testified at trial as to whether the bench was directly on the track when Michael ran into it or whether it was immediately adjacent to the track." *Id.* 826–27.

> At trial, there was considerable conflict in the evidence and debate among the lawyers as to whether the bench was on or merely near the track immediately preceding the race. This debated issue, however, may not have been critical to the jury. This was not a race among a handful of elite racers. The teachers had placed 100 teenagers on a track. The teenagers were trying to both run and walk in a competitive event. Most, if not all of them, had limited experience running track. *Whether a bench was on the track or merely a few inches from the edge of the track, a jury could determine that it was reasonably foreseeable that an inexperienced runner, racing in a crowd, could strike the bench and sustain a significant injury*. This determination was specifically supported by the testimony of one of the instructors that the benches were traditionally kept six feet from the track for this very reason.

Id. at 828–29 (emphasis added). To paraphrase *Carr* as applied here, whether the pedestal table was on the running course or nearby, a jury could determine it was reasonably foreseeable that an inexperienced second-grader, racing on a crowded makeshift indoor running course, could strike the pedestal table and sustain significant injury.

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In conclusion, the trial court erred in granting summary final judgment on the Collias's negligence claims. Reversal is warranted to allow a jury to make the determination whether the school acted negligently.

RAY, C.J., and M.K. THOMAS, J., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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