FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D22-231

EILEEN SMITH,

Appellant,

v.

WESTDALE ASSET MANAGEMENT,
LTD. d/b/a ANGEL COVE
APARTMENT HOMES,

Appellee.

On appeal from the Circuit Court for Escambia County.
Coleman Lee Robinson, Judge.

December 12, 2022

PER CURIAM.

In this trip-and-fall case involving a speed bump at an apartment complex, the trial court granted summary judgment for Appellee after determining that a reasonable jury could not return a verdict for Appellant based upon the evidence. We affirm.

Appellant's suit arose out of a 2016 incident in which she tripped over a speed bump at an apartment property managed by Appellee. Appellant was there helping a friend who lived at the complex move out. As Appellant walked down the complex's internal roadway looking for its bank of mailboxes, she kicked and tripped over an ordinary speed bump, injuring her knee and other

things. Appellant testified that the unpainted speed bump had been partly concealed by the shade of a tree and she didn't see it. But she also acknowledged that she wasn't looking ahead while walking on the roadway because she was searching for the mailbox. Appellant's subsequent lawsuit focused on the speed bump, alleging that Appellee breached its duty to warn of a dangerous condition as well as negligent maintenance of its premises.

Summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). The "new" summary judgment standard is construed in accordance with the federal summary judgment standard. *See In re: Amendments to Fla. Rule of Civ. Procedure 1.510*, 317 So. 3d 72 (Fla. 2021). Under this standard "the burden on the moving party may be discharged by 'showing' – that is, pointing out to the [trial] court – that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). This court reviews an order granting summary judgment de novo. *See Dudowicz v. Pearl on 63 Main, Ltd.*, 326 So. 3d 715, 718 (Fla. 1st DCA 2021).

In premises liability cases, a plaintiff must demonstrate that the defendant had actual or constructive knowledge of a dangerous condition on its premises, the defendant owed a duty to protect the plaintiff from this dangerous condition, the defendant breached this duty, the defendant's breach was the cause of the plaintiff's fall, and that the plaintiff suffered an injury. *Id.* at 719. "[A] business owner owes two 'separate and distinct' duties to business invitees: '1) to warn of concealed dangers which are or should be known to the owner and which are unknown to the invitee and cannot be discovered through the exercise of due care; and 2) to use ordinary care to maintain its premises in a reasonably safe condition.'" *Brookie v. Winn-Dixie Stores, Inc.*, 213 So. 3d 1129, 1131 (Fla. 1st DCA 2017) (quoting *Rocamonde v. Marshalls of Ma, Inc.*, 56 So. 3d 863, 865 (Fla. 3d DCA 2011)).

Regarding the duty to warn, the only problem alleged with the speed bump in this case relates to its visibility and whether it should have been painted. The speed bump was not otherwise

alleged to have physical defects or dangerous characteristics that contributed to Appellant's injury. On the visibility issue, the record shows that the speed bump's presence was open, obvious, and specifically known to Appellant. Generally, a business owes no duty to warn an invitee of an open and obvious condition when the business's "knowledge" of the condition is not superior to that of the invitee. *Brookie*, 213 So. 3d at 1132. And here, the complex's only roadway had five or six different sets of speed bumps. At least three times within the past year, Appellant had driven over them to the back of the complex where her friend lived. Each trip into and out of the complex took Appellant over and back of these sets of speed bumps (totaling more than two dozen traversals of the complex's speed bumps in her car before the fall), including over the speed bump where she fell. Appellant thus knew that speed bumps proliferated at the complex, including the specific set of speed bumps at the place where she tripped. *See id.* (finding no duty to warn of an impediment's presence where Appellant had encountered it twice before). The trial court further considered photographs taken in close proximity to the speed bump where Appellant tripped, which "clearly show[ed] the presence of speed bumps" even when shaded by an adjacent tree: "the only photographs taken close to the speed bumps show them rather clearly." *See Ramsey v. Home Depot U.S.A., Inc.*, 124 So. 3d 415, 417 (Fla. 1st DCA 2013) (concluding that a wheel stop placed at a parking space and clearly visible presents no unreasonable risk of harm). Moreover, Appellant's deposition testimony cited by the trial court acknowledged "that she was not looking directly where she was going, [but] that she 'was looking around to see where the mailboxes were.'" *Id.* (affirming partly because plaintiff admitted that she was not looking where she was walking when she tripped and fell over a parking lot wheel stop). Under these circumstances, particularly given Appellant's knowledge of the speed bump here, we agree with the trial court that there was no duty on Appellee's part to warn about an ordinary speed bump on a roadway that was open, obvious, and familiar to Appellant. *See Brookie*, 213 So. 3d at 1131; *Ramsey*, 124 So. 3d at 417; *Schoen v. Gilbert*, 436 So. 2d 75, 76 (Fla. 1983).

Furthermore, Appellee breached no duty to exercise ordinary care to maintain its premises in a reasonably safe condition. The record does not indicate that the speed bump was an inherently

dangerous condition that would cause injury. But assuming arguendo that it was, the speed bump "was so open and obvious, and previously observed by Appellant, that Appellees could reasonably expect Appellant to protect [her]self from the purported danger." *Brookie*, 213 So. 3d at 1133. *Brookie* analyzes numerous precedents in reaching the conclusion that it is neither "probable nor foreseeable" that someone familiar with a known potentially dangerous condition would disregard it and fail to protect oneself. *Id.* at 1132-34. *See also Earley v. Morrison Cafeteria Co. of Orlando*, 61 So. 2d 477, 478 (Fla. 1952) (recognizing that a "proprietor has a right to assume that the invitee will perceive that which would be obvious to him upon the ordinary use of his own senses"). Any tripping-related danger presented by the common speed bump here was readily avoidable by Appellant by paying attention to the road that she had travelled before and watching her step. In turn, Appellee could not reasonably anticipate that Appellant would disregard the speed bump, kick it, fall, and injure herself. *See Brookie*, 213 So. 3d at 1135 (concluding that the appellant "had a duty to avoid the previously observed pallet, which he did twice before he fell").

AFFIRMED.

LEWIS and OSTERHAUS, JJ., concur; MAKAR, J., dissents with opinion.

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

MAKAR, J., dissenting.

Reversal is required in this negligent maintenance case because a jury issue exists as to the visibility of the unmarked speed bump over which the plaintiff, Eileen Smith, fell while walking at the apartment complex. The trial court decided the case based on his own personal assessment of the photographic evidence, concluding that that "[t]he better quality photographs

seem to clearly show the presence of speed bumps, even in the shade." Summarily ruling for the apartment complex was improper under the circumstances due to relevant testimony and evidence contrary to the judge's viewpoint.

The standard for summary judgment, as stated in our recent trip and fall cases, is as follows:

> 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*.

Brookie v. Winn-Dixie Stores, Inc., 213 So. 3d 1129, 1131 (Fla. 1st DCA 2017) (internal citations omitted) (emphasis added); *see also Collias by & through Collias v. Gateway Acad. of Walton Cnty., Inc.*, 313 So. 3d 163, 165 (Fla. 1st DCA 2021).

Under the applicable summary judgment standard, a triable issue exists as to whether the speed bump—which maintenance records and the apartment manager's own testimony established had not been cared for in many years—was a hazard; it was painted in 2017, but that was *after* the September 2016 incident in this case. In addition, Smith testified that she could not see the unmarked speed bump, which was further obscured in the shade of a large tree at the time of her fall. The evidence is in conflict, thereby precluding summary judgment.

Smith's testimony about her prior visits to the complex doesn't foreclose a jury question on her negligent maintenance claim—a claim that is based on a failure to maintain property rather than a duty to warn of an open and obvious condition. The two theories of recovery are distinct and analyzed differently; even if a condition is open and obvious for which no duty to warn exists, the duty to

maintain property is independent of the duty to warn and its own basis for recovery, an oft overlooked point of law.[1]

Moreover, that she may have been looking for a mailbox at the time shows only potential comparative negligence on her part, not a basis to deny her negligence case entirely. *Fenster v. Publix Supermarkets, Inc.*, 785 So. 2d 737, 739 (Fla. 4th DCA 2001) ("A plaintiff's knowledge of a dangerous condition does not negate a defendant's potential liability for negligently permitting the dangerous condition to exist; it simply raises the issue of comparative negligence and precludes summary judgment.").

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[1] *See, generally* Benjamin Jilek, *The "Open and Obvious" Defense and Summary Judgment in Premises Liability Claims*, 25 Trial Advoc. Q. 36, 37 (2006) (article exclusively discussing the open and obvious doctrine as one of "the most commonly misunderstood aspects of premises liability in Florida"). This article states:

> In contrast to popular belief among many trial attorneys and judges, the duty to maintain is not related to, or discharged along with, the duty to warn. Instead, it is a distinct duty that does not depend on whether or not the condition was open and obvious: "A plaintiff's knowledge of a dangerous condition does not negate a defendant's potential liability for negligently permitting the dangerous condition to exist; it simply raises the issue of comparative negligence and precludes summary judgment."

Id. (footnote omitted) (citing *Miller v. Slabaugh*, 909 So. 2d 588, 589 (Fla. 2d DCA 2005), which quotes from *Fenster v. Publix Supermarkets, Inc.,* 785 So. 2d 737, 739 (Fla. 4th DCA 2001)); *see also Marriott Int'l, Inc. v. Perez-Melendez*, 855 So. 2d 624, 632 (Fla. 5th DCA 2003) ("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." (quoting *Pittman v. Volusia Cnty.*, 380 So. 2d 1192, 1193–94 (Fla. 5th DCA 1980))).

Notably, this case is 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." *Collias*, 313 So. 3d at 166 (citing *Brookie*, 213 So. 3d at 1131–32). In this case, Smith made no such admission; she did not see and walk around the unmarked speed bump twice before falling on a third pass by.

This situation is more akin to *Collias*, which held that the "open and obvious" doctrine is independent of and analytically different from a failure to maintain a safe premises theory, i.e., the claim asserted in Smith's complaint. In *Collias*, a second grader was seriously injured when she ran into a pedestal table abutting an area set aside inside a school building. The court made clear that:

> 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 . . . *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).

Collias, 313 So. 3d at 166–67 (emphases added). The highlighted language makes clear that Smith's negligent maintenance claim is actionable; she is not claiming a "duty to warn," she is asserting a duty to make safe, which is a different issue and the issue to be tried in this case.

The principle that juries—not judges at the summary judgment stage—should resolve factual disputes as to the

dangerousness of unmarked speed bumps is borne out in the caselaw. A near red cow[2] case is *Bryant v. Lucky Stores, Inc.*, 577 So. 2d 1347 (Fla. 2d DCA 1990), which involved facts similar to this case. The plaintiff, Sylvia Bryant, was leaving a grocery store and "stepped from the sidewalk onto a raised speed bump in the fire lane in front of the store. She tripped and fell, sustaining injuries to her shoulder." *Id.* at 1348. She sued the store, "asserting that the speed bump was not 'reasonably visible' to pedestrians and constituted a hazardous condition of which [the grocer] had a duty to warn." *Id.* The trial judge viewed photos of the speed bump and concluded it was an obvious condition, granting summary judgment to the grocer. *Id.*

The Second District, in an en banc opinion, reversed the summary judgment, stating:

> *The fact that the bump was open and visible is not determinative of whether or not Mrs. Bryant's negligence in failing to see the speed bump was the sole cause of her injury.* The question is whether she used due care for her own safety, taking into consideration her age and all of the circumstances surrounding the incident. *The trial judge determined from viewing the photographs that any person would have seen the speed bump. This finding fails to take into consideration all of the relevant factors as to whether or not Mrs. Bryant should have seen it.* We have

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[2] *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1390 n.2 (11th Cir. 1993) ("The term 'red cow' is used in some legal circles, particularly in Florida, to describe a case that is directly on point, a commanding precedent."); *see also* Scott D. Makar, "*Proverbially Speaking": Rotten Apples, Philadelphia Lawyers and Red Cows*, 70 Fla. B.J., 48, 50 (1996) ("A popular theory is that the phrase originated in a law course at the University of Florida in the 1940s and 1950s. The fact that some of the judges using the phrase attended the College of Law in Gainesville during this time period buttresses this theory. Some practicing attorneys also recall first hearing the phrase while law students at the University of Florida. The search for a conclusive answer, however, will continue 'until the cows come home.'" (citation omitted)).

> viewed the photographs and conclude that reasonable men can differ on these issues, requiring their resolution by the trier of fact.

Id. at 1349 (emphases added) (internal citation omitted). The highlighted portions emphasize that conflicting evidence should not be resolved by a judge in these types of cases, particularly in the context of a negligence claim based on a speed bump that was difficult to see under the circumstances and had not been painted or otherwise maintained for many years (until after the incident).

Smith does not claim a different parking lot design ought to have been used, *see Ramsey v. Home Depot U.S.A., Inc.*, 124 So. 3d 415, 418 (Fla. 1st DCA 2013) (holding that "alternate parking lot designs [are] insufficient to create a genuine issue of material fact"); instead, her claim is that the existing speed bump created a hazard due to failings in maintaining and marking it appropriately. ("[T]here was no color in my view in order for me to see a white strip or yellow strip or anything."). Because the duty to warn includes painting speed bumps with yellow paint (or the like),[3] the negligent failure to maintain the speed bump and its markings alleged in this case is one for which the conflicting evidence must go to the jury.

Other states have ruled similarly.[4] For example, in *Ex parte Kraatz*, 775 So. 2d 801, 803 (Ala. 2000), a state supreme court held

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[3] *See Bryant v. Lucky Stores, Inc.*, 577 So. 2d 1347, 1351 (Fla. 2d DCA 1990) ("A jury could reasonably decide that the relevant standard of care required of a landowner under these circumstances included a duty to warn of the speed bump by painting the bump with yellow paint, similar to the yellow paint on the nearby curb. A jury could also reasonably conclude that such yellow paint would have prevented this accident, i.e., that the absence of the paint was a proximate cause of the accident.") (Altenbernd, J., concurring in part, dissenting in part).

[4] A cottage industry of sorts involves the various contexts in which speed bumps (or the lack thereof) have spawned lawsuits. *See* John P. Ludington, *Legal Aspects of Speed Bumps*, 60 A.L.R. 4th §2(a) (2022) ("The use or nonuse of speed bumps—those

that summary judgment was precluded where a genuine factual dispute existed as to the dangerousness of an unmarked and unpainted speed bump over which an invitee had tripped in low light. As in this case, factors, such as shade, play a role in the determination. *Id.* at 804 ("The variable factors which make openness-and-obviousness under partial or poor light conditions a fact question not appropriate for resolution by summary judgment are direction, level, color, diffusion, shadows, and like qualities of light, as well as the other physical features of the scene."). Indeed, in a slightly different context, this Court reversed a summary judgment in a property dispute, holding that triable issues existed as to the extent to which speed bumps were dangerous and interfered with access to a residence. *Dianne v. Wingate*, 84 So. 3d 427, 431 (Fla. 1st DCA 2012) ("At this stage of the proceedings, the pleadings, exhibits, and depositions in the record reveal the existence of triable issues of fact regarding whether the speed bumps constitute an interference that substantially or unreasonably diminishes [the residents'] rights.").

A plaintiff who has survived summary judgment, of course, doesn't automatically win at trial. For example, the plaintiff in *Vinar v. City of Bexley*, No. 02AP-701, 19 2003 WL 1818972, at *3 (Ohio Ct. App. Apr. 8, 2003), who lost at trial, claimed on appeal that "all of the evidence supports the conclusion that the speed bump was a danger." *Id.* The appellate court disagreed, noting that among other items of evidence were "six photographs of the speed bump itself," which were "open to more than one interpretation of the danger presented by the speed bump and, thus, create a factual question for the jury." *Id.* It thereby affirmed the defense verdict, noting that it was not up to judicial decision-makers to pass upon the evidence. *Id.* at *4 ("Although we may have come to a different conclusion regarding the danger posed by the speed bump, we may not reverse a jury's verdict based upon our opinion of the evidence."). *See also Braudrick v. Wal-Mart Stores, Inc.*, 250 S.W.3d 471, 480–81 (Tex. App. 2008) (affirming defense verdict where evidence existed to support jury's determination as to

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several-inch artificial rises in trafficked areas intended to slow vehicular traffic—has engendered litigation both as to public and private roadways and parking areas.").

whether speed bump was painted or contributed to shopper's injury).

Here, the evidence is conflicting as to whether the speed bump was marked and properly maintained and whether it was visible under the shaded conditions at the time of the fall. Because the evidence is conflicting and permits different reasonable inferences, it should be submitted to the jury.

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