NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

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| LINDSEY FREDRICK,<br><br>Appellant,<br><br>v.<br><br>DOLGENCORP, LLC, d/b/a/ DOLLAR GENERAL STORE,<br><br>Appellee. | ) | Case No. 2D18-4621 |

Opinion filed May 27, 2020.

Appeal from the Circuit Court for Lee County; Alane C. Laboda, Judge.

Alexander Brockmeyer and Molly Chafe Brockmeyer of Boyle Leonard & Anderson, P.A., Fort Myers, for Appellant.

Jennifer J. Kennedy of Abbey, Adams, Byelick, & Mueller, L.L.P., St. Petersburg, for Appellee.

CASE, JAMES R., Associate Senior Judge,

In this premises liability case, Lindsey Fredrick appeals from an order granting final summary judgment in favor of Dolgencorp, LLC (Dollar General) on Fredrick's complaint alleging negligence by Dollar General that caused him to slip and fall on a patch of laundry detergent. We reject Fredrick's argument for reversal with

respect to its duty to maintain the premises in a reasonably safe condition. However, genuine issues of material fact remain as to whether Dollar General breached its duty to warn Fredrick of the danger posed by the liquid. Accordingly, we reverse the trial court's judgment in favor of Dollar General on that issue and remand for further proceedings.

The following facts are undisputed. A customer dropped a bottle of laundry detergent near the checkout counter in a Dollar General store, causing the detergent to spill on the floor. At the time of the spill, the store manager and another employee were working behind the counter. As soon as the store manager noticed the spill, he left the counter to retrieve cleaning supplies while the other employee continued to check out customers. The manager did not alert the other employee to the spill. Approximately forty-one seconds after the spill, Fredrick entered the store.[1] As he was walking past the counter, Fredrick stepped on the detergent and fell to the ground, sustaining injuries. The fall occurred fifty-one seconds after the spill. Thirty-two seconds after Fredrick's fall and eighty-three seconds after the spill, the store manager returned to the location of the spill with cleaning supplies.

Fredrick filed a negligence complaint against Dollar General, alleging that the store breached its duty of care to Fredrick by failing to maintain the property in a reasonably safe condition and failing to warn Fredrick of the unreasonably dangerous condition posed by the detergent. In response, Dollar General moved for final summary judgment. In the motion, Dollar General argued that despite its actual knowledge of the

[1]The spill and Fredrick's fall were caught on the store's surveillance cameras, providing a timeline of the events.

spill, the approximately one minute between the spill and Fredrick's fall constituted insufficient time for it to remedy the spill as a matter of law. It also argued that the store manager acted reasonably in immediately leaving the scene of the spill to retrieve cleaning supplies to remedy the dangerous condition. Accordingly, it argued that it was entitled to judgment in its favor. Notably, the motion did not address Dollar General's duty to warn Fredrick of the spill.

In response, Fredrick filed depositions of the store manager and the other employee who was working at the register at the time of the spill. The employee working behind the counter testified that she was not notified of the spill by the store manager and that she did not know about it until after Fredrick's fall. She explained that employees have access to sandwich boards that warn customers of wet floors and that one is typically located behind the counter. The store manager admitted that the other employee could have notified Fredrick of the detergent as he walked in the store if he had told her about the spill. He also admitted that he could have quickly walked over to the spill and blocked it off before leaving to retrieve cleaning supplies and that doing so would have been safer than leaving the spill unattended. He admitted that Fredrick's fall was a "preventable slip and fall."

At the hearing on the motion for summary judgment, Dollar General again focused its argument exclusively on its duty to maintain its premises in a reasonably safe condition, arguing that the store manager had insufficient time to remedy the condition. In response, Fredrick emphasized that Dollar General's argument did not sufficiently address its duty to warn him of the danger posed by the detergent. Fredrick's counsel argued that "[t]here's clearly an issue of material fact here, and that is

to [sic] Dollar General's duty to warn . . . Fredrick of a known dangerous and hazardous condition of which they had actual knowledge that day but made the decision not to warn him." At the end of the hearing, the court granted Dollar General's motion. In its final summary judgment order, the court held that Dollar General "did not have a sufficient opportunity to correct or warn of the dangerous condition." It further found that Dollar General "used ordinary care to remedy the condition." It accordingly entered judgment in favor of Dollar General.[2] Fredrick timely appealed.

We review the trial court's order granting final summary judgment de novo. Walker v. Winn-Dixie Stores, Inc., 160 So. 3d 909, 911 (Fla. 1st DCA 2014). "In ruling on a motion for summary judgment, the court must draw every possible inference in favor of the party against whom summary judgment is sought." Skipper v. Barnes Supermarket, 573 So. 2d 411, 413 (Fla. 1st DCA 1991). "Summary judgment should only be granted where there is a complete absence of any genuine issue of material fact." Houk v. Monsanto Co., 609 So. 2d 757, 760 (Fla. 1st DCA 1992).

In a negligence case, a defendant moving for summary judgment "must show that there is no negligence or that the sole proximate cause of the injury was the negligence of the plaintiff." Bryant v. Lucky Stores, Inc., 577 So. 2d 1347, 1349 (Fla. 2d DCA 1990). "To establish that there was no negligence, the movant must demonstrate that there is no duty owed to the plaintiff or that it did not breach a duty which is owed." Id. Relevant here, a business owner owes two duties to a business invitee:

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[2]Fredrick also filed a motion for reconsideration of the trial court's ruling, arguing once again that the court's ruling overlooked Dollar General's duty to warn Fredrick of the danger posed by the laundry detergent, but the trial court denied the motion.

> (1) he must use reasonable care to maintain the premises in a reasonably safe condition; and (2) he must give the invitee warning of concealed perils which are or should have been known to him, and which are unknown to the invitee and could not be discovered by the invitee even if he exercised due care.

Williams v. Madden, 588 So. 2d 41, 43 (Fla. 1st DCA 1991).

We begin with Dollar General's duty to maintain the premises. We agree with the trial court's conclusion that Dollar General did not breach its duty to maintain its premises in a reasonably safe condition because it did not have sufficient time to do so in the fifty-one seconds between the spill and Fredrick's fall. See Dominguez v. Publix Super Mkts., Inc., 187 So. 3d 892, 893-94 (Fla. 3d DCA 2016) (concluding that grocery store did not breach its duty to maintain its premises in a reasonably safe condition where only thirteen seconds passed between the spill of laundry detergent on the ground and the customer's fall); Gaidymowicz v. Winn-Dixie Stores, Inc., 371 So. 2d 212, 214 (Fla. 3d DCA 1979) ("We conclude that with only one minute actual notice, Winn-Dixie did not have a sufficient opportunity to correct the dangerous condition."). We thus affirm the trial court's grant of final summary judgment on Dollar General's duty to maintain.

As for Dollar General's duty to warn, however, the deposition testimony of the store manager and other employee filed by Fredrick in response to Dollar General's summary judgment motion contradicts the trial court's finding that Dollar General "did not have sufficient opportunity to . . . warn of the dangerous condition" and creates a disputed issue of material fact. See Combs v. Aetna Ins. Co., 410 So. 2d 1377, 1378 (Fla. 4th DCA 1982) (concluding that grant of final summary judgment was inappropriate in slip and fall case because the record revealed genuine issues of material fact

surrounding the alleged duty to warn); see also Perez-Brito v. Williams-Sonoma Stores, Inc., 735 Fed. App'x. 668, 671-72 (11th Cir. 2018) (applying Florida law and reversing trial court's order granting final summary judgment in a premises liability case where the evidence showed in part that employees working at the store where the plaintiff slipped and fell could have warned plaintiff of the spill). Indeed, the store manager testified that he should have told the other employee about the spill, that she could have warned Fredrick as he walked in the store, that he could have quickly blocked off the spill, and that Fredrick's fall was preventable. See Perez-Brito, 735 Fed. App'x. at 671-72 (identifying the evidence that precluded a grant of final summary judgment in favor of Williams-Sonoma, including evidence that an employee of the store was near the spill when it occurred but did not move near the spill to warn other customers and evidence that the associate store manager could have remained at the spill and radioed other employees to bring cleaning supplies instead of leaving the spill unattended). Accordingly, we reverse the trial court's grant of summary judgment in favor of Dollar General on the issue of its duty to warn Fredrick. See Combs, 410 So. 2d at 1378.

In so ruling, we leave undecided the issue of whether the patch of laundry detergent constituted an open and obvious condition. See Dominguez, 187 So. 3d at 894 (describing a patch of laundry detergent on the floor of a grocery store as an open and obvious condition). Dollar General did not raise this issue below or on appeal, and we will not decide it for the first time on appeal. See Sousa v. Zuni Transp., Inc., 286 So. 3d 820, 822 (Fla. 3d DCA 2019) ("Even if the record on appeal were to support an affirmance on these alternative grounds—an issue about which we express no opinion—it is well-settled that '[t]he [t]ipsy [c]oachman doctrine does not apply to

grounds not raised in a motion for summary judgment.' " (alterations in original) (quoting Mitchell v. Higgs, 61 So. 3d 1152, 1155 n.3 (Fla. 3d DCA 2011))). If Dollar General chooses to raise the issue on remand, Fredrick should have the opportunity to put forward evidence to dispute the issue of fact. See, e.g., Levy v. Home Depot, Inc., 518 So. 2d 941, 942 (Fla. 3d DCA 1987) (explaining that Home Depot alleged that condition was open and obvious in motion for summary judgment in premises liability case and the plaintiff, in opposition, proffered his own affidavit explaining why he did not notice the condition).

In summary, the trial court did not err in finding that Dollar General did not breach its duty to maintain the premises in a reasonably safe condition. We reverse its finding that Dollar General did not breach its duty to warn Fredrick of the dangerous condition and remand for further proceedings on the issue.

Reversed and remanded for further proceedings.

SILBERMAN and SALARIO, JJ., Concur.