DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

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JACK CONRAD,

Appellant,

v.

THE BOAT HOUSE OF CAPE CORAL, LLC,
and KEVIN CODE,

Appellees.

No. 2D20-227

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December 17, 2021

Appeal from the Circuit Court for Lee County; Joseph C. Fuller, Judge.

Nicholas A. Shannin and Carol B. Shannin of Shannin Law Firm, Orlando; and Brian M. Davis of The Trial Professionals, Naples, for Appellant.

Kaylin S. Grey, Raul Chacon, Jr., and Jonathan Hernandez of Manning Gross + Massenburg, LLP, Miami, for Appellees.

SILBERMAN, Judge.

In this negligence action resulting from a slip and fall, Plaintiff Jack Conrad appeals a final summary judgment as to liability in favor of The Boat House of Cape Coral, LLC, and Kevin Code, its manager (collectively, the Boat House). Conrad contends that the trial court erred in determining that the Boat House had no duty to warn or to maintain and repair regarding the condition of its seawall which had a chunk of concrete missing at its edge (the divot). Because genuine issues of material fact remain, we reverse and remand for further proceedings. In doing so, we reject the Boat House's alternative arguments for affirmance without discussion.

In April 2018, Conrad filed his negligence complaint that alleged breaches of duty for the Boat House's failure to maintain its premises in a reasonably safe condition and to warn him, a business invitee, of dangerous conditions. The Boat House sought summary judgment as to liability. The Boat House asserted that Conrad's negligence was the sole cause of the accident, that the Boat House had no duty to warn Conrad because the cracked seawall was open and obvious, and that Conrad's knowledge of the condition was equal to or greater than that of the Boat House.

Conrad's deposition reflects that he was an experienced boater and that he had his pontoon boat serviced at the Boat House. When he returned to the Boat House after the service was complete, he went to the dock to board his boat. The ropes were pulled taut due to low tide, and the boat deck was about four feet below the seawall. He saw yellow paint along the edge of the seawall but contended that he did not see the divot because the edge of the seawall was painted all one color which "camouflaged" the divot.

Conrad was asked if he stepped on the "missing cement section of the sea wall," and he said yes. Conrad described that he was going to step over the railing of his boat down onto the livewell because the livewell was about two feet higher than the boat deck. He put his hand on a post, stepped up onto the seawall with his left foot, and then went to step his right foot down onto the boat. As he leaned forward, his left "foot went out from underneath [him]" and he fell, causing injury.

At the time he fell, he did not know what caused him to fall. After he fell, he saw the divot. He admitted that if he would have looked, he could have seen the divot. He was focusing more on his boat and where he was going to put his other foot as he was going

to step onto the boat. He had used that dock about six times previously, but not at the specific location of the divot. He did not know why the Boat House docked his boat there.

An employee of the Boat House testified in his deposition that the length of the seawall is about 120 feet. Photographs show that along the length of the seawall the edge is painted with yellow paint. The purpose of the yellow paint is so that people will know where "the seawall ends and the water begins."

A former employee of the Boat House, Gary Cullen, gave deposition testimony that there had been chipped concrete, or divots, on that seawall "[f]orever" and that the divot in question was about a foot wide. He had seen customers stumble or trip—but not fall—on divots on the seawall but not on that particular divot. Prior to Conrad's fall, Cullen had warned the business owner of safety issues and told him that the divots needed to be fixed because "somebody is going to bust their ass."

After a hearing on October 28, 2019, the trial court issued its order granting the motion for summary judgment. The trial court determined that the divot was "clearly visible and was, or should have been obvious to the Plaintiff, as it was neither latent nor

concealed, but was patent and obvious to ordinary observation and use of senses." The trial court recognized the existence of "the duty to warn and the duty to maintain premises in a reasonably safe condition" but noted that "the open and obvious nature of a condition may preclude a finding of a breach of either duty as a matter of law," quoting *Brookie v. Winn Dixie Stores, Inc.*, 213 So. 3d 1129, 1133 (Fla. 1st DCA 2017). The trial court granted the motion for summary judgment and subsequently entered a final judgment in favor of the Boat House.

On appeal, Conrad argues that the Boat House knew of a dangerous defect, failed to warn Conrad of that dangerous defect, and failed to maintain or repair that dangerous defect. Appellate review of a summary judgment is by the de novo standard. *Greene v. Twistee Treat USA, LLC*, 302 So. 3d 481, 482 (Fla. 2d DCA 2020) (citing *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000)). To be entitled to summary judgment, the movant must show that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Pratus v. Marzucco's Constr. & Coatings, Inc.*, 310 So. 3d 146, 148-49 (Fla. 2d DCA 2021). We must draw all reasonable inferences in favor of the

nonmovant, and if the record shows a possibility that a genuine issue of material fact exists, summary judgment is not permitted. *Id.* at 149. "A party seeking summary judgment in a negligence action has a more onerous burden than that borne in other types of cases." *Id.* (quoting *Watts v. Goetz*, 311 So. 3d 253, 258 (Fla. 2d DCA 2020)).

> An owner owes two duties to a business invitee:
>
> (1) the duty to use reasonable care in maintaining the property in a reasonably safe condition; and (2) the duty to warn of dangers of which the owner has or should have knowledge and which are unknown to the invitee and cannot be discovered by the invitee through the exercise of reasonable care.

*Pratus*, 310 So. 3d at 149 (quoting *Tallent v. Pilot Travel Ctrs., LLC*, 137 So. 3d 616, 617 (Fla. 2d DCA 2014)). These two duties are distinct. *Wolford v. Ostenbridge*, 861 So. 2d 455, 456 (Fla. 2d DCA 2003).

With respect to knowledge, the Boat House asserts that Conrad's knowledge of the divot was equal to or greater than that of the Boat House because he used the dock without incident at least six previous times. However, this ignores Conrad's testimony that

he had never used the dock in the specific place where the divot was located.

The trial court determined that the divot at the edge of the seawall "was patent and obvious to ordinary observation," and that conclusion is confirmed by the record photographs. Usually, a business owner has "no obligation to protect the invitee against dangers which are known to him, or which are so obvious and apparent that he may reasonably be expected to discover them." *Greene*, 302 So. 3d at 483 (quoting *Ashcroft v. Calder Race Course, Inc.*, 492 So. 2d 1309, 1311 (Fla. 1986)).

However, the result is different when the harm is foreseeable to the owner:

> The obvious danger doctrine provides that an owner or possessor of land is not liable for injuries to an invitee caused by a dangerous condition on the premises when the danger is known or obvious to the injured party, *unless the owner or possessor should anticipate the harm despite the fact that the dangerous condition is open and obvious.*

*Pratus*, 310 So. 3d at 149 (emphasis added) (quoting *De Cruz-Haymer v. Festival Food Mkt., Inc.*, 117 So. 3d 885, 888 (Fla. 4th DCA 2013)); *see also Greene*, 302 So. 3d at 484. In fact, in granting summary judgment the trial court cited two cases, *Sokoloff v.*

*Oceania I Condominium Ass'n*, 201 So. 3d 664 (Fla. 3d DCA 2016), and *Spatz v. Embassy Home Care, Inc.*, 9 So. 3d 697 (Fla. 4th DCA 2009), which recognize that the owner is not liable under the obvious danger doctrine "unless the owner or possessor should anticipate the harm despite the fact that the dangerous condition is open and obvious." *Sokoloff*, 201 So. 3d at 664-65 (quoting *Spatz*, 9 So. 3d 697, 699 (Fla. 4th DCA 2009)).

Furthermore, the issue "is not whether the object is obvious, but *whether the dangerous condition of the object is obvious.*" *Pratus*, 310 So. 3d at 149 (quoting *De Cruz-Haymer*, 117 So. 3d at 888). The court must consider all the existing "circumstances surrounding the accident and the alleged dangerous condition." *Id.* (quoting *De Cruz-Haymer*, 117 So. 3d at 888). In *Pratus*, an employee of a subcontractor stepped into an uncovered drain on a construction site and was injured. *Id.* at 148. Although the drain was obvious, this court determined that genuine issues of material fact existed regarding whether "the uncovered drain presented an open and obvious danger." *Id.* at 150.

In *Brookie*, 213 So. 3d at 1133, which the trial court relied upon, the appellate court determined that under the circumstances

an empty pallet near the exit of a grocery store was "open and obvious and not inherently dangerous." The court stated that the plaintiff "was the sole proximate cause of his injuries" when he had observed the pallet on the first two occasions he walked by it, but on the third he "walk[ed] right into the pallet." *Id.* at 1134. The court contrasted the case of *Burton v. MDC PGA Plaza Corp.*, 78 So. 3d 732 (Fla. 4th DCA 2012), which dealt with a pothole which "is not a natural condition" and "forms when a landowner fails to maintain the property." *Brookie*, 213 So. 3d at 1136 (quoting *Burton*, 78 So. 3d at 735).

Here, the divot in the seawall is similar to a pothole because it reflects a defective condition from failure to maintain the property. Based on the photographs in the record, the divot in the seawall was open and obvious. But it is a fact question for the jury as to whether the divot was an obviously dangerous condition. As to the failure to warn, summary judgment was inappropriate because there was a genuine issue of material fact as to whether it was obvious that the divot was a dangerous condition.

In addition, even if the divot was an open and obvious danger, "a landowner or possessor can still be held liable for failing 'to

exercise reasonable care to prevent foreseeable injury' to invitees." *Cook v. Bay Area Renaissance Festival of Largo, Inc.*, 164 So. 3d 120, 123 (Fla. 2d DCA 2015) (quoting *Ashcroft*, 492 So. 2d at 1312). "While the open and obvious nature of a hazard may discharge a landowner's duty to warn, it does not discharge the landowner's duty to maintain the property in a reasonably safe condition." *Fitzherbert v. Inland U.S. Mgmt.*, 90 So. 3d 338, 340 (Fla. 2d DCA 2012) (quoting *Hogan v. Chupka*, 579 So. 2d 395, 396 (Fla. 3d DCA 1991)). Despite a hazard being open and obvious, the Boat House's duty to maintain its property requires it to repair those "conditions that [it] foresee[s] will cause harm." *Middleton v. Don Asher & Assocs.*, 262 So. 3d 870, 872 (Fla. 5th DCA 2019).

This foreseeability issue is usually a factual question for the jury:

> 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.

*Collias ex rel. Collias v. Gateway Acad. of Walton Cnty., Inc.*, 313 So. 3d 163, 167 (Fla. 1st DCA 2021) (quoting *Aaron v. Palatka Mall,*

*L.L.C.*, 908 So. 2d 574, 578 (Fla. 5th DCA 2005)); *see also Cook*, 164 So. 3d at 123 (stating that whether an exposed pipe on a walkway "was a 'dangerous condition' in the context of foreseeability" was a jury question); *Middleton*, 262 So. 3d at 873 ("[A] factual issue remained as to whether Appellees should have anticipated that, notwithstanding that the condition was obvious, condominium residents would use the sidewalk and proceed to encounter the cracked and uneven concrete, and could be harmed thereby." (citing *Lotto v. Point E. Two Condo. Corp.*, 702 So. 2d 1361, 1362 (Fla. 3d DCA 1997))).

The Boat House failed to establish that there was no genuine issue of material fact as to whether it should have foreseen that injury could occur as a result of the divot on the edge of the seawall. Cullen testified that he had warned the owner of the Boat House that the divots needed to be fixed because "somebody is going to bust their ass." The Boat House asserts that Cullen is a disgruntled former employee, implying that he is not credible. However, witness credibility is not considered on summary judgment. *See Bernhardt v. Halikoytakis*, 95 So. 3d 1006, 1008-09 (Fla. 2d DCA 2012) ("It is improper to consider either the weight of

the conflicting evidence or the credibility of witnesses in determining whether a genuine issue of material fact exists.").

Viewing all reasonable inferences in favor of Conrad, whether the Boat House should have foreseen that the divot would cause injury despite it being open and obvious is a jury question. *See Cook*, 164 So. 3d at 123. Therefore, genuine issues of material fact remain regarding whether the Boat House breached its duty to maintain its premises in a reasonably safe condition, and summary judgment was improper.

Because genuine issues of material fact exist regarding the duty to warn and the duty to maintain the premises, we reverse the order granting the Boat House's motion for summary judgment and the ensuing final judgment and remand for further proceedings.

VILLANTI and STARGEL, JJ., Concur.

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Opinion subject to revision prior to official publication.