

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM
BEACH, FL 33401**

JEAN WILLIAMS,
Appellant

CASE No.- 4D2023-2499
L.T. No.- 502022CA007802

v.

TARGET CORPORATION,
Appellee.

APPELLANT JEAN WILLIAMS' REPLY BRIEF

On Appeal From the Circuit Court Of the Fifteenth Judicial Circuit,
In And For Palm Beach County, Florida

Dan W. Moses, Esq.
Florida Bar No.: 765650
Benjamin L. Moses, Esq.
Florida Bar No.: 1002360
The Moses Legal Team, P.A.
Attorneys for Appellant JEAN WILLIAMS
900 North Federal Highway
Suite 160
Boca Raton, Florida 33432
561-368-0663 Telephone
561-338-4042 Facsimile
dan@themoseslegalteam.com
ben@themoseslegalteam.com

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF CITATIONS.....	iii
ARGUMENT IN RESPONSE TO APPELLEE TARGET CORPORATION'S ANSWER BRIEF.....	1
I. TARGET CORPORATION FAILS TO ADEQUATELY SUPPORT ITS CONTENTION THAT IT MAINTAINED ITS PREMISES IN A REASONABLY SAFE CONDITION.....	1
A. The Opinions Presented by TARGET CORPORATION's Expert Witness Fail to Address the Specific Dangerous Condition/Negligence Alleged by WILLIAMS.....	1
B. TARGET CORPORATION's Evaluation of the Case Law Contained in WILLIAMS' Initial Brief Fails to Make an Argument Relevant to WILLIAMS' Allegations That TARGET CORPORATION Failed to Maintain Its Premises in a Reasonably Safe Condition.....	2
1. <i>De Cruz-Haymer Offers Precedent That an Open and Obvious Condition Can Constitute a Dangerous Condition for Which Liability May Be Found.....</i>	<i>2</i>
2. <i>There Is No Precedent Or Legal Authority Presented by TARGET CORPORATION Which Supports Its Argument That WILLIAMS Had a Duty to Avoid Anything Other Than the Curb Stop Itself.....</i>	<i>3</i>
II. TARGET CORPORATION FAILS TO SHOW THAT THE DANGEROUS CONDITION ALLEGED BY WILLIAMS WAS 'OPEN AND OBVIOUS' OR 'NOT A DANGEROUS CONDITION' AS A MATTER OF LAW.....	4
A. Case Law Cited by TARGET CORPORATION Indicates That an Ordinary Curb Stop Under Ordinary	

Circumstances is an ‘Open and Obvious’ Condition as a Matter of Law, But Does Not Provide Guidance as to WILLIAMS’ Specific Allegations.....4

CONCLUSION.....10

CERTIFICATION OF SERVICE.....13

CERTIFICATION OF COMPLIANCE.....14

TABLE OF CITATIONS

Cases

<i>Aaron v. Palatka Mall, LLC</i> , 908 So. 2d 574 (Fla. 5th DCA 2005).....	7-8
<i>Circle K Convenience Stores, Inc. v. Ferguson</i> , 556 So. 2d 1207 (Fla. 5th DCA 1990).....	11
<i>De Cruz-Haymer v. Festival Food Market, Inc.</i> , 117 So. 3d 885 (Fla. 4th DCA 2013).....	2-3, 6
<i>Porfilio v. United States</i> , No. 16-21763, 2017 WL 7796061 (S.D. Fla. Oct. 20, 2017).....	11

**ARGUMENT IN RESPONSE TO APPELLEE TARGET CORPORATION'S
ANSWER BRIEF**

- I. TARGET CORPORATION FAILS TO ADEQUATELY SUPPORT ITS CONTENTION THAT IT MAINTAINED ITS PREMISES IN A REASONABLY SAFE CONDITION**
- A. The Opinions Presented by TARGET CORPORATION's Expert Witness Fail to Address the Specific Dangerous Condition/Negligence Alleged by WILLIAMS**

TARGET CORPORATION writes in its Answer Brief that "WILLIAMS failed to present expert testimony to support her assertion that the curb stop suffered from design defects that caused her damages. Based thereon, the opinion provided by TARGET's Expert's that the curb stop is code compliant is undisputed." TARGET CORPORATION's Answer Brief at 18. This is misguided as TARGET CORPORATION's expert, Derrek-Ian Verlaan, provided no opinion as to the compliance of the curb stop itself, nor did he provide any opinion as to the condition of the curb stop itself whatsoever beyond that it was blue; TARGET CORPORATION's expert, Verlaan, did not ever examine the subject curb stop; TARGET CORPORATION's expert, Verlaan, never opined upon the design or condition of the curb stop. See ROA. 379-380. Notwithstanding, TARGET CORPORATION puts forth his opinion (memorialized in his expert affidavit (ROA. 379-380)) as its only evidence to overcome WILLIAMS' testimony and allegations that the subject curb stop was in a state of disrepair and was not maintained in a reasonably

safe condition. Moreover, there is no legal requirement articulated by TARGET CORPORATION requiring WILLIAMS to put forth an expert opinion in order to adequately allege the existence of a concealed dangerous condition.

Just as TARGET CORPORATION writes on Page 13 of its Answer Brief, “[m]ere conclusions and unsupported factual allegations are legally insufficient to defeat a summary judgment motion” – TARGET CORPORATION must be held to this same standard in terms of supporting its own motion for summary judgment.

B. TARGET CORPORATION’s Evaluation of the Case Law Contained in WILLIAMS’ Initial Brief Fails to Make an Argument Relevant to WILLIAMS’ Allegations That TARGET CORPORATION Failed to Maintain Its Premises in a Reasonably Safe Condition

1. *De Cruz-Haymer Offers Precedent That an Open and Obvious Condition Can Constitute a Dangerous Condition For Which Liability May Be Found*

In WILLIAMS’ Initial Brief, comparisons are made with the *De Cruz-Haymer* case – in that case, a store patron tripped over a rumpled floor mat and suffered injuries. *De Cruz-Haymer v. Festival Food Market, Inc.*, 117 So. 3d 885 (Fla. 4th DCA 2013). The court found that, despite the fact that a floor mat is an open and obvious condition, one might reasonably expect that somebody will trip over a rumpled store mat. *Id* at 889. The comparison

made by WILLIAMS was to show that there exists precedent/case law which acknowledges that a landowner can still be found liable for injuries caused by a condition acknowledged to be open and obvious. TARGET CORPORATION writes that “[c]learly, a curb stop is not the equivalent of a rumpled and moveable floor mat placed at the only public entrance to a defendant’s store. On this Record there is no evidence that WILLIAMS was obliged to step over the blue curb stop because it was the sole ‘public entrance’ to the store. Based upon the foregoing it was not foreseeable that WILLIAMS would fail to perceive the necessity to avoid the open and obvious blue curb stop.” TARGET CORPORATION’s Answer Brief at 20.

2. *There Is No Precedent Or Legal Authority Presented by TARGET CORPORATION Which Supports Its Argument That WILLIAMS Had a Duty to Avoid Anything Other Than the Curb Stop Itself*

TARGET CORPORATION writes as though WILLIAMS had an affirmative duty to avoid the subject blue curb stop in an unspecified capacity, despite no such duty being articulated in the case law. This is further notwithstanding the fact that by all accounts, WILLIAMS did in fact avoid the subject blue curb stop. See WILLIAMS’ Answers to Interrogatories (ROA. 295) and Deposition Testimony (ROA. 180). It is implicit in TARGET CORPORATION’s argument that WILLIAMS should have avoided not only the curb stop altogether or in its entirety, but a zone even greater than the

'open and obvious' danger itself (an area including a piece of rebar protruding upwards from a curb stop); however, there is no legal authority or support for this position presented. Furthermore, there is no legal authority or support for this position in light of WILLIAMS' allegations that the piece of rebar protruding upwards actually constituted a concealed and separate dangerous condition on its own. There is no evidence in the record that contradicts this critical allegation put forth by WILLIAMS.

By all accounts, but for the presence of a concealed piece of rebar protruding upwards from the subject curb stop, WILLIAMS never would have fallen nor suffered injuries. TARGET CORPORATION cannot absolve itself of the duties it owes WILLIAMS and all business invitees by simply writing that "it was not foreseeable that WILLIAMS would fail to perceive the necessity to avoid the open and obvious blue curb stop," especially when (by all accounts) WILLIAMS did in fact avoid the open and obvious blue curb stop. TARGET CORPORATION Answer Brief at 20.

II. TARGET CORPORATION FAILS TO SHOW THAT THE DANGEROUS CONDITION ALLEGED BY WILLIAMS WAS 'OPEN AND OBVIOUS' OR 'NOT A DANGEROUS CONDITION' AS A MATTER OF LAW

A. Case Law Cited by TARGET CORPORATION Indicates That an Ordinary Curb Stop Under Ordinary Circumstances Is an 'Open and Obvious' Condition as a Matter Of Law, But Does Not Provide Guidance as To WILLIAMS' Specific Allegations

TARGET CORPORATION's Motion for Summary Judgment was granted based on the Lower Tribunal's findings that the curb stop was open and obvious as a matter of law; the Motion for Summary Judgment and the Order granting same make no mention of the protruding piece of rebar or whether the protruding piece of rebar itself constitutes a condition separate and apart from the subject curb stop. ROA. 831-832. WILLIAMS has maintained that she did not in fact trip over the curb stop, but that that she tripped over a piece of rebar protruding upwards from the curb stop (which was further concealed by way of its being painted the same color as the curb stop from which it protruded); WILLIAMS has further alleged that this constituted a dangerous condition separate and apart from the curb stop itself. TARGET CORPORATION's expert has put forth no opinion on the matter. The only commentary on the matter that we have is TARGET CORPORATION's unsupported assertion in its Answer Brief (at 18) that "the blue rebar is an integral part of the curb stop which itself is open and obvious" – whether this assertion is supported or not is immaterial, as there has been no authority put forth which would tend to indicate that such a condition, as alleged by WILLIAMS HEREIN, is 'open and obvious' or 'not a dangerous condition' as a matter of law.

Pertinently, the *De Cruz-Haymer* case presents a scenario whereby a danger which ordinarily is an open and obvious danger can have affixed to it a dangerous condition for which liability may be found. See generally *id.* TARGET CORPORATION makes the unsupported assertion that the blue rebar is an integral part of the curb stop which therefore mandates summary judgment; in *De Cruz-Haymer*, the dangerous condition alleged by the plaintiff is not an 'integral part' of the open and obvious condition – it is in fact the open and obvious condition itself; just as WILLIAMS herein, the plaintiff in *De Cruz-Haymer* alleged that an open and obvious condition (the floor mat) was both concealed and made to be more dangerous than it would ordinarily, commonly, and expectedly be. The court in *De Cruz-Haymer* agreed with the proposition that a defendant cannot hide behind the 'open and obvious' doctrine because a plaintiff's allegations involve an item which courts have found, under ordinary circumstances, to be open and obvious. When a plaintiff alleges that a defendant failed to maintain its premises in a reasonably safe condition by way of a peculiarity/supplemental condition (either a rumple in a floor mat or piece of rebar protruding from a curb stop) in that which might otherwise be found to be open and obvious by law, a question of fact arises as to whether the alleged condition is entitled to the same level of protection of that which is protected by precedent. TARGET

CORPORATION's expert, Verlaan, failed to provide any opinion on the condition of the subject curb stop or the subject protruding rebar, or the 'integral' nature of the blue rebar as it pertains to the subject curb stop; he also provided no opinion on 'open and obvious' nature of the dangerous condition alleged by WILLIAMS. ROA. 379-380. Further, and more importantly, TARGET CORPORATION (as well as the Lower Tribunal in granting TARGET CORPORATION's Motion for Summary Judgment) has put forth no support or legal authority/precedent for its assertion that the dangerous condition alleged by WILLIAMS (the piece of rebar, painted blue, protruding from the blue curb stop) was open and obvious as a matter of law. ROA. 831-832.

In its opinion in *Aaron v. Palatka Mall, LLC*, the Fifth District Court of Appeal wrote, "[w]hen 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." 908 So. 2d 574, 578 (Fla. 5th DCA 2005). In the same opinion, the Fifth District Court of Appeal further wrote, on the 'open and obvious' doctrine, "[w]e must apply the doctrine according to its intended purpose,

which is to ensure, in certain instances, that injured parties are held accountable for their inattention to the obvious dangers that confront them. It is inappropriate for us to say that the accident in the instant case is one of those instances because, based on the evidence in the record before us, material issues of fact exist whether the bumper was a dangerous condition that was open and obvious.” *Id* at 579.

In the instant case, WILLIAMS has alleged that TARGET CORPORATION breached its duty to maintain its premises in a reasonably safe condition by way of allowing iron rebar to protrude from a curb stop, being further concealed by way of its being painted the same color as the said curb stop. Pursuant to *Aaron v. Palatka Mall*, this generally raises an issue of fact 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.” *Id* at 578. TARGET CORPORATION responded that the condition alleged by WILLIAMS was ‘open and obvious’ and put forth its expert opinion (Verlaan’s affidavit) and case law which tends to indicate that, under ordinary circumstances, there is no negligence on the part of a landowner by way of maintaining ordinary parking bumpers. In the instant case, WILLIAMS has alleged that the dangerous condition was not an ordinary curb stop, but

protruding iron rebar which was further concealed by way of its paint. TARGET CORPORATION puts forth no guidance on the matter of whether the specific dangerous condition alleged by WILLIAMS is indeed open or obvious as a matter of law. TARGET CORPORATION's expert opinions provide no guidance on the matter. Case law put forth by TARGET CORPORATION provides no guidance on the matter. The allegations put forth by WILLIAMS plainly assert the existence of genuine issues of material fact as to whether the dangerous condition complained of was a dangerous condition that was open and obvious.

CONCLUSION

TARGET CORPORATION has failed to demonstrate that it maintained its premises in a reasonably safe condition as a matter of law, and it has failed to demonstrate the dangerous condition alleged by WILLIAMS was both 'open and obvious' and 'open and obvious' as a matter of law.

WILLIAMS has alleged that TARGET CORPORATION breached its duty to maintain its premises in a reasonably safe condition; neither TARGET CORPORATION's expert testimony nor cited case law tend to indicate that it is entitled to judgment as a matter of law on WILLIAMS' claim, especially as neither the expert testimony nor the cited case law addresses iron rebar protruding from a curb stop, further concealed by way of its paint. TARGET CORPORATION is not entitled to judgment as a matter of law that their premises were indeed maintained in a reasonably safe condition.

TARGET CORPORATION has alleged that the dangerous condition alleged by WILLIAMS was 'open and obvious' as a matter of law, and that TARGET CORPORATION is therefore entitled to summary judgment; however, neither the expert testimony nor the cited case law addresses in any capacity iron rebar protruding from a curb stop, being further concealed by way of its paint. Case law cited by TARGET CORPORATION tends to indicate that, under ordinary circumstances, the maintaining of ordinary

parking bumpers is, as a matter of law, not negligent. This stems from the traditional 'open and obvious' doctrine, that when a condition is "so open and obvious, so common and so ordinarily innocuous,' the condition does not constitute a 'hidden dangerous condition as a matter of law.' *Porfilio v. United States*, No. 16-21763, 2017 WL 7796061, at *2 (S.D. Fla. Oct. 20, 2017) (citing *Circle K Convenience Stores, Inc. v. Ferguson*, 556 So. 2d 1207, 1208 (Fla. 5th DCA 1990))." TARGET CORPORATION's Answer Brief at 16.

As it pertains to the specific allegations of WILLIAMS, the record is devoid of any evidence or case law which would tend to indicate whether the dangerous condition alleged by WILLIAMS (a piece of iron rebar protruding from a curb stop, further concealed by way of its being painted the same color as the curb stop itself) was common, ordinary, or obvious. Without any record evidence or case law on point, TARGET CORPORATION is not entitled to summary judgment that it maintained its premises in a reasonably safe condition as a matter of law, nor that the dangerous condition alleged by WILLIAMS was 'open and obvious' and did not constitute a dangerous condition as a matter of law. The Lower Tribunal made specific findings of fact following its examination of photographs which depicted the protruding iron rebar; these determinations of fact are specifically within the function of

a trial jury. Summary judgment in favor of TARGET CORPORATION should be reversed, and this matter should be remanded for a trial by jury.

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail to: **Jon D. Derrevere, Esq.**,
DERREVERE, STEVENS, BLACK & COZAD, 2005 Vista Parkway, Suite
210, West Palm Beach, Florida 33411 at email address
eservice@derreverelaw.com on this **5th** day of **March**, 2024.

THE MOSES LEGAL TEAM, P.A.
Attorneys for Appellant
900 North Federal Highway
Suite 160
Boca Raton, Florida 33432
561-368-0663 Telephone
561-338-4042 Facsimile
dan@themoseslegalteam.com

BY: /s/ Dan W. Moses
DAN W. MOSES, ESQUIRE
Florida Bar No.: 765650

CERTIFICATION OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document complies with the applicable font (14-point Arial) and word count limit (4,000 words) requirements.

THE MOSES LEGAL TEAM, P.A.
Attorneys for Appellant
900 North Federal Highway
Suite 160
Boca Raton, Florida 33432
561-368-0663 Telephone
561-338-4042 Facsimile
dan@themoseslegalteam.com

BY: /s/ Dan W. Moses
DAN W. MOSES, ESQUIRE
Florida Bar No.: 765650