IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

JOAN MORRIS,

Appellant,

v.

FIFTY-FIFTY, INC. d/b/a AIRPORT FARMERS & FLEA MARKET

Appellee.

Case No. 5D23-3621

L.T. Case No. 2022-CA-1177

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT IN AND FOR HERNANDO COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

This is a premises-liability case. Plaintiff, Joan Morris, fell while walking at an outdoor flea market owned by Defendant, Fifty-Fifty, Inc. (d/b/a Airport Farmers & Flea Market). Ms. Morris's foot had caught on the raised edge of a paved walkway. The walkway's edge, according to witness testimony, was difficult to see and several inches higher than the surrounding walking surfaces. Ms. Morris sued Defendant for negligence, alleging that Defendant had failed to keep its property reasonably safe, and that Defendant had also failed to warn about a dangerous condition. The trial court granted summary judgment in Defendant's favor on both theories of liability. Ms. Morris challenges that ruling on appeal. As she argued below, a jury—not a court—must decide whether Defendant was negligent.

Ms. Morris and her friend visit the flea market.

Ms. Morris's accident occurred at the Airport Farmers & Flea Market, which is owned and operated by Defendant. R.43-44, 93, 115, 117. It was a sunny day in March of 2022, and Ms. Morris and her friend, Carolyn Condreay, had gone to the flea market to spend the day. R.43-44, 50, 93. Ms. Morris "loves flea markets," and had been going to Defendant's market at least once a month for a couple

of years. R.45, 94. This was Ms. Condreay's second time visiting the market with Ms. Morris. R.94.

The flea market is outdoors and sits on a lot (or "yard") with sandy ground. R.46, 95, 201. An asphalt walkway runs from the parking lot into the market and past some of its booths. R.46-47, 95, 102. As Ms. Morris and Ms. Condreay went "all over the flea market," they sometimes walked on the paved walkway and other times walked on the sand, depending on which booth they wanted to see. R.102.

Ms. Morris trips against the edge of the walkway where the adjacent ground had eroded away.

After spending a few hours at the market, Ms. Morris and Ms. Condreay were walking on unpaved ground toward the parking lot, intending to stop at a vegetable stand on their way out. R.46, 93-94. As they approached the paved walkway, Ms. Morris "hit something" and fell, striking her forehead, nose, and knee on the pavement. R.44, 95. She had tripped against the edge of the walkway, in a spot where the sand had eroded three to four inches lower than the pavement. R.95, 104.

Ms. Condreay testified that this three- to four-inch depression was deeper than all the other transitions from sand to pavement (or vice versa) that they had crossed throughout the flea market:

> Q. And you saw that there was a road before you, a walkway— the paved walkway before you; correct?
>
> A. Yes. We were on both. We walked both, you know, pavement and sand, depending on what booth we would go see.
>
> Q. So you're aware that—so you were aware that generally there would be changes in the elevation while walking throughout the flea market; correct?
>
> A. A little, *but not that much, no*.
>
> Q. Did you transition from blacktop surface to sand surface during that day at the flea market?
>
> A. Yes, yes.
>
> Q. Did you have any issues doing that at any other locations?
>
> A. No.

R.102 (emphasis added).

There is no evidence Ms. Morris saw the depression before she tripped and fell. She was looking forward as she walked across the yard, and she did not look down at the ground "to determine [if] it was safe to walk on." R.45. She admitted that she would have been able to see the walkway if she were looking for it. R.78.

Ms. Condreay was walking directly behind Ms. Morris, and she unequivocally testified that she did *not* see the "raised blacktop area" before Ms. Morris fell. R.95-96, 103. Immediately after the fall, Ms. Condreay looked down and saw the four-inch drop. R.103-04. She agreed that, once she looked down to see what Ms. Morris had tripped over, the "change in elevation" was "obvious." R.104-05.

Ms. Morris was gushing blood, and Ms. Condreay screamed for help. R.96-97. Some EMTs from a nearby booth ran over and helped stop the bleeding, then Ms. Condreay drove Ms. Morris to a hospital. R.97.

Ms. Condreay returns and photographs the tripping hazard.

Later that day, Ms. Condreay returned to the flea market and took photographs of the location where Ms. Morris had tripped and fallen. R.108-09. The photographs are in the record. R.32-35. It is difficult to make out exactly where the sand ends and the asphalt begins in the photographs. The edge of the asphalt is crooked and wavey, as if it had been wearing away for many years. R.34-35.

The photographs show a garden hose (or "cord," as it was described in Ms. Morris's deposition) stretched out on the ground and passing near the spot where Ms. Morris tripped. R.32-35, 48. But Ms.

Morris did not trip over the hose or cord, and she testified that it was not there when she fell. R.48, 109. Two of the photos show an orange traffic cone in the background, which also was not present when Ms. Morris fell. R.32-33, 108.

Ms. Morris and Ms. Condreay saw no warning signs.

Ms. Morris and Ms. Condreay both testified that they did not see any warning signs in the area where Ms. Morris fell, or anywhere else in the flea market. R.77-78, 96, 110-11. On the other hand, Defendant's director signed an affidavit stating that he had placed "signs warning of unlevel surfaces throughout the farmer's market located at the parking lot, farmer's market entrance, by the office and approximately 15 yards from where the fall occurred," and that the signs were present on the date of Ms. Morris's accident. R.115-16.

Attached to his affidavit is a photograph of the entrance to the flea market, with a sign stating "CAUTION UNEVEN WALKING SURFACES" fastened to a post and facing toward the parking lot. R.117. Nothing in the record reveals when this photograph was taken. The record also contains no more specific information about the sign that was allegedly 15 yards away from where Ms. Morris fell, such as exactly where that sign was posted or in which direction it was facing.

And while Defendant's director claimed that he personally observed that the signs were present on the day of Ms. Morris's accident, he had said differently in his earlier-given interrogatory responses. There, he stated that he was not present on the day of the accident and had "no personal knowledge regarding the incident." R.147.

During their depositions, Ms. Morris and Ms. Condreay were each shown a photograph of a sign stating "Caution, uneven walking surfaces," like the one in the photo attached to Defendant's affidavit. R.77, 110. Ms. Morris testified that she had never seen that sign at the flea market. R.77. Ms. Condreay likewise testified that she had not seen that sign, or any signs like it, "anywhere in the flea market." R.110-11. She added, "I wasn't looking for signs like that. You're looking at what's on the tables and what's around." R.111. Ms. Condreay also asked defense counsel, "Where is that [sign] in conjunction to where [Ms. Morris] fell?" R.110. Counsel responded, "I'm not sure." R.110.

Ms. Morris files suit seeking damages for her injuries.

As a result of her fall, Ms. Morris suffered a bad concussion; cuts and bruises on her forehead, nose, and knee; an injury to her neck; and worsened shoulder pain from her scoliosis. R.45, 53-54,

60-61, 64. She continues to have impairments and other long-term effects from her injuries. R.61-65, 77, 99, 107.

Ms. Morris sued Defendant, seeking damages for her injuries. R.10-12. Her complaint alleged that Defendant "negligently allowed a dangerous condition to remain on their premises, namely a dilapidated and uneven portion of the asphalt," and that Defendant or its agents knew or should have known of this condition. R.11, ¶ 5. Ms. Morris alleged that Defendant had been negligent in failing to keep its business premises in a reasonably safe condition, *and* in failing to warn Ms. Morris of a dangerous condition. R.11.

The trial court grants summary judgment for Defendant.

Defendant moved for summary judgment. R.22-29. On Mrs. Morris's negligent-maintenance claim, Defendant argued that the "driveway" (i.e., the asphalt walkway) was not a dangerous condition because it amounted to a "difference in floor levels," and because the walkway was an open and obvious condition. R.26-27. On the failure-to-warn claim, Defendant argued that it had no duty to warn about an open and obvious condition. R.27-28. Alternatively, Defendant maintained that it had adequately warned Mrs. Morris by placing signs at the market. R.27-28. As evidentiary support for its motion,

Defendant filed Ms. Condreay's photographs of the walkway, the depositions given by Ms. Morris and Ms. Condreay, and the affidavit of Defendant's director. R.30-117.

Ms. Morris responded to Defendant's motion. R.118-41. In her response, Ms. Morris pointed out that Defendant owed her two distinct duties. R.121-22. The first was a duty to safely maintain its premises. R.121-22. The second was a duty to warn of a dangerous condition. R.121-22.

On the negligent-maintenance claim, Mrs. Morris argued that the decisions relied upon by Defendant, which involved "a mere difference in floor levels" were inapposite, while other decisions, which involved negligently maintained sidewalks and outdoor surfaces, were much more analogous and militated in her favor. R.122-23. She also argued that while the open and obvious nature of a condition may sometimes discharge a landowner's duty to warn, it cannot discharge a duty to maintain the premises in a reasonable safe condition. R.123-24.

On her failure-to-warn claim, Ms. Morris argued that the "obvious danger doctrine" did not apply to the walkway here. And even if the doctrine did apply, Ms. Morris' deposition testimony, in which

she denied seeing any warning signs, raised a disputed issue of fact on whether Defendant sufficiently warned about the condition. R.121-25. (The response—and Defendant's later-filed reply, R.142-45—referred to other evidence that the trial court found inadmissible, and Ms. Morris is not challenging that ruling on appeal.)

The trial court held a hearing on Defendant's motion. R.344-70. For the most part, the parties' counsel reiterated the arguments from their written submissions and cited-to case law. R.348-64.

Ms. Morris's counsel identified the dangerous condition as the walkway's edge being adjacent to "three to four inches of eroding sand," as described in Ms. Condreay's testimony. R.360. Counsel argued that photographs of the condition "show it's not as open and obvious as [it] may seem," and that a jury should decide whether the condition was truly open and obvious. R.360. The jury should also decide, argued counsel, Ms. Morris's testimony that she never saw any warning signs around the flea market. R.360-61. Finally, counsel reemphasized that there is a difference between a landowner's duty to warn and its duty to safely maintain its premises. R.358. For the latter, the obvious nature of a danger creates a question of fact on whether a plaintiff should be found comparatively negligent. R.358.

The trial court directed the parties to submit proposed orders, and the court ultimately entered an order granting Defendant's motion for summary judgment. R.313-32, 364, 369.

The order essentially adopted Defendant's arguments. The trial court characterized the asphalt walkway (or "driveway," as the order calls it) as a "mere difference in floor level," and on this basis ruled that "the driveway is not an inherently dangerous condition as a matter of law." R.322.

The trial court drew its own inferences from the photographs, which showed, in the court's view, "an open and obvious condition that Plaintiff would have observed with the use of her senses." R. 323. The trial court faulted Ms. Morris for failing to "look down immediately prior to the incident" or to "observe and account for the condition of the driveway." R.323. And the court found that Ms. Morris should have known about the condition because she "had navigated this driveway condition prior to the fall and was already aware of the condition." R.323. (On this point, the trial court was mistaken; there is no evidence that Ms. Morris had walked across or was aware of the three- to four-inch-deep area of eroded sand before her accident.)

Finally, the trial court ruled that Defendant had fulfilled its duty to warn by "plac[ing] signs at the Farmer's Market specifically warning of any uneven surfaces." R.323. The trial court did not address Ms. Morris's testimony that she had never seen any signs. R.323.

The trial court rendered a final judgment for Defendant on December 1, 2023. R.333-34. Ms. Morris timely appealed one week later. R.335-38.

SUMMARY OF THE ARGUMENT

Defendant had a duty to maintain its property in a reasonably safe condition. Ms. Morris presented evidence that Defendant's property was not reasonably safe to her. She tripped on the raised edge of an asphalt walkway. The walkway was in a deteriorated condition. Ms. Morris's friend, Ms. Condreay, said the walkway's edge was raised several inches above the adjacent sandy ground. Neither Ms. Morris nor Ms. Condreay had noticed the raised edge. But Defendant *had* noticed. Defendant had hung signs on the property warning about the danger of uneven walking surfaces. On these facts, a genuine dispute existed over whether the walkway's condition was reasonably safe. This is true even if that condition is open and obvious. A landowner has a duty to correct all dangers on its property, even

obvious ones. This is not to say that Ms. Morris will bear no fault for failing to notice the condition. But comparative negligence is a factual question, not a legal one. It is for the jury to decide.

Defendant owed Ms. Morris a second duty: to warn her about any concealed dangers. The trial court found that the walkway was open and obvious. But it does not matter if the *walkway* was obvious. The salient issue is whether the walkway's *danger*—the raised edge that caught Ms. Morris's foot—was open and obvious. And on that question, a reasonable jury could disagree with the trial court. A jury could also disagree with the trial court's finding that Defendant had discharged its duty to warn by placing signs on the property. A jury can decide whether Ms. Morris saw the warning signs (she said that she did not), whether the signs were positioned effectively (or at all), and whether the signs adequately warned her. But these are all questions of fact. They cannot be resolved by summary judgment.

STANDARD OF REVIEW

This Court applies a de novo standard of review to an order granting summary judgment. *Williams v. Weaver*, 381 So. 3d 1260, 1264 (Fla. 5th DCA 2024). Summary judgment is appropriate only if there is no genuine dispute of material fact. *Id.* In deciding whether

a genuine dispute exists, this Court "views the evidence in a light most favorable to the non-moving party." *Id.* (quotation omitted).

ARGUMENT

Defendant is a property owner. As a property owner, Defendant owes two duties to invitees while they are on the premises. *Id.* at 1265. Defendant has a duty "to maintain the premises in a reasonably safe condition," and a duty "to give warning of concealed perils which are known or should be known to the owner, but which are not known to the invitee." *Id.* (citing *Frazier v. Panera, LLC*, 367 So. 3d 565, 567 (Fla. 5th DCA 2023)). "These two duties are distinct from one another[.]" *Pozanco v. FJB 6501, Inc.*, 346 So. 3d 120, 123–24 (Fla. 3d DCA 2022). Defendant's "compliance with one does not necessarily mean that [Defendant] has complied with the other." *Id.*

In her complaint, Ms. Morris alleged that Defendant breached both duties. She brought one claim for negligent maintenance and another for a failure to warn. The trial court granted summary judgment on both claims. This was error. As we explain in section II below, there was enough evidence to create a fact question on Ms. Morris's failure-to-warn claim, and on whether the walkway's dangerous condition was open and obvious. And as we will show in section I,

there surely was no basis to grant summary judgment on Ms. Morris's negligent-maintenance claim, which could not have been defeated by Defendant's open-and-obvious defense.

Summary judgment should be the exception, and not the rule, in negligence cases. That is because "the evidence to support the elements of negligence are frequently subject to more than one interpretation." *Regency Lake Apartments Assocs., Ltd. v. French*, 590 So. 2d 970, 972-73 (Fla. 1st DCA 1991). This is so even when the facts may seem, on the surface, to be straightforward enough. Take this case as an example. Ms. Morris tripped on a walkway located on Defendant's property. But deciding whether Defendant was negligent is not as simple a matter as the trial court (and Defendant) made it out to be. Fact questions abound.

For instance: Even if the walkway's danger seemed obvious, was it reasonable for Defendant to leave the walkway in this condition? Or would a reasonable property owner have fixed it? Ms. Morris's friend said the walkway's edge was raised by several inches—is that too much? And even if not, should Defendant still have foreseen that an invitee at the flea market might not see the edge and trip on it? Also: did Defendant's warning signs do an adequate job of warning

Ms. Morris? Ms. Morris and her friend said they could not see the signs—is that testimony credible? And aren't the signs themselves evidence that Defendant recognized the walkway was dangerous?

The trial court believed that it could answer all these questions in the place of a jury. This was a mistake. A trial judge should grant summary judgment only if the evidence is "so one-sided that one party must prevail as a matter of law." *In re Amendments to Florida Rule of Civil Procedure 1.510*, 309 So. 3d 192, 192 (Fla. 2020) (citation omitted). And there was no evidence like that here.

I. The trial court erred in granting summary judgment on Ms. Morris's negligent-maintenance claim because whether the walkway's condition was dangerous, and whether Defendant should have repaired it, were disputed questions of fact.

Ms. Morris alleged that Defendant had failed to maintain its premises in a reasonably safe condition. Ms. Morris tripped on the edge of Defendant's walkway, which was raised several inches above the surrounding ground. R. 95, 104. The drop-off was higher at this point in the walkway than in other places. R.102. These facts should have created a jury question on whether this "condition was dangerous and whether [Defendant] should have anticipated that the

dangerous condition would cause injury[.]" *Aaron v. Palatka Mall, L.L.C.*, 908 So. 2d 574, 576-77 (Fla. 5th DCA 2005).

The trial court did not think this an open question. The trial court found that, under Florida law, the walkway was no more than a "mere difference in floor levels" and therefore could not be dangerous. R.322-23 (citing cases). But the trial court's relied-on cases were inapposite. In the cases cited by the trial court, the plaintiffs tripped on entirely different conditions, like a typical *indoor* step, *Schoen v. Gilbert,* 436 So. 2d 75, 76 (Fla. 1983); or a joint between asphalt and concrete, *Circle K Convenience Stores, Inc. v. Ferguson,* 556 So. 2d 1207, 1208 (Fla. 5th DCA 1990); or an "ordinary sidewalk curb," *Aventura Mall Venture v. Olson,* 561 So. 2d 319, 320 (Fla. 3d DCA 1990), without a "break in the curb that contributed to the fall," *Gorin v. City of St. Augustine,* 595 So. 2d 1062, 1063 (Fla. 5th DCA 1992).

Not so here. Ms. Morris fell on a deteriorating asphalt walkway, which is "clearly different from an ordinary sidewalk curb or a joint between concrete and asphalt." *Turner v. Winn-Dixie Food Stores, Inc.*, 651 So. 2d 827, 828 (Fla. 5th DCA 1995). That is why this Court, in *Turner*, distinguished *Aventura Mall* and *Circle K*—both cited by the trial court, R.322—and declined to apply them to a case in which the

plaintiff had tripped on "a part of the asphalt which ha[d] fallen into disrepair." 651 So. 2d at 828.

Indeed, in situations in which outdoor walking surfaces have deteriorated, Florida courts have consistently held that a jury must decide whether the walking surface's "state of disrepair" caused the plaintiff's fall. *Id.* (plaintiff tripped on pothole); *see also*, *e.g.*, *Conrad v. Boat House of Cape Coral, LLC*, 331 So. 3d 857, 862 (Fla. 2d DCA 2021) (plaintiff tripped on seawall "divot"); *Greene v. Twistee Treat USA, LLC et. al,* 302 So. 3d 481, 483-84 (Fla. 2d DCA 2020) ("a de-pression in the pavement"); *Middleton v. Don Asher & Assoc. Inc.*, 262 So. 3d 870, 871-72 (Fla. 5th DCA 2019) (cracked sidewalk); *Leon v. Pena*, 274 So. 3d 410, 411-13 (Fla. 4th DCA 2019) (same); *Trainor v. PNC Bank, Nat'l Ass'n*, 211 So. 3d 366, 368-70 (Fla. 5th DCA 2017) (pothole); *Lotto v. Point E. Two Condo. Corp.,* 702 So. 2d 1361, 1361 (Fla. 3d DCA 1997) (cracked sidewalk); *Hogan v. Chupka*, 579 So. 2d 395, 396-97 (Fla. 3d DCA 1991) ("blacktop" that "fell some inches short of meeting the sidewalk").

This Court's decision in *Middleton*, 262 So. 3d 870, is directly on point. There, the plaintiff filed suit after she "tripped on an uneven sidewalk" on a condominium property that the defendants owned. *Id.*

at 871. Plaintiff was familiar with the property's grounds; she lived at the condo complex and "had previously walked the property on several occasions and frequently passed the area where she fell." *Id.* The trial court granted summary judgment, ruling that "the sidewalk was so open and obvious that it could not be held to constitute a hidden, dangerous condition." *Id.* This Court reversed on appeal. *Id.* at 873.

This Court explained, "while the fact that a danger is obvious discharges a landowner's duty to warn, it does not discharge the landowner's duty to maintain his premises." *Id.* at 872 (quotation omitted). "Thus, notwithstanding that the condition of the sidewalk was open and obvious, [defendants] had a duty to maintain the property in a reasonably safe condition[.]" *Id.* (citations omitted).

The defendants in *Middleton* knew about the uneven sidewalk—and had even marked damaged portions with "a series of blue dots that had been placed on the sidewalk throughout the property"—but had not fixed the problem. *Id.* As a result, a "factual issue remained as to whether [defendants] 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." *Id.*

So too here. Even if the walkway's deteriorated and dangerous condition were obvious, a question of fact remains on whether Defendant should have foreseen that invitees would cross over the walkway and hurt themselves. *See id.*

More, Defendant here placed warning signs at the flea market cautioning patrons about "uneven walking surfaces." R.117. That is evidence that Defendant, like the defendant in *Middleton*, knew about the potential danger posed by the walkway. In fact, Ms. Morris has a stronger case. In *Middleton*, the defendant had painted the blue dots not to warn residents, but rather to mark where repairs were needed. *Id.* at 873. Defendant, in contrast, put up *warning* signs. The entire point of signs like these "is to warn of *dangers*." *Guevara v. NCL (Bahamas) Ltd.*, 920 F.3d 710, 721 (11th Cir. 2019) (emphasis added). The presence of the signs, then, "allows for the inference" that Defendant knew the walkway was dangerous. *Id.* at 721-22; *see also Mabrey v. Carnival Cruise Lines, Inc.*, 438 So. 2d 937, 937 (Fla. 3d DCA 1983) ("[I]t it is evident that the defendant did have knowledge that the deck was dangerous, since it had posted at the entrance to the deck a sign warning 'Slippery When Wet'.").

More still, Ms. Morris was at a flea market. She would have been distracted by the different stalls and displays. *See* R.111 (Ms. Condreay testifies that at the market, "[y]ou're looking at what's on the table and what's around"). This created a fact question—namely, whether "there is a possibility that circumstances on [the] premises would distract [her] attention from [a] known or obvious dangerous condition." *Pratus v. Marzucco's Constr. & Coatings, Inc.*, 310 So. 3d 146, 149 (Fla. 2d DCA 2021) (quoting *Greene*, 302 So. 3d at 483-84).

The trial court did not think that Defendant needed to anticipate whether Ms. Morris would notice the walkway's condition. In the trial court's opinion, Ms. Morris would have seen the walkway "with the use of her senses," or if she had been looking directly at it. R.323.

This is one view of the evidence, to be sure. But it is not the only view. A competing inference is that the walkway's edge, while visible when looked at directly, could be easily overlooked by an invitee walking at the market. *See Nw. Florida Crippled Children's Association v. Harigel,* 479 So. 2d 831, 833 (Fla. 1st DCA 1985) (recognizing that a step in a retail store might have been dangerous due to "the surrounding conditions of the step-down—the elevation of the display rack so that a customer's eye is naturally focused up and away from

the approaching edge"). And at the summary-judgment stage, Ms. Morris was entitled to have all inferences drawn in her favor. *See Williams*, 381 So. 3d at 1264.

But even if the trial court's view of the evidence were correct, it would not warrant the entry of summary judgment. As discussed above, Ms. Morris claimed that Defendant failed to maintain the premises in a reasonably safe condition, and for that claim, "the obvious danger doctrine does not apply." *Aaron*, 908 So. 2d at 577.

Instead, whether the walkway's dangerous condition was obvious becomes an issue of Ms. Morris's "own comparative negligence." *Trainor*, 211 So. 3d at 370. Comparative negligence presents a question of fact. *Id.* It cannot act as a complete bar to recovery. *Id.*; *see also Knight v. Waltman*, 774 So. 2d 731, 734 (Fla. 2d DCA 2000).

II. The trial court erred in granting summary judgment on Ms. Morris's failure-to-warn claim because whether the walkway's dangerous condition was obvious, and whether Ms. Morris had been adequately warned of that danger, were disputed questions of material fact.

The trial court granted summary judgment on Ms. Morris's failure-to-warn claim for two reasons: because the trial court believed the walkway was open and obvious, and because Defendant had hung up warning signs. R.322-23. Neither reason holds water.

Start with the open-and-obvious finding. "The obvious danger doctrine provides that an owner or possessor of land" need not warn an invitee about a dangerous condition "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. The trial court ruled that Defendant's walkway was open and obvious. To reach this ruling, the trial court relied on decisions finding that "an unmarked curb or sidewalk" was an open and obvious condition. R.322.

As explained above, those decisions are distinguishable. *See* supra at 16-17. And in any event, the propriety of summary judgment in a handful of decisions does not decide *this* case; "the open-and-obvious-condition principle 'is certainly not a fixed rule, and all of the circumstances must be taken into account.'" *Pratus*, 310 So. 3d at 149 (quoting *Greene*, 302 So. 3d at 483).

More than that, the trial court's open-and-obvious analysis focused on the wrong condition. The trial found that photographs "show[ed] that the *driveway* is an open and obvious condition that Plaintiff would have observed with the use of her senses." R.323 (emphasis added). But whether the walkway (or driveway, as the court

referred to it) was obvious is not the issue. "The test for application of the [open-and-obvious] doctrine is not whether the object is obvious, but *whether the dangerous condition of the object is obvious*." *Pratus*, 310 So. 3d at 149 (emphasis in original).

The dangerous condition here was not the walkway itself. The walkway had deteriorated, creating a three-to-four inch raised edge. That was the dangerous condition. Neither Ms. Morris nor Ms. Condreay had seen this edge—which was raised higher at this point in the walkway than in other places—creating a genuine question of material fact on whether the edge was "so open and obvious that the [Defendant] could reasonably expect that it would be discovered by an invitee[.]" *Greene*, 302 So. 3d at 483; *see also Pratus*, 310 So. 3d at 149.

This is all the more true because Ms. Morris fell at a flea market—a setting in which there is "reason to expect that [her] attention will be distracted." *Greene*, 302 So. 3d at 484 (quoting *Ashcroft v. Calder Race Course, Inc.*, 492 So. 2d 1309, 1311 (Fla. 1986)); *see also Doering v. Villages Operating Co.*, 153 So. 3d 417, 418 n.1 (Fla. 5th DCA 2014) (positing that "genuine issue of material fact existed as to

whether the raised plank was open and obvious" based on testimony that premises were crowded and plaintiff was "scanning the area").

The trial court did not believe that Ms. Morris needed to be warned at all. The court found that Ms. Morris "had navigated this driveway condition prior to the fall and was already aware of the condition." R.323. But no record evidence supports this finding. Ms. Morris had been to the flea market on previous occasions but could not recall whether she had crossed the walkway before. R.50. She certainly never said she had seen or traversed the "driveway condition" that caused her fall.

This is reason enough for reversal. At the summary-judgment stage, a trial court errs when it weighs the evidence, or when it draws inferences in favor of the moving party. *G & G In-Between Bridge Club Corp. v. Palm Plaza Associates, Ltd.*, 356 So. 3d 292, 297 (Fla. 2d DCA 2023); *Carrizosa v. Chiquita Brands Int'l, Inc.*, 47 F.4th 1278, 1328 (11th Cir. 2022).

The trial court's other basis for granting summary judgment on the failure-to-warn claim was that Defendant "had placed signs at the Farmer's Market specifically warning of uneven surfaces, thereby fulfilling any duty it may have had." R.323. As many courts have

recognized, the mere placement of a warning sign does not discharge a defendant's duty to warn if there are fact questions about whether the signage was adequate, based on its location and visibility. *See, e.g.*, *Steak n' Shake Operations, Inc. v. Davis*, 265 So. 3d 694, 695 (Fla. 1st DCA 2019); *Laidlaw v. Krystal Co.*, 53 So. 3d 1128, 1129 (Fla. 4th DCA 2011); *La Villarena, Inc. v. Acosta*, 597 So. 2d 336, 338 (Fla. 3d DCA 1992); *Radke v. NCL (Bahamas) Ltd.*, 536 F. Supp. 3d 1313, 1323 (S.D. Fla. 2021).

There were fact questions here. Defendant's corporate representative gave contradictory testimony on whether the signs were hanging on the day when Ms. Morris fell. *See* supra at 5-6. Ms. Condreay had not seen any warning signs. R.110-11. Neither had Ms. Morris, despite having visited the market many times before. R.77. And Defendant did not say where the sign was oriented in relation to the place where Ms. Morris fell.

For these reasons, the record evidence "could support an assertion that either the signs were not put out until after the appellant fell, or that if put out sooner they were not readily visible and thus did not sufficiently warn of the danger." *Laidlaw*, 53 So. 3d at 1129. Thus, the trial court erred in deciding Ms. Morris's failure-to-warn

claim as a matter of law. *See La Villarena, Inc.*, 597 So. 2d at 338 (affirming denial of directed verdict on failure-to-warn claim because "a jury question existed as to whether the permanent entrance sign adequately warned" plaintiff).

CONCLUSION

The trial court erred in granting summary judgment. This Court should reverse so that Ms. Morris's case may be decided by a jury.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b) and the word limitation requirements of Florida Rule of Appellate Procedure 9.210(a)(2)(B). This brief contains 5,337 words.

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