IN THE FIFTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

JOAN MORRIS,

Appellant,

v.

CASE NO.: 5D23-3621
LT CASE NO.: 2022-CA-1177

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

Appellee.

FIFTY-FIFTY, INC., D/B/A AIRPORT FARMERS & FLEA MARKET'S ANSWER BRIEF

On Appeal from the Circuit Court of the Fifth Judicial Circuit in and for Hernando County, Florida, L.T. No. 2022-CA-1177, Hon. Donald Scaglione.

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CITATION TO RECORD

The record on appeal is cited as "R. ___," referring to the page number assigned by the clerk. The Appellant, Joan Morris, shall be referred to herein as "Ms. Morris." The Appellee, Fifty-Fifty, Inc. d/b/a Airport Farmers & Flea Market shall be referred to herein as "Fifty-Fifty, Inc." The Appellant's Initial Brief shall be referred to herein as "IB" followed by the page number.

STATEMENT OF THE CASE AND FACTS

Nature of the Case. This appeal arises from a final summary judgment granted to the owner of a Farmer's Market on a premises liability complaint where the plaintiff alleged she tripped at an outdoor Farmer's Market when she transitioned from a sandy surface to a blacktop surface that differed in level and by approximately three to four inches at the place where the fall occurred.

Fifty-Five, Inc. is the Owner of a Farmer's Market. (R. 115.) The Airport Farmers & Flea Market ("the Farmer's Market") is an outdoor market located in Spring Hill, Hernando County, Florida. (R. 43-44.) The Farmer's Market consisted of sandy walkways with an asphalt walkway running through the middle of the property. (R. 32-35.) Signs were placed throughout the Farmer's Market warning of uneven surfaces. (R. 115-117.) The signs were located at the parking lot; the entrance to the Famer's Market; by the office; and approximately fifteen yards from where Ms. Morris fell. (R. 115-117.)

Ms. Morris Was a Regular Visitor to Farmer's Market. (R. 45.) Ms. Morris visited the Farmer's Market at least once a month for a couple of years. (R. 45.) She loved to go to flea markets. (R. 102.)

Ms. Morris Brought a Cane to the Farmer's Market Due to the "Uneven Ground". As testified by Ms. Morris:

> Q. Earlier you said you were walking with a cane, right?
>
> A. Yes, sir.
>
> Q. When did you start walking with a cane?
>
> A. After – well, when did I start? I usual [SIC] have one available in case there is rough - - uneven ground, and I will use it then. And that stems from my scoliosis.
>
> Q. Is it fair to say you had it because you were aware of the - - of uneven ground at the flea market?
>
> A. I think so.

(R. 76.)

Ms. Morris and Her Friend Were "All Over" the Farmer's Market Before the Fall Including the Area Where Fall Occurred. (R. 102.) Ms. Morris was at the Farmer's Market with her friend, Carolyn Condreay, the day of the fall. (R. 93-94.) Ms. Condreay described how they walked "all over" the Farmer's Market, including traversing the sandy walkways to the blacktop surface and the area where Ms. Morris fell:

> Q. So while you and Ms. Morris were walking at the flea market on the day of the incident, immediately prior to the incident, were you aware that you were walking on sand?
>
> A. Oh, yeah.
>
> 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.

Q. Did you have any - - did you traverse this particular area on that day before this incident?

A. Did we what?

Q. Traverse that particular area before the incident on that day? Did you walk - -

A. We walked – yes, we walked on the blacktop. We went in front of that EMT booth, and we were all over the flea market. She loves to go to flea markets.

(R. 101-102.)

Ms. Morris Falls While Walking at Farmer's Market. Ms. Morris visited the Farmer's Market on March 19, 2022, with her friend, Ms. Condreay. (R. 44.) It was a bright, sunny day. (R. 50.) Ms. Morris

and Ms. Condreay were “all over” the market that day. (R. 101-102; 50.) Ms. Morris walked across asphalt walkways with transitions to sand walkways while at the Farmer’s Market without any issues. (R. 101-102.) Ms. Morris had her cane with her due to the uneven ground and unlevel surfaces. (R. 76.) Notwithstanding, there were warning signs of unlevel surfaces located throughout the Farmer’s Market including approximately 15 yards from where Ms. Morris fell. (R. 115-117.)

Ms. Morris and her friend had been at the Farmer’s Market walking “all over” for approximately two hours before Ms. Morris fell. (R. 94.) Ms. Morris walked by an EMT booth before her fall. (R. 96.) She fell to the right of the EMT booth. (R. 96.) Ms. Morris and Ms. Condreay were not looking at anything immediately before the fall. (R. 45.) Ms. Morris fell when she tripped where the sandy walkway met up with the blacktop asphalt driveway, the same area they had traversed earlier. (R. 45-46.) Ms. Morris was walking from the sandy path to transition to the asphalt walkway when she fell. (R. 46-47.) Ms. Morris admitted she was not looking at the ground to see where she was walking at the time of the fall. (R. 45.) She also admitted that she would have seen the asphalt driveway without glasses if she was looking at it. (R. 78.)

Ms. Condreay described the change in elevation between the sandy walkway and asphalt driveway as "obvious." (R. 104-105.) Ms. Condreay observed eroding sand near the edge of the blacktop asphalt driveway. (R. 95.) She estimated the change in level to be three to four inches. (R. 95.) The owner of the Farmer's Market came over to assist after Ms. Morris fell. (R. 96-97.)

Ms. Morris Sues Fifty-Five, Inc. (R. 10-12.) Ms. Morris alleged that Fifty-Five, Inc. "…negligently allowed a dangerous condition to remain on their premises, namely a dilapidated and uneven portion of the asphalt." (R. 10). Morris also contended that Fifty-Five, Inc. did not warn or notify Morris of the "known dangerous condition." (R. 10.)

Fifty-Five, Inc. Moves for Summary Judgment Supported by Summary Judgment Evidence. (R. 22-117.) Fifty-Five, Inc. moved for summary judgment on three grounds: (1) the driveway was an uneven surface that was not a dangerous condition as a matter of law; (2) the condition of the driveway where Ms. Morris allegedly fell was so open and obvious that it was not a dangerous condition as a matter of law; and (3) Fifty-Five, Inc. did not have a duty to warn of an open and obvious condition. Regardless, warnings were provided. (R. 28.)

Fifty-Five, Inc. highlighted that Florida's new standard for summary judgment applied. (R. 24-25.) Thus, summary judgment was appropriately entered against a party who failed to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Conclusory assertions were insufficient to raise genuine issues of material fact. (R. 25.)

Fifty-Five, Inc. noted that under Florida law, a landowner owed two duties to a business invitee: (1) to use reasonable care to maintain the premises in a reasonably safe condition; and (2) to give the invitee warning of concealed perils which are known to the owner, and unknown to the invitee, and could not be discovered by the invitee even if she exercised due care. (R. 25.)

Fifty-Five, Inc. filed the deposition transcripts of Morris and Condreay; photographs of the asphalt walkway and the affidavit of Nicholas Delcorso. (R. 30-117.)

Mr. Delcorso's affidavit verified that he 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…". (R. 115.) Mr. Delcorso personally observed that the signs were present on March 19, 2022, the day

Ms. Morris fell, although Mr. Delcorso did not see Ms. Morris fall. (R. 116; 147.)

Trial Court Hears Summary Judgment Motion. (R. 344-370.) Fifty-Five, Inc. highlighted Florida law that unlevel walking surfaces alone are not inherently dangerous conditions. (R. 349-350.) Here, Ms. Morris had been to the Farmer's Market many times in the past and simply was not looking where she was going. (R. 349.) Fifty-Five, Inc. also highlighted that there was no evidence that the walkway was dilapidated or not maintained other than conclusory statements within the pleadings. (R. 353.) And, "…saying that it was unmaintained does not make it so." (R. 353.)

Trial Court Grants Fifty-Five, Inc.'s Motion for Summary Judgment. (R. 313-332.) The trial court noted that Florida's new summary judgment standard, i.e., the federal standard, applied to the summary judgment proceedings. (R. 313-314.) In this regard, the trial court highlighted the movant's current burden and the similarity with the directed verdict standard. (R. 318.)

> Those applying new rule 1.510 must recognize the fundamental similarity between the summary judgment standard and the directed verdict standard. *See Anderson*, 477 U.S. at 251 (noting that "the inquiry under each is the same"). Both standards focus on "whether the evidence presents a sufficient disagreement to require

> submission to a jury." Id. at 251-52. And under both standards "[t]he substantive evidentiary burden of proof that the respective parties must meet at trial is the only touchstone that accurately measures whether a genuine issue of material fact exists to be tried." Thomas Logue & Javier Alberto Soto, *Florida Should Adopt the Celotex Standard for Summary Judgments,* 76 Fla. Bar J., Feb. 2002, at 26; *see also Anderson*, 477 U.S. at 255.
>
> Those applying new rule 1.510 must recognize that a moving party that does not bear the burden of persuasion at trial can obtain summary judgment without disproving the nonmovant's case. Under Celotex and therefore the new rule, such a movant can satisfy its initial burden of production in either of two ways: "[I]f the nonmoving party must prove X to prevail [at trial], the moving party at summary judgment can either produce evidence that X is not so or point out that the nonmoving party lacks the evidence to prove X." *Bedford v. Doe,* 880 F.3d 993, 996-97 (8th Cir. 2018). "A movant for summary judgment need not set forth evidence when the nonmovant bears the burden of persuasion at trial." *Wease v. Ocwen Loan Servicing, L.L.C.*, 915 F.3d 987, 997 (5th Cir. 2019). Those applying new rule 1.510 must recognize that the correct test for the existence of a genuine factual dispute is whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson,* 477 U.S. at 248. Under our new rule, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris,* 550 U.S. 372, 380 (2007). In Florida it will no longer be plausible to maintain that "the existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised."

(R. 318.)

Under this standard, the trial court made the following findings in pertinent part:

- Plaintiff alleges she was "walking though [SIC] the Farmer's Market when [Plaintiff] tripped and fell on what appears to be a dilapidated, uneven, driveway running through the middle of thoroughfare for foot traffic."

- Photographic depictions of the asphalt walkway where Plaintiff fell were reviewed and put forward.

- Plaintiff admits she would have seen the driveway without glasses if she was looking at it.

- Plaintiff and Carolyn Condrey, Plaintiff's friend who accompanied her to the Farmer's Market, "weren't looking at anything" immediately prior to the fall.

- At no point did Plaintiff look at the ground to determine if it was safe to walk on.

- Nothing prevented Plaintiff from seeing the area around the driveway.

- Ms. Condrey was immediately behind Plaintiff when Plaintiff fell.

- Plaintiff walked on other asphalt driveways with transitions to sand walkways at other locations without any issues.

- The fall occurred to the right of an EMT booth.

- Plaintiff walked by the EMT booth before the fall on the driveway.

- The change in elevation between the sand walkway and driveway was obvious.

- Defendant placed signs throughout the Farmer's Market warning invitees of uneven surfaces.

- There is no evidence in the record that anything other than a change in floor elevation caused Plaintiffs alleged fall.

- The Court reviewed:

    A. Photographs of Asphalt Walkway
    B. Photographs of Asphalt Walkway
    C. Transcript of the Deposition of Plaintiff, Joan Morris taken on April 17, 2023.
    D. Transcript of the Deposition of Carolyn Condreay taken on April 19, 2023.
    E. Affidavit of Nicholas DelCorso.

(R. 320-321.)

The trial court noted that there was no evidence supporting Ms. Morris' allegation that the asphalt driveway was "dilapidated." (R. 322.) Instead, Ms. Morris' claim as to a dangerous condition was based on a "mere difference in floor level." (R. 322.)

The trial court's order highlighted Florida law that a mere change in elevation is an open and obvious condition that is not unreasonably dangerous as a matter of law. (R. 321-323.) Under the law, the owner of property is permitted to assume that an invitee will perceive that which

would be obvious to them upon the ordinary use of their senses. (R. 321.) Ms. Morris testified she did not look down immediately prior to the incident. (R. 323.) The trial court also noted that Ms. Morris had navigated the driveway prior to her fall. (R. 323.) Ms. Condreay testified that they had traversed that particular area of the blacktop in front of the EMT booth before the fall. (R. 102.)

The trial court did not find that Fifty-Five, Inc. had any duty to warn, but "…[t]o the extent Defendant was required to warn Plaintiff, Defendant placed signs at the Farmer's Market specifically warning of uneven surfaces, thereby fulfilling any duty it may have had." (R. 323.) A final judgment was subsequently entered in favor of Fifty-Five, Inc. (R. 333-334.)

This appeal followed. (R. 335-338.)

SUMMARY OF THE ARGUMENT

Property and business owners in Florida do not have unlimited liability to invitees at their property, nor do they owe unlimited duties. They are not insurers for all who enter. Those who do enter are required to utilize all of their senses, and businesses are entitled to presume that invitees will do so.

Here, the unrebutted evidence established that Ms. Morris tripped when she admittedly was not looking where she was walking at an outdoor Farmer's Market she had visited several times. The Farmer's Market contained sandy walking areas which abutted a blacktop asphalt walkway. There was a difference in elevation between the sandy walking paths and the blacktop asphalt walkway. The difference was three to four inches in the area where Ms. Morris tripped. The fall happened on a bright, sunny day. Ms. Morris was not distracted or looking at anything at the time of the fall. Nothing obstructed her ability to see what was right in front of her. Ms. Morris was also aware of the uneven ground and changes in elevation as a previous visitor. She brought her cane with her because of the unlevel surfaces.

This case fits squarely within Florida law as an open and obvious condition that was not unreasonably dangerous. This situation is akin to

curbs, sidewalks, parking lots, and parks containing walking paths and asphalt paths which are bound to have uneven spots. An elevation change of three to four inches has routinely been found as not unreasonably dangerous.

Ms. Morris attempts to avoid this well settled law by claiming (with no evidence) that the asphalt walkway was "dilapidated" and in need of repair. But other than a change in level, there is no evidence of any "disrepair." Attorney argument is not evidence. Ms. Morris presented zero evidence that the condition of the asphalt walkway violated any code or standard. There was no evidence of any cracks, bulges or gully. Instead, there was a change in elevation likely found in most public parks and outdoor spaces containing grassy and paved walkways. A change in elevation is not the equivalent of "disrepair." And warning invitees of the obvious does not create a duty where none existed to begin with. A warning does not transform an open and obvious condition into a concealed condition. Cases dealing with wet and slippery floors on cruise ships have zero applicability to the present matter.

Thus, the trial court correctly found that Fifty-Five, Inc. complied with its duty to maintain the property in a reasonably safe condition.

The trial court also correctly found no breach of the duty to warn. Under Florida law, Fifty-Five, Inc. only had a duty to warn of latent or concealed dangers which were unknown to Ms. Morris and could not be discovered through the exercise of due care. Here, there was no latent or concealed "danger." Ms. Morris admitted she would have seen the blacktop asphalt walkway intersecting the sandy walkway if she was looking where she was walking. Ms. Condreay said it was "obvious." And Ms. Morris was aware of the uneven levels and brought her cane for precisely that reason. It doesn't matter whether Ms. Morris saw a warning sign. She was already aware of an undisputedly open and obvious condition. Fifty-Five, Inc. had no duty to warn and its decision to place warning signs in an abundance of caution doesn't change anything. It doesn't create a duty where none existed. And the time for Ms. Morris to present evidence and challenge the placement of signs, the sufficiency of same, etc. was in the trial court. Even assuming there was a duty (and there isn't one), Ms. Morris failed to rebut the evidence that signs were placed throughout the Farmer's Market.

Florida's current summary judgment standard closely mirrors the standard for directed verdict in which the focus is whether the evidence presents a sufficient disagreement to require submission to a jury. Here,

even viewing the evidence in the light most favorable to Ms. Morris, there is no disagreement to be presented to a jury.

This Court should affirm the final judgment in this case based on an objective view of the record evidence and well settled Florida law.

STANDARD OF REVIEW

A. Appellate Standard of Review.

This Court reviews a trial court's ruling on a motion for summary judgment *de novo. Orlando v. FEI Hollywood, Inc.,* 898 So. 2d 167, 168 (Fla. 4th DCA 2005). In this regard, the final judgment and actions of the trial court are presumed correct. *Sorrels v. Rebecca's Ice Cream, Inc.,* 696 So. 2d 1313, 1315 (Fla. 2d DCA 1997) ("This court notes that the final judgment rendered by the lower court is clothed with a presumption of correctness.") *Martin v. Adkisson*, 343 So. 2d 1315, 1316 (Fla. 1st DCA 1977)("Actions of a trial court are presumed correct."). This is true even under a *de novo* standard of review. *Thurman v. Davis*, 321 So. 3d 341, 344 (Fla. 1st DCA 2021). It is the appellant's sole burden to provide an adequate record to the reviewing court demonstrating reversible error. *Schroeder v. MTGLQ Investors, L.P.,* 290 So. 3d 93, 95 (Fla. 4th DCA 2020). It is also not the function of an appellate court to determine the facts of the case. *Id.* If the appellant fails in its burden to present a record demonstrating reversible error, the final judgment is presumed correct and should be affirmed. Again, the presumption, even on *de novo* review, is that the final judgment was correctly entered. *Thurman v. Davis*, 321 So. 3d 341, 344 (Fla. 1st DCA 2021).

Further, under the tipsy coachman rule, this Court should affirm the final judgment regardless of the reasoning of the trial court if there is any basis which would support the judgment in the record. *Catalo v. Llano Financing Group, LLC,* 238 So. 3d 885, 886 (Fla. 4th DCA 2018).

B. Standard for Summary Judgment.

Florida has now adopted the federal standard for summary judgment. *See In re Amendments to Fla. R. Civ. P. 1.510,* 309 So. 3d 192 (Fla 2020)(adopting the federal summary judgment standard). Under Florida's current standard, the test for the existence of a genuine factual dispute is whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *In re Amendments to Fla. R. Civ. P. 1.510,* 317 So. 3d 72, 75 (Fla. 2021). As stated by the Florida Supreme Court:

> Under our new rule, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Scott v. Harris, 550 U.S. 372, 380,127 S. Ct. 1769, 167 L.Ed. 2d 686 (2007). In Florida it will no longer be plausible to maintain that "the existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised." Bruce J. Berman & Peter D. Webster, Berman's Florida Civil Procedure § 1.510:5(2020 ed.) (describing Florida's pre-amendment summary judgment standard).

In re Amendments to Fla. R. Civ. P. 1.510, 317 So. 3d at 75-76.

Importantly, summary judgment is no longer disfavored in Florida. Again, as explained by the Florida Supreme Court:

> We agree with the Supreme Court that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of [our rules] as a whole." Celotex, 477 U.S. at 327, 106 S.Ct. 2548. The Supreme Court's reasoning underlying the federal summary judgment standard is compelling: "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose."

Id. at 323-24, 106 S.Ct. 2548. *In re Amendments to Fla. R. Civ. P. 1.510,* 317 So. 3d at 194.

Negligence cases may be appropriately decided on summary judgment where the non-movant fails to designate specific facts indicating that there is a genuine issue for trial:

> A court may grant summary judgment "if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).
>
> **Material facts are those that may affect the outcome of the case under the applicable substantive law**. Anderson v. Liberty, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2 202 (1986). Disputed issues of material fact preclude the Entry of summary judgment, **but factual disputes that are irrelevant or unnecessary do not.** Id. "[S]ummary judgment will not lie if the dispute about a

> material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.
>
> In determining whether the moving party has satisfied its burden, the Court considers all inferences drawn from the underlying facts in a light most favorable to the party opposing the motion and resolves all reasonable doubts against the moving party. *Matsushita Elec. Inc. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587-588, 106 Ct. 1348, 89 L.Ed.2d 538 (1986).
>
> The moving party may rely solely on the pleadings to satisfy its burden. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A nonmoving party bearing the burden of proof, however, must go beyond the pleadings and submit affidavits, depositions, answers to interrogatories, or admissions **that designate specific facts indicating that there is a genuine issue for trial.** *Id.* at 324, 106 S.Ct. 2548. If the evidence offered by the non-moving party "is **merely colorable,** or is **not significantly probative**, the Court may grant summary judgment." *Anderson*, 477 U.S. at 249-250, 106 S.Ct. 2505.
>
> Similarly, summary judgment is mandated against a party who fails to prove an essential element of its case "with respect to which [the party] has the burden of proof." *Celotex,* 477 U.S. at 323, 106 S.Ct. 2548.

Thorpe v. BJ's Restaurants, Inc., 287 F. Supp. 3d 1332, 1334-1335 (M.D. Fla. 2017).

Florida's current summary judgment standard closely mirrors the standard for directed verdict, in which the focus of the analysis is whether the evidence presents a sufficient disagreement to require submission to a

jury. *Duran v. Crab Shack Acquisition, FL, LLC,* 384 So. 3d 821, 824 (Fla. 5th DCA 2024).

But even the Florida Supreme Court held that summary judgment was appropriate in a negligence case under the prior standard. *Early v. Morrison Cafeteria Co. of Orlando*, 61 So. 2d 477, 478 (Fla. 1952)(finding question of negligence properly decided by the court as a matter of law where no genuine issue of material fact). In sum, no deference should be shown to Ms. Morris simply because this is a negligence action.

ARGUMENT

I. Trial Court Correctly Found Fifty-Five, Inc. Did not Breach Duty to Maintain Property in Reasonably Safe Condition.

As recognized by this Court, a property owner owes two duties to an invitee:

> Generally, a property owner owes two duties to an invitee: (1) the duty to use reasonable care in maintaining the property in a reasonably safe condition; and (2) the duty to warn of latent or concealed dangers which are unknown to the invitee and cannot be discovered through the exercise of due care. *Aaron v. Palatka Mall, L.L.C.,* 908 So. 2d 574, 577 (Fla. 5th DCA 2005). The open and obvious nature of a hazard may discharge a landowner's duty to warn, but it does not discharge the landowner's duty to maintain the property in a reasonably safe condition. *See, e.g., Schoen v. Gilbert,* 436 So. 2d 75 (Fla. 1983)(holding difference in floor levels is not inherently dangerous condition, even in dim lighting, so as to constitute failure to use due care for safety of person invited to premises). Other conditions are dangerous, but are so open and obvious that an invitee may be reasonably expected to discover them and to protect himself. *See, e.g., Ashcroft v. Calder Race Course, Inc.*, 492 So. 2d 1309, 1311 (Fla. 1986).

Dampier v. Morgan Tire & Auto, LLC, 82 So. 3d 204, 206 (Fla. 5th DCA 2012).

It is axiomatic that the mere occurrence of an accident does not give rise to the inference of negligence. *Duran v. Crab Shack Acquisition, FL, LLC,* 384 So. 3d 821, 824 (Fla. 5th DCA 2024)("Negligence will not be presumed merely because of the happening of an accident."). *Cassel v.*

Price, 396 So. 2d 258, 264 (Fla. 1st DCA 1981). Instead, a plaintiff must show that the allegedly dangerous condition was an **unreasonable** hazard. *Id.* Further, there is no duty on the part of a landowner to exercise such control over the business invitee or the premises so as to be an insurer of his safety. *Taylor v. Universal City Prop. Management,* 779 So. 2d 621, 622 (Fla. 5th DCA 2001)("The law provides that some injury-causing conditions are simply so open and obvious that they can be held as a matter of law not to give rise to liability as dangerous conditions."); *Emmons v. Baptist Hospital,* 478 So. 2d 440, 442 (Fla. 1st DCA 1985). Florida law does not require a landowner to maintain its property such that an accident could never happen and has no duty to warn of an obvious condition which is not in itself dangerous. *Matson v. Tip Top Grocery Co., Inc.,* 9 So. 2d 366, 368 (Fla. 1942).

The Florida Supreme Court held 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." *Earley v. Morrison Cafeteria Co. of Orlando*, 61 So. 2d 477, 478 (Fla. 1952). The standard applied by the court in evaluating all of the circumstances of the incident must be an **objective** one. *Brookie v. Winn-Dixie Stores, Inc.,* 213 So. 3d 1129, 1134 (Fla. 1st DCA 2017)("The standard must be based on an objective

evaluation, understanding that every case will involve an accident, which cannot by itself mandate that summary judgment never be granted in cases involving open and obvious conditions."). And, "…the legal duty of premises owners owed to business invitees is based on logic, common sense, and human experience." *Id.* at 1137.

Here, the trial court properly ruled as a matter of law that Fifty-Five, Inc. did not breach the duty to maintain the premises in a reasonably safe condition:

> Obviously, in some cases, a property owner may in fact comply with **both duties** when an open and obvious condition does not trigger a duty to warn and the condition itself does not violate a property owner's duty to maintain the premises in a reasonably safe condition.

Id. at 1131.

A. Florida Case Law Overwhelmingly Supports Change in Floor Levels as Open and Obvious Condition that is Not Unreasonably Dangerous.

The Florida Supreme Court has held numerous times that a difference in floor levels is not a dangerous condition as a matter of law. *Schoen v. Gilbert,* 436 So. 2d 75, 76 (Fla. 1983)(holding that six-inch drop between foyer and living room was not inherently dangerous); *Matson v. Tip Top Grocery Co.,* 9 So. 2d 366, 368 (Fla. 1942)("It is common knowledge that there are steps and uneven floor levels in many public

places."); *Hoag v. Moeller,* 82 So. 2d 138, 139 (Fla. 1955)(finding 3.5 to 4 inch drop between living room and dining room was not a dangerous condition); *Bowles v. Elkes Pontiac Co.,* 63 So. 2d 769, 772 (Fla. 1952)(holding 3-inch drop between platform and showroom floor was not dangerous condition); *Casby v. Flint*, 520 So. 2d 281, 282 (Fla. 1988)("Multiple floor levels in a dimly lit or overcrowded room are not inherently dangerous conditions. They are so commonplace that the possibility of their existence is known to all. Warning of such common conditions goes beyond the duty of reasonable care owed to the invitee.").

Similarly, Florida's appellate courts have routinely held that changes in elevation, whether in private or public space, are not inherently dangerous. *Circle K Convenience Stores, Inc. v. Ferguson*, 556 So. 2d 1207, 1208 (Fla. 5th DCA 1990)(holding ridge between concrete and asphalt in parking lot was so open and obvious that it could not be "hidden dangerous condition" for purposes of determining whether landowner was liable for injuries suffered by invitee when she stubbed her toe on ridge); *Rosenfeld v. Walt Disney World Co.,* 651 So. 2d 811, 812 (Fla. 5th DCA 1995)(street curb in an amusement park is not an inherently dangerous condition); *Gorin v. City of St. Augustine,* 595 So. 2d 1062, 1063 (Fla. 5th DCA 1992)(sidewalk curb used as a platform to pick up and drop off

passengers riding a tram not a hidden dangerous condition); *Aventura Mall Venture v. Olson*, 561 So. 2d 319, 321 (Fla. 3d DCA 1990)(six inch sidewalk curb located at mall was not a concealed and latent danger).

1. Transition from Sandy Walkway to Asphalt Walkway Was Open and Obvious Condition Not Unreasonably Dangerous.

Ms. Morris argues that whether the transition from the beige sandy walkway to the black asphalt walkway was "open and obvious" should have been a jury question. (IB. 15-21.) Ms. Morris characterizes the walkway's drop-off as the "danger." (IB. 15.)

The unlevel transition from the black asphalt walkway to the beige sandy walkway or vice versa is akin to uneven sidewalks and unlevel sidewalk joints that have routinely been found not to be "dangerous conditions." As explained by a district court applying Florida law:

> ….unlevel surfaces frequently found in parking lots and streets are often not found to be dangerous conditions. *See Circle K Convenience Stores, Inc. v. Ferguson,* 556 So. 2d 1207, 1208 (Fla. 5th DCA 1990)(finding that slightly raised, concrete cover of underground gas tank in asphalt parking lot was "so common and so ordinarily innocuous" that it was not a hidden dangerous condition); *Gorin v. City of St. Augustine,* 595 So. 2d 1062, 1062-63 (Fla. 5th DCA 1992)(finding that unpainted sidewalk curb on which a tram rider tripped was not a dangerous condition).
>
> Likewise here, the **unlevel sidewalk joint** at the Compton Place Apartments was not a dangerous

> condition. **Although not an interior architectural feature, it rose no higher than the uneven floors found to be not dangerous in *Schoen, Hoag, and Bowles.*** Furthermore, an unlevel sidewalk seam is akin to commonplace concrete joints and curbs that other courts have found to be not dangerous. *Ferguson,* 556 So. 2d at 1208; *Gorin,* 595 So. 2d at 1062-63; *Kelley,* 2021 WL 37595 at *3. As such, the uneven sidewalk joint was not a dangerous condition, and the uncontested facts show Compton Place therefore did not breach its duty to maintain the premises in a reasonably safe condition.

Tanner v. Garden Communities, LLC, 2024 WL 3920692, *3 (M.D. Fla. Aug. 22, 2024).

In *Circle K Convenience Stores, Inc, v. Ferguson,* 556 So. 2d 1207 (Fla. 5th DCA 1990), this Court found that an uneven ridge in a parking lot created by the meeting of concrete with asphalt was so open and obvious it could not be a "hidden dangerous condition." In *Circle K,* the condition was described as "…not perfect, the concrete being at places higher than the asphalt." *Id.* at 1208. Similarly, this Court has found that uneven levels commonly found in parking lots, streets, and parks created by curbs, sidewalks and related fixtures are typical ordinary features that are not dangerous conditions as a matter of law. *Middleton v. Don Asher & Associates, Inc.,* 262 So. 3d 870, 872 (Fla. 5th DCA 2019)(uneven sidewalk was an open and obvious condition); *Rosenfeld v. Walt Disney*

World Co., 651 So. 2d 811, 812 (Fla. 5th DCA 1995)(street curb not inherently dangerous).

Further, Ms. Condreay's "guestimate" of a three-to-four-inch transition where Ms. Morris tripped is likewise not a "dangerous" condition. (R. 104.) The Florida Supreme Court and multiple appellate courts have held that differences in floor levels even at six inches were not unreasonably dangerous. *See, Schoen,* 436 So. 2d at 76 (six-inch drop); *Moeller*, 82 So. 2d at 139 (three-and-a-half to four-inch drop); *Elkes Pontiac*, 63 So. 2d at 772 (three-inch drop-off). And, as noted herein, unlevel sidewalks, joints, and curbs at these levels have similarly been found as "commonplace" and "ordinarily innocuous."

Under Ms. Morris' standard, virtually all of Florida's parks and public places containing asphalt walkways abutting sandy and/or grassy paths would be considered unreasonably dangerous. *See, e.g., Kelly v. Sun Communities, Inc.*, 2021 WL 37595, *3 (M.D. Fla. Jan. 5, 2021)("Like these examples and those provided by the Florida Supreme Court, the uneven sidewalk here was not a dangerous condition. While not a construction feature like the difference in floor height within a building or the step-down from a street curb, uneven sidewalks are just as commonplace – any stretch of sidewalk is bound to have flaws and uneven spots caused by tree

roots or myriad other reasons."); *see also K.G. ex. Rel. Grajeda v. Winter Springs Cmty. Evangelical Congregational Church,* 509 So. 2d 384, 385 (Fla. 5th DCA 1987)(holding "protruding, uneven bricks" placed around base of tree in area where children often played was not dangerous condition requiring landowner to take corrective measures).

2. Ms. Morris' Claims of "Distraction" are Red Herring.

On appeal, Ms. Morris argues for the first time that just by being at a flea market, an inference was raised that she was distracted. (IB. 20.) But there was no argument, much less, any evidence presented to the trial court on this point. It should not be considered on this basis alone. *State Farm Mut. Auto Ins. Co. v. Long*, 189 So. 3d 335, 337 (fn3) (Fla. 5th DCA 2016)(declining to address claim of error because precise argument not made below). And it meritless in any event.

The evidence was that Ms. Morris had been to the Farmer's Market several times and was aware that the property contained unlevel areas. (R. 45, 76.) She brought her cane for this purpose. (R. 76.) The incident happened on a bright, sunny day. (R. 50.) Ms. Morris did not testify that she was distracted in any way at the time of the incident. Instead, Ms. Morris and her friend "weren't looking at anything" immediately prior to the fall. (R. 45.) She admitted that she was not looking where she was

walking. (R. 45.) And if she was looking, she would have seen the asphalt walkway. (R. 78.) Thus, the case, *NW. Florida Crippled Children's Association v. Harigel*, 479 So. 2d 831, 833 (Fla. 1st DCA 1985) has no applicability.

Ms. Morris' citation to *Pratus v. Marzucco's Construction & Coatings, Inc.,* 310 So. 3d 146 (Fla. 2d DCA 2021) is similarly misguided. First, *Pratus* was decided under Florida's previous summary judgment standard, i.e., if the "slightest doubt" might exist, summary judgment was improper. *Id.* at 149. Second, *Pratus* involved evidence of an uncovered drain at a construction site, an inherently dangerous condition. Our case involves the innocuous and unremarkable condition of an unlevel transition from a sandy walkway to an asphalt walkway commonly found in public parks and outdoor spaces.

Likewise, in *Greene v. Twistee Treat USA, LLC,* 302 So. 3d 481 (Fla. 2d DCA 2020), the plaintiff stepped in a concealed hole in a parking lot while being distracted by a building that resembled an "enormous ice cream cone." *Id.* at 484. No remotely similar facts exist in our case. Instead, the present matter is on par with the numerous authorities that have held that a mere change in elevation involving a sidewalk or curb or similar structure is open and obvious and not unreasonably dangerous.

Under Ms. Morris' argument, any invitee at a farmers or flea market would be deemed to be "distracted" simply by being in an area where goods are sold. Again, there is simply no evidence of same in our case. None was presented at the summary judgment stage as required under Florida's summary judgment rule. Fla. R. Civ. P. 1.510(c)(1)(5) (2023).

B. No Evidence that Asphalt Walkway was in State of Disrepair.

On appeal, Morris repeatedly characterizes the asphalt walkway as "deteriorating" with no record support whatsoever. There are no photographs depicting any cracks or bulges in the asphalt. Morris' trial counsel conceded there was no "gully." ("…in this case we do not have necessarily what I would consider a gully…") (R. 360, L.11-12.) There is no evidence of any violation of code or any standard for that matter. There is zero evidence that the asphalt walkway was in need of repair, much less, the nature of the repair required. There are no photographs showing a "gully." The evidence was simply that the area where Morris tripped was uneven with an approximate difference of 3-4 inches according to Ms. Condreay when transitioning from the sand walkway to the asphalt walkway. A difference in height of a few inches between the ground and a driveway is commonplace.

Thus, the trial court correctly found that there was no evidence of anything more than an ordinary transition from the sandy walkway to the asphalt walkway. An uneven level is not the equivalent of "disrepair." Attorney arguments and conclusory statements to the contrary are not evidence. *Olson v. Olson*, 260 So. 3d 367, 369 (Fla. 4th DCA 2018)("…the statements of an attorney are not evidence.")

Again, this Court and others have recognized that outdoor areas such as sidewalks and parking lots where pedestrians are expected to walk will naturally have uneven levels of varying degrees. *Frazier v. Panera,* LLC, 367 So. 3d 565, 566 (Fla. 5th DCA 2023)("Many cases cited by the court and Panera involving uneven pavement, traffic bumps, landscape features, and steps within business premises or residences were decided in favor of the defendant on the grounds that the conditions were a matter of common knowledge or everyday life.") The sandy walkway not being completely level with the asphalt walkway is not the equivalent of "disrepair."

C. Authorities Relied on by Morris Distinguishable.

The authorities relied on by Morris involve vastly different circumstances and are easily distinguishable. Every single case cited by Ms. Morris involved <u>evidence</u> of potholes, cracked sidewalks, or obvious disrepair. (IB. 17-18.)

For example, Morris cites to *Turner v. Winn-Dixie food Stores, Inc.,* 651 So. 2d 827 (Fla. 5th DCA 1995) without ever mentioning the case involved a pothole in a parking lot. As noted by this Court, "[a] pothole is clearly different from an ordinary sidewalk curb or a joint between concrete and asphalt." *Id.* at 828. There is no evidence of any potholes in the asphalt walkway in our case.

Morris' reliance on *Middleton v. Don Asher & Assoc. Inc.,* 262 So. 3d 870 (Fla. 5th DCA 2019) is equally misplaced. In *Middleton*, the plaintiff tripped on an uneven and cracked sidewalk at her condominium property. There was evidence that the sidewalk was in "significant disrepair," and that the association and property manager knew of the condition and need to repair for at least eighteen months before the accident. *Id.* at 873. This Court held that the condition was open and obvious and there was no duty to warn. *Id.* at 872. But the evidence of the <u>significant</u> disrepair created an issue of fact as to the duty to maintain the sidewalk. *Id.* at 873. No such evidence of "disrepair," let alone, "significant disrepair" exists in our case.

Similarly, *Hogan v. Chupka*, 579 So. 2d 395 (Fla. 3d DCA 1991) involved evidence of a broken and uneven sidewalk and a gully where the blacktop of the parking lot fell short of meeting the sidewalk. Our case has no such evidence. Ms. Morris' counsel conceded that there was no gully.

(R. 360.) And the photographs depict nothing more than commonplace and ordinary innocuous features found in many outdoor settings and parks. (R. 32-35.)

Ms. Morris failure to present any evidence of disrepair is fatal to her argument under Florida's current summary judgment standard. Fifty-Five, Inc. would be entitled to a directed verdict at trial based on the current record. That is precisely the standard correctly and appropriately applied by the trial court.

II. No Duty to Warn of Open and Obvious Condition.

The trial court correctly found that Fifty-Five, Inc. had no duty to warn Ms. Morris of the open and obvious condition of the asphalt blacktop driveway. Under Florida law, there is no duty to warn of an obvious condition which is not in itself dangerous. Instead, a landowner's duty is "…to give the invitee warning of **concealed** perils which are known to the owner, and unknown to the invitee, and could not be discovered by the invitee even if she exercised due care." *Williams v. Madden*, 588 So. 2d 41, 43 (Fla. 1st DCA 1991).

Here, the open and obvious nature of the edge of the blacktop asphalt driveway was sufficiently obvious to Ms. Morris upon the ordinary use of her own senses. And she was familiar with the Farmer's Market

including the existence of "rough" and uneven spaces. (R. 76.) Multiple courts have held that there is no duty to warn of unmarked curbs or sidewalk edges. *Gorin v. City of St. Augustine,* 595 So. 2d 1062 (Fla. 5th DCA 1992); *Aventura Mall Venture v. Olson*, 561 So. 2d 319 (Fla. 3d DCA 1990).

Morris argues that a duty to warn existed because the walkway had "deteriorated, creating a three-to-four inch raised edge." (IB. 23.) This is a misnomer. Again, there is no evidence of "deterioration." The evidence was that sandy walkway was not level with the blacktop asphalt driveway by about 3-4 inches. This is a common, everyday occurrence in many public places containing asphalt paths, walkways, etc. Ms. Morris' failure to utilize all of her senses while traversing the Farmer's Market and observe where she was walking does not turn an open and obvious condition into a "dangerous condition." There was no duty to warn of the open and obvious transition between the sandy walkway and blacktop asphalt driveway.

A. No Fact Issues Exist When No Duty to Begin With

Ms. Morris argues that the mere placement of a warning sign did not discharge Fifty-Five, Inc.'s alleged "duty to warn." And there were fact issues about whether the signage was adequate, based on location and

visibility. Ms. Morris then cites several cases all dealing with wet and slippery floors and alleged "warnings" related to same. (IB. 24-26.)

First, Fifty-Five, Inc. did not have a duty to warn of an open and obvious condition of an unlevel transition between the ground and an asphalt walkway. *Middleton v. Don Asher & Associates, Inc.*, 262 So. 3d 870, 872 (Fla. 5th DCA 2019) (uneven sidewalk was an open and obvious condition for which association had no duty to warn). But even assuming a duty to warn existed, Ms. Morris failed to present any admissible evidence regarding the sufficiency of the signage. Thus, even if an issue as to the adequacy of the signage existed (and it does not) it was not preserved. Instead, the record fully supports that multiple signs warning of uneven surfaces were placed throughout the Farmer's Market including on the day of Ms. Morris' fall. (R. 115-117.) Ms. Morris' claim that Fifty-Five, Inc. gave "contradictory testimony" on whether signs were hanging on the day Ms. Morris fell is not supported by the record. Fifty-Five, Inc.'s representative verified that the signs were displayed the day of Ms. Morris' fall. That the representative did not witness the fall is not "contradictory." Ms. Condreay testified that the owner came to the scene after Ms. Morris fell. (R. 96-97.)

Finally, none of the authorities cited by Ms. Morris are remotely applicable. (IB. 25.) Ms. Morris cites to multiple cases all involving wet and

slippery floors where a duty to warn plainly existed. *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. 1313 (S.D. Fla. 2021). Thus, issues as to the adequacy of the warnings may have been fact questions in those cases. Here, there was no condition akin to a wet and slippery floor creating any duty to warn.

B. Ms. Morris Was Aware of Uneven Surfaces and Had Traversed Exact Area Where She Later Fell.

Further, Ms. Morris had knowledge of "rough" and uneven ground at the Farmer's Market. (R. 76.) So, in addition to the condition being open and obvious on a bright sunny day, Ms. Morris was already aware unlevel ground existed. It was why she brought her cane to the Farmer's Market. (R. 76.) Further, Ms. Condreay testified that they walked in the area where Ms. Morris later fell. (R. 101-102.) Ms. Morris ignores this undisputed evidence.

There is no duty to warn where the invitee is plainly aware of the condition and there is no concealment. That is Florida law. The trial court correctly applied it in this case.

Ms. Morris misapprehends cases involving cruise ships and federal maritime and common law in an effort to transform the placement of warning signs as an admission of a "dangerous" condition. (IB. 19.) But under Florida law, Fifty-Five, Inc. had no duty to warn to begin with. The placement of warning signs did not create a duty where one never existed. The unlevel ground was open and obvious, and known to Ms. Morris. Fifty-Five, Inc.'s placement of signs warning of an open and obvious condition in an abundance of caution did not transform the condition into a concealed one. And again, Ms. Morris was plainly aware of the conditions at the Farmer's Market. In this regard, it doesn't matter whether Ms. Morris ever saw the warning signs. They were not required to begin with. Abundant Florida law supports that no duty to warn existed in this case.

CONCLUSION

The final summary judgment granted below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Answer Brief has been electronically filed with the Clerk of Court on August 29, 2024 via the E-filing Portal:

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.045(b) and Florida Rule of Appellate Procedure 9.210(a)(2)(B), I hereby certify that this Answer Brief was prepared using proportionately spaced Arial 14-point font and complies with the applicable font and word count limit requirements.

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