Back to the Basics on Open and Obvious– Duty to Warn and Duty to Maintain – Can you comply with one without the other?

The open and obvious danger doctrine provides that an owner of land is not liable for injuries to an invitee caused by a dangerous condition on the premises when the danger is known or obvious to the injured party unless the owner should anticipate the harm even though the dangerous condition was open and obvious. *Aaron v. Palatka Mall, L.L.C.*, 908 So. 2d 574, 576-77 (Fla. 5th DCA 2005). This doctrine rests upon the generally accepted notion that real property owners and possessors should be legally permitted to assume that those entering their premises will perceive open and obvious conditions using their ordinary senses. *Id*.; *Brookie v. Winn-Dixie Stores, Inc.*, 213 So. 3d 1129, 1130-31 (Fla. 1st DCA 2017) (quoting *Early v. Morrison Cafeteria Co. of Orlando*, 61 So. 2d 477, 479 (Fla. 1952)). The test for whether the open and obvious doctrine applies is not whether the object is obvious but rather whether the alleged dangerous condition of the object is obvious. *Williams v. Weaver*, 381 So. 3d 1260, 1265 (Fla. 5th DCA 2024). To determine whether the doctrine applies, the court must consider all of the facts and circumstances surrounding the accident and the alleged dangerous condition. *Id*.

I. Duty to Warn

Under Florida premises liability law, there is no duty to warn against an open and obvious, not inherently dangerous, condition. *Brookie*, 213 So. 3d at 1131. Nor is there a duty to warn against a condition that is "simply so open and obvious, so common and so ordinarily innocuous, that [it] can be held as a matter of law to not constitute a hidden dangerous condition." *Krol v. City of Orlando*, 778 So. 2d 490, 493 (Fla. 5th DCA 2001); *see e.g.*, *Early*, 61 So. 2d at 478 (finding that a condition of a floor mat was patent and obvious, and the "ordinary use" of the plaintiff's senses "would have disclosed it to her"); *Circle K Convenience Stores, Inc. v. Ferguson*, 556 So.

2d 1207, 1208 (Fla. 5th DCA 1990) (finding that an uneven parking lot surface located at a convenience store does not constitute a hidden dangerous condition). A landowner is entitled to assume an invitee will perceive these obvious dangers. *City of Melbourne v. Dunn*, 841 So. 2d 504, 505 (Fla. 5th DCA 2003). Further, if the defendant's knowledge of a condition is equal to the plaintiff's, there is no duty to warn of an open and obvious condition. *Brookie*, 213 So. 3d at 1132 (finding a plaintiff who had previously passed by an empty pallet near the entrance of a store and later suffered an injury from the pallet had equal knowledge to the store); *Hunt v. Slippery Dip of Jacksonville, Inc.*, 453 So. 2d 139, 139 (Fla. 1st DCA 1984) (holding that "defendant's knowledge of a danger must be superior to that of a business invitee . . . to create a duty on the part of the defendant to warn."); *see also McAllister v. Robbins*, 542 So. 2d 470, 470 (Fla. 1st DCA 1989) (affirming summary judgment where there was "no question of a duty to warn, since the plaintiff's knowledge was equal with that of the defendants").

For example, does a landowner have a duty to warn about a floor mat, even if it is in poor condition? The floor mat, sitting at the entrance of the store, is arguably patent and obvious because it is something that each patron must cross to enter. So, if the customer uses his or her ordinary senses, he or she would have noticed the mat's condition and avoided the alleged danger. This factor alone should relieve a landowner of a duty to warn. However, what if the customer testifies that he or she knew of the mat's condition, had already crossed over it to enter the store and even complained to the landowner's staff about its condition. For this reason, the customer's knowledge of the mat's condition was equal to that of the landowner, and they did not have a duty to warn the customer.

Using another example, a customer alleges that he or she slipped and fell on a wet floor because there had been a spill, there was a wet floor sign in the area, but the spill was not cleaned

up yet. Arguably, the wet floor sign satisfies the landowner's duty to warn of an open and obvious, yet dangerous condition, the wet floor.

II. Failure to Maintain

While an open and obvious danger often relieves the landowner's duty to warn, a landowner still has a duty to maintain the property in a reasonably safe condition. *TruGreen Landcare, LLC v. LaCapra*, 254 So. 3d 628, 631 (Fla. 5th DCA 2018). However, some conditions are so obvious and not inherently dangerous that they can be said, as a matter of law, not to constitute a dangerous condition and will not give rise to liability due to the failure to maintain the premises in a reasonably safe condition. *Dampier v. Morgan Tire & Auto, LLC*, 82 So. 3d 204, 206 (Fla. 5th DCA 2012); *Schoen v. Gilbert*, 436 So. 2d 75, 77 (Fla. 1983) (holding a difference in floor levels is not an inherently dangerous condition, even in dim lighting, so as to constitute a failure to use due care for the safety of a person invited to the premises). Other conditions may be dangerous but are so open and obvious that a landowner may reasonably expect an invitee to discover them and protect herself. *Dampier*, 82 So. 3d at 206. Courts generally attempt to apply this rule in these circumstances to absolve the landowner of liability unless the landowner should anticipate or foresee harm from the dangerous condition despite such knowledge or obviousness. *Id*.

Continuing with our floor mat example, did the landowner keep its premises in a reasonably safe condition? Because the floor mat was something that every person entering the store had to cross, the condition of the mat was so obvious and not inherently dangerous that it could be said as a matter of law not to constitute a dangerous condition that gives rise to liability. Even when arguing that the floor mat's condition is dangerous, it is so open and obvious that the landowner could have expected the customer to protect himself or herself from its purported danger. The

customer certainly saw the mat and noticed its condition, crossing over it when entering the store and even complaining about it to the landowner's staff. Because of this, the landowner could have reasonably expected the customer to protect himself or herself from the floor mat's condition when the injury occurred.

Using our second example, the wet floor, while the wet floor sign satisfies the duty to warn, a landowner may still be found negligent for failing to maintain the premises. A wet floor is a dangerous condition and if allowed to remain in that condition for a period of time, regardless of the warning, the landowner could be found negligent regardless of the open and obvious nature of the condition. That would go to the customer's comparative fault.

Conclusion

When evaluating your premises liability case where an open and obvious condition is involved, we must remember to evaluate from the standpoint of both duties – the duty to warn and the duty to maintain. It can be easy to absolve the landowner of liability because the duty to warn was satisfied. Where the open and obvious condition is a hazardous condition, we must remember to look at the duty to maintain for a complete analysis of liability.