[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11091

D.C. Docket No. 3:16-cv-01578-MMH-PDB

BILLIE SANFORD,
CHARLES SANFORD,

Plaintiffs-Appellants,

versus

OMNI HOTELS MANAGEMENT CORPORATION,
a foreign corporation-for-profit,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(March 4, 2019)

Before ED CARNES, Chief Judge, MARTIN, and ROGERS,[*] Circuit Judges.

[*] Honorable John M. Rogers, United States Circuit Judge for the Sixth Circuit, sitting by designation.

PER CURIAM:

Billie Sanford tripped up a short flight of steps in a hotel restaurant and injured her left knee, left arm, and back. She claims that the she did not see the steps because the patterned carpet leading up to and on the steps created the optical illusion of a level floor. She brought a negligence claim under Florida law against Omni Hotels Management Corp., the owner and operator of the hotel restaurant in question.[1] The district court granted summary judgment to Omni. This is Sanford's appeal.

I.

A.

The facts below are taken entirely from the summary judgment record. See Holloman v. Mail-Well Corp., 443 F.3d 832, 836 (11th Cir. 2006) ("We consider only the evidence that was available to the district court at the time it considered the [summary judgment] motion."). When reviewing the record we "view all the evidence, and make all reasonable factual inferences, in the light most favorable to the nonmoving party." Hulsey v. Pride Rests., LLC, 367 F.3d 1238, 1243 (11th Cir. 2004) (quotation marks omitted).

[1] Her husband, Charles, brought a loss of consortium claim as well. The district court granted summary judgment to Omni on that claim. The Sanfords have not raised the claim on appeal, so it is abandoned and we will not discuss it further. AT&T Broadband v. Tech Commc'ns, Inc., 381 F.3d 1309, 1320 n.14 (11th Cir. 2004) ("Issues not raised on appeal are considered abandoned.").

In November 2014 the Omni Hotel & Resort in Jacksonville hosted a conference for the African Methodist Episcopal Church. During that conference Sanford operated a vendor booth at the hotel. One day she decided to go to the hotel's restaurant, Juliette's Bistro, for the first time to try the buffet. The host was leading her to a seat by the buffet area, and she was following just "inches" behind him.

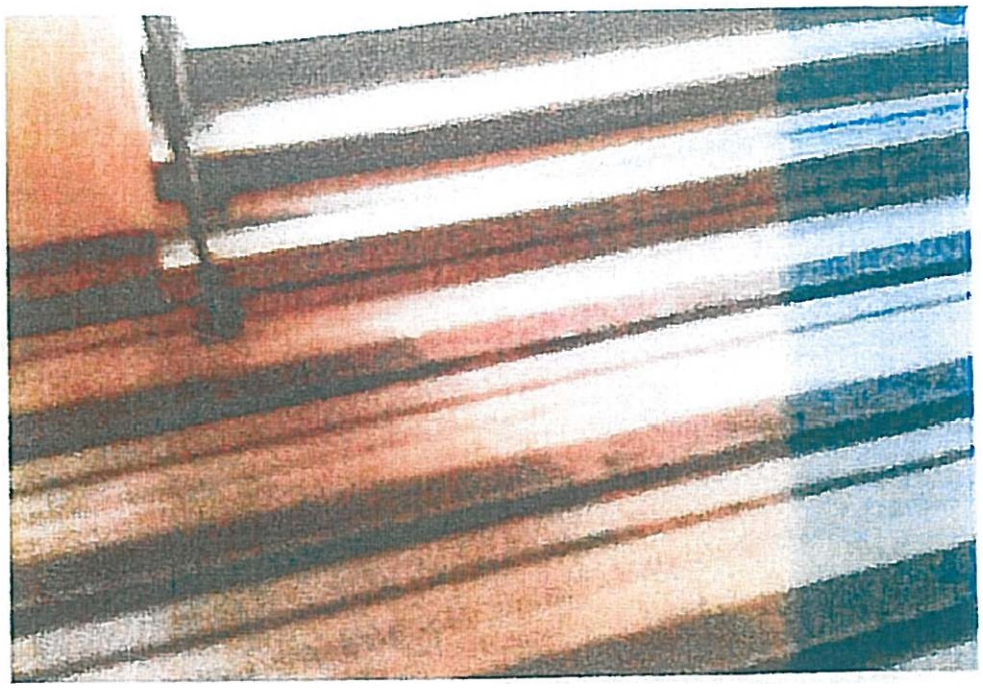
While she was doing that, Sanford's left foot suddenly hit something, causing her to trip and fall. She suffered injuries to her left knee, left arm, and back. Later she concluded that her left foot had hit the first of three steps leading to the elevated buffet area of Juliette's Bistro. She claims that she did not see the steps and did not see the host she was following go up the steps. She also claims that she did not notice (or use) the handrails on each side of the steps and was not looking at the floor while she walked because her eyes were trained on the host.

But she did see, in her peripheral vision, the carpet on the steps and the floor leading up to the steps. Here is how she described the carpet in her deposition: "The only thing I could see about the carpet is that it was a color and the design that looked like it just kept going on and on into the area of which we were walking." The carpet "had a horizontal line through it that ran parallel to the steps" that "kind of camouflaged that there w[ere] steps there." Because of that design, she testified, "the steps and the carpet . . . looks like all the same thing,"

and "it did not seem to [her] visually that there was a step there." So she believed "that the level had not changed" and that she "was still on the same level" because "it all looked like it was all the same."

Here are the only two pictures of the steps the district court admitted into the summary judgment record[2]:

[2] Sanford filed a motion for leave to file two higher-quality versions of those pictures, and she attached those pictures to her motion. But the district court denied Sanford's motion, and she has not contested that denial in this appeal.



The host did not warn Sanford about the steps. Omni does not have a record of any similar incidents on this set of steps.

B.

Sanford sued Omni in Florida state court, claiming that the steps presented a dangerous condition that it negligently failed to warn her about. Omni removed the case to the U.S. District Court for the Middle District of Florida based on diversity of citizenship.[3]

[3] Although Sanford's state court complaint alleged damages in excess of only $15,000, she later filed a stipulation that her damages were greater than $400,000 — thus satisfying the $75,000 amount in controversy requirement. The parties are completely diverse: Sanford and her husband are Georgia citizens, and Omni is a Delaware corporation with its principal place of business in Texas.

After discovery, the district court granted Omni's motion for summary judgment and entered judgment in favor of Omni and against Sanford. The court found that the pictures showed that the steps were an open and obvious condition and were not unreasonably dangerous.[4] As a result, the court ruled that Sanford's negligence claim failed because Omni did not have a duty to warn her about the presence of the steps and Omni did not otherwise breach its duty of reasonable care. Sanford appealed.

II.

We review de novo a district court's grant of summary judgment. Hulsey, 367 F.3d at 1243.

A district court "shall grant summary judgment if the movant shows that 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). "A 'material' fact is one that 'might affect the outcome of the suit under the governing law.'" Furcron v. Mail Ctrs. Plus, LLC, 843 F.3d 1295, 1303 (11th Cir. 2016) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986)). And a "dispute about a material fact is 'genuine' . . . if the evidence is such that a

[4] It also noted that the higher-quality pictures Sanford sought to submit "do not rectify these deficiencies."

reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248, 106 S. Ct. at 2510.

III.

This premises liability case boils down to whether Omni, a landowner, owed Sanford, an invitee, a duty under Florida negligence law to warn her about the steps in Juliette's Bistro. "A possessor of land has a duty to warn invitees of inherently dangerous conditions that are not obvious to them." Rice v. Whitehurst, 778 So. 2d 1027, 1028 (Fla. 4th DCA 2001). "An owner is entitled to assume that the invitee will perceive that which would be obvious to him upon the ordinary use of his own senses, and is not required to give the invitee notice or warning of an obvious danger." Aventura Mall Venture v. Olson, 561 So. 2d 319, 320 (Fla. 3d DCA 1990) (quotation marks and brackets omitted).

"[A] difference in floor levels does not of itself constitute failure to use due care for the safety of a person invited to the premises and there is no duty to issue warning of such condition when it is obvious and not inherently dangerous." Hoag v. Moeller, 82 So. 2d 138, 139 (Fla. 1955) (emphasis added). But "accompanying circumstances" — such as "an uncommon design or mode of construction creating a hidden danger which a prudent invitee would not anticipate" — "may transform a change in floor levels into a dangerous situation, creating a duty to warn." Casby v. Flint, 520 So. 2d 281, 282 (Fla. 1988); see Kupperman v. Levine, 462 So. 2d 90,

91 (Fla. 4th DCA 1985) (holding that a change in floor levels in the middle of a room, accompanied by furniture designed to create the illusion of a level floor, could constitute a dangerous condition)[5]; Nw. Fla. Crippled Children's Ass'n v. Harigel, 479 So. 2d 831, 832–33 (Fla. 1st DCA 1985) (holding that a change in floor levels under a display rack at a clothing store could constitute a dangerous condition because the display rack focused customers' eyes away from the floor).

Sanford argues that Omni had a duty to warn her about the change of levels in Juliette's Bistro because the carpet on the steps and on the floor leading up to the steps created an optical illusion that masked the change in floor levels, thus turning that change into a dangerous condition. Because the only pictures of the steps in the summary judgment record are not clear enough to be of assistance, we turn to the other evidence in the record: Sanford's deposition testimony and the affidavit of the hotel manager.

The affidavit makes a rather simple point: Omni does not have any "record of any injuries or prior substantially similar trip and falls in the area where Ms. Sanford's incident occurred." That suggests that the carpeting did not create an

[5] Omni asserts that Kupperman is "procedurally distinguishable" because it involved a motion to dismiss, not a motion for summary judgment. See Kupperman, 462 So. 2d at 91. But Omni does not explain why that procedural distinction matters for our purposes, and we see no reason that it would.

optical illusion that transformed the change in floor levels into a dangerous condition, but that suggestion is hardly conclusive.

That leaves Sanford's deposition testimony. She testified that the carpet on and leading up to the steps "had a horizontal line through it that ran parallel to the steps" that "kind of camouflaged that there w[ere] steps there." To her, "the steps and the carpet . . . look[ed] like all the same thing," and "it did not seem to [her] visually that there was a step there." She believed "that the level had not changed" and that she "was still on the same level" because "it all looked like it was all the same." To paraphrase her testimony only slightly, the pattern on the carpet created an optical "illusion of a level floor," Kupperman, 462 So. 2d at 91.

We have no legitimate basis to discount Sanford's testimony at this stage of the proceedings. See Feliciano v. City of Miami Beach, 707 F.3d 1244, 1253 (11th Cir. 2013) ("As a general principle, a plaintiff's testimony cannot be discounted on summary judgment unless it is blatantly contradicted by the record, blatantly inconsistent, or incredible as a matter of law, meaning that it relates to facts that could not have possibly been observed or events that are contrary to the laws of nature."). The low-quality pictures in the summary judgment record and the hotel manager's affidavit do not "blatantly contradict" or "utterly discredit[]" her testimony. Scott v. Harris, 550 U.S. 372, 380, 127 S. Ct. 1769, 1776 (2007). At best they demonstrate that there is a genuine dispute of material fact about whether

the carpeting created the illusion of a level floor and thus presented a dangerous condition about which Omni had a duty to warn invitees like Sanford.

Omni offers three arguments why it did not have a duty to warn under Florida law, none of which is persuasive.

First, Omni argues that Sanford has not shown that the carpeting on and around the steps created an optical illusion under Florida law because "there is no record evidence that anything other than the similar colored carpet covered the steps." "Florida law is clear," Omni asserts, "that to create an optical illusion of flatness, the change in floor level must be concealed by something more than a uniform color scheme." Two of the Florida cases Omni cites to support that assertion, however, involved not just a uniform color scheme, but a uniform color. See Aventura, 561 So. 2d at 320 (curb and the driveway were the same color); Rosenfeld v. Walt Disney World Co., 651 So. 2d 811, 812 (Fla. 5th DCA 1995) (curb and street were the same color). According to the Florida Supreme Court, "[i]t is a matter of general knowledge that there are multiple steps in hotels, restaurants, storerooms and other business establishments throughout Florida with the same color as that of the floor. Bowles v. Elkes Pontiac Co., 63 So. 2d 769, 772 (Fla. 1952) (emphasis added). Here, however, Sanford testified that the carpet on and around the steps had a multi-colored pattern, a pattern that "kind of camouflaged that there w[ere] steps there."

The only other Florida case Omni cites on this point — Rice v. Whitehurst, 778 So. 2d 1027 (Fla. 4th DCA 2001) — involved tiling that covered the floor of a home's foyer and sunken living room. Id. at 1028. All of the tile was "square, pink, and lined up to create continuity in the room" with grout joints that "match[ed] up." Id. The Rice plaintiff argued that the tiles created an optical illusion that obscured the change in floor levels, but the court held that the tiling was not unusual enough to be an optical illusion under Florida law. Id. at 1029. Although the tiling in Rice was not unusual enough, Omni has not persuaded us that carpeting with horizontal lines that camouflage steps is sufficiently similar to the tiling in Rice for that decision to control this case. Rice is distinguishable.

Second, Omni argues that a plaintiff must offer expert testimony to create a genuine dispute of material fact about whether a landowner has a duty to warn invitees about a change in floor levels. We have found no Florida decision explicitly requiring expert opinion for the plaintiff to prevail in a case of this type, and there are several Florida decisions that are inconsistent with such a requirement. See Harigel, 479 So. 2d at 833 (holding that whether the circumstances accompanying a particular change in floor levels "constitute[d] [a] failure to use due care for the safety of a person invited to the premises . . . was a jury question" without mentioning expert testimony) (quotation marks omitted); Pensacola Rest. Supply Co. v. Davison, 266 So. 2d 682, 684 (Fla. 1st DCA 1972)

(similar); see also Krivanek v. Pasternack, 490 So. 2d 252, 253 (Fla. 2d DCA 1986) (holding that there was enough evidence to sustain a jury's finding of a dangerous condition without mentioning expert testimony).

Third, Omni argues that Sanford was to blame for her fall because she "failed to use the railings that were present on both sides of the steps" and she "was not watching where she was stepping." That may be a valid comparative negligence argument, but it would still present a genuine dispute of material fact. See, e.g., Lenhart v. Basora, 100 So. 3d 1177, 1179 (Fla. 4th DCA 2012) ("The fact-finder's task in [a comparative negligence] case is to determine such proportion of the entire damages plaintiff sustained as the Defendant's negligence bears to the combined negligence of both the Plaintiff and the Defendant." (quotation marks omitted)). More important, an argument about Sanford's comparative negligence "misses the point" of this appeal, which is whether the carpeting on the steps in Juliette's Bistro "transform[ed] a change in floor levels into a dangerous situation, creating a duty to warn." Casby, 520 So. 2d at 282. "[T]he focus is not on this [plaintiff's] failure to observe, but on the absence of any duty on the part of the [landowner] to warn of possible changes in floor levels." Id.

IV.

The district court's judgment is **REVERSED**, and the case is **REMANDED** for further proceedings consistent with this opinion.