Circuit Court for Montgomery County
Case No.: 456327V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0562

September Term, 2020

BATSHEVA AVISSAR

v.

WESTLAKE TERRACE CONDOMINIUM, et al.

Arthur,
Beachley,
Battaglia, Lynne, A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: July 20, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104

In October of 2018, Batsheva Avissar, Appellant, filed suit against Westlake Terrace Condominium, the owner of the complex in which she lived, as well as Quiza Management, LLC, the company that manages the complex; also sued was Scapers Landscaping Services, Inc., the landscaping company hired by Westlake and Quiza for snow and ice removal within the common areas of the complex. Ms. Avissar alleged that all were negligent in failing to remove snow and ice on January 27, 2016, which led to her being injured when she slipped and fell on "black ice"[1] on a sidewalk outside of her condominium on that day.[2] Prior to trial, Westlake and Quiza moved for summary judgment, as did Scapers. Ms. Avissar responded, and a hearing occurred in August of 2020 during which the trial court granted summary judgment in favor of all three defendants.

Ms. Avissar timely appealed to this Court, raising two questions:

> 1. Whether the motions court erred by requiring the Plaintiff to establish record evidence that the Defendants had "actual notice" of the dangerous

[1] "Black ice" denotes ice that "is difficult to see because it reflects less light than regular ice, and therefore does not appear glossy or slick, 'which is a result of its columnar grain structure.'" *Poole v. Coakley & Williams Const., Inc.*, 423 Md. 91, 99 n.2 (2011) (quoting American Meteorological Society, Glossary of Meteorology 88 (2d. ed. 2000)).

[2] Westlake Terrace Condominium and Quiza Management, LLC, filed cross-claims against Scapers Landscaping Services, Inc., alleging, inter alia, that "any injuries and damages received by the Plaintiff, Batsheva Avissar, were caused solely or in part by the negligence of the Cross-Defendant, Scapers Landscaping Services, Inc." Scapers Landscaping, Inc., in turn, filed a cross-claim in which it alleged "that it was the negligence of the Cross-Defendants, in whole or in part, that caused any and all damages allegedly sustained by the Plaintiff."

> condition, as opposed to "constructive notice?"
>
> 2. Whether the motions court erred in determining that there were no triable issues of fact as to whether the Defendants had constructive notice of the potential for ice to form at the location of Ms. Avissar's fall?

We shall reverse the trial court's grant of summary judgment, because there are genuine issues of material fact raised by Ms. Avissar.

In her complaint, Ms. Avissar alleged, among other issues, that Westlake, Quiza, and Scapers were jointly and severally liable because:

> 6. At all times relevant to this complaint, one or more of the above-named Defendants were responsible for the snow and ice removal at the sidewalk located at 7546 Westlake Terrace, Bethesda, MD 20817 [hereinafter "the sidewalk"].
>
> 7. On or about January 27, 2016, at approximately 6:40 am, Plaintiff exited her condominium in order to walk to her car, turned right, and proceeded to walk along the sidewalk, which had recently been cleared of snow by employee(s) and/or agent(s) of one or more of the Defendants, when she slipped and fell on an area of "black ice," i.e. ice that was not readily discernible to the eye because it blended in with the pavement. The sidewalk apparently had not been appropriately cleared of ice, thereby creating a slipping hazard for pedestrians on the sidewalk.
>
> 8. The above described incident occurred due to the sole negligence of employee(s) and/or agent(s) of one or more of the Defendants. The acts of negligence include, but are not limited to, failure to remove and/or ameliorate the ice; failure to perform appropriate winter maintenance on the sidewalk; failure to use salt or other appropriate de-icing chemicals on the area; failure to warn; and/or other acts of negligence.
>
> 9. As a proximate result of the above-described incident, the Plaintiff has suffered and will continue to suffer physical injuries, including a fractured right ankle that required surgery, in addition to the accompanying pain and suffering. In addition, she has incurred medical bills, lost wages,

and other economic losses.

* * *

Discovery ensued and at its close, Westlake and Quiza, who were both represented by the same counsel, filed a motion for summary judgment, as did Scapers. In their motions, each alleged that they did not have actual or constructive notice of the presence of black ice, where Ms. Avissar fell.

Ms. Avissar, in opposing the motion of Westlake and Quiza, filed a Statement of Material Facts in Dispute,[3] in which she identified various facts in dispute, the most relevant for our purposes being:

> 11. Ms. Avissar fell on black ice that covered an area "[b]etween 1 square foot to square foot and a half" and independent eyewitnesses verified that it was "difficult to see."
>
> 12. The sidewalk where Ms. Avissar fell had piles of snow over a foot tall adjacent to it, and it was towards the bottom of a hill, in an area where snow melt would naturally drain from areas higher on the hill.

* * *

[3] Rule 2-501(b), which defines required elements of an opposing party's response to a motion for summary judgment, provides:

> (b) **Response.** A response to a motion for summary judgment shall be in writing and shall (1) identify with particularity each material fact as to which it is contended that there is a genuine dispute and (2) as to each such fact, identify and attach the relevant portion of the specific document, discovery response, transcript of testimony (by page and line), or other statement under oath that demonstrates the dispute. A response asserting the existence of a material fact or controverting any fact contained in the record shall be supported by an affidavit or other written statement under oath.

> 14. The temperature fluctuations on January 27 and the days leading up to it were such that Westlake and Quiza knew or should have known that a freeze-melt-refreeze cycle would occur at the community, creating ice on the common area sidewalks when the temperature dropped later in the day.
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> * * *
>
> 20. The topography of the Westlake premises, in that the common area sidewalk where Ms. Avissar fell was at the bottom of a slight grade where snow melt would naturally drain, was such that Westlake and Quiza should have known that black ice would form on the sidewalk when the temperature dropped shortly after sundown.
>
> * * *

With respect to Scapers's motion, Ms. Avissar incorporated the above referenced facts and added a fact specific to Scapers:

> 10. Despite the weather conditions that facilitated the melt and refreeze of existing snow piles, as described above, an employee of Scapers walked the premises on the morning of January 27 and chose not to treat any of the common area sidewalks with deicing chemicals because of the mistaken belief that it was not necessary to do so.

An affidavit of John Allin, whom Ms. Avissar had previously identified as an expert witness in the field of snow and ice management and removal, was also attached to her filings in opposition to both motions. Among other averments in the affidavit, Mr. Allin postulated, in paragraph 19, that:

> Ms. Avissar's fall occurred at the bottom of a slight grade where snow melt would naturally drain when the temperature rose above freezing and then re-froze when the temperature dropped shortly after sundown.

Following a hearing, which took place in August of 2020, the trial court granted both motions for summary judgment and reasoned from the bench that:

> So, the question is what we have in this case at least from the evidence that I have in this case is that there's been no report that that's where water pools or drains. Those other two places actually had actual knowledge.[4] At 4 o'clock it was mostly dry and there was no issue, that's from testimony . . . .
>
> And that there isn't any evidence, simply no evidence that the defendants had actual or constructive knowledge of the hazardous condition on the sidewalk in which the accident occurred. I don't think the mere fact of a freeze and refreeze is enough notice especially when you haven't had any issues prior to that for several days.

She then ruled:

> I think at this point in time [Ms. Avissar] has failed to show in this particular case, the plaintiff, that either the management company or the condominium Westlake or Scapers had actual constructive knowledge[5] of the alleged hazard's existence in this case, and therefore, I'm going to grant the summary of judgment for the defendants in this case.
>
> I think that given the facts of this case I just don't think that there's any evidence. I understand you have an expert, but I just don't think that there's any evidence of actual constructive knowledge. So, I'm going to grant

[4] The trial judge appeared to be referring, in her oral opinion to two cases, both of which concerned slip-and-falls on black ice, about which she had discussed earlier in the proceedings: *Honolulu Ltd. v. Cain*, 244 Md. 590 (1966) and *Raff v. Acme Markets, Inc.*, 247 Md. 591 (1967).

[5] We have no idea, because no one attempted to correct the transcript, as to whether the trial judge was distinguishing actual from constructive notice in her ruling or actually meant "actual constructive notice."

the motion.

A party is entitled to summary judgment when "there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law." Rule 2–501(a).[6] The Court of Appeals has explained that the standard for appellate review of a grant of summary judgment is "to determine whether the trial court was legally correct." *Maryland Cas. Co. v. Blackstone Intern. Ltd.*, 442 Md. 685, 694 (2015) (citation omitted). "Thus, we must first ascertain, independently, whether a dispute of material fact exists in the record on appeal." *Macias v. Summit Mgmt. Inc.*, 243 Md. App. 294, 313 (2019) (citations omitted). We construe facts in the record and all reasonable inferences, which may be drawn from them, in the light most favorable to the non-moving party. *Id.* In our analysis, "we consider only the grounds for granting summary judgment relied upon by the court." *Id.*

Ms. Avissar, herein, asserts that the trial court erred by discounting evidence by

[6] Rule 2-501(a), which governs motions for summary judgment, provides:

> (a) **Motion.** Any party may file a written motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law. The motion shall be supported by affidavit if it is (1) filed before the day on which the adverse party's initial pleading or motion is filed or (2) based on facts not contained in the record. A motion for summary judgment may not be filed: (A) after any evidence is received at trial on the merits, or (B) unless permission of the court is granted, after the deadline for dispositive motions specified in the scheduling order entered pursuant to Rule 2-504(b)(1)(E).

which a jury could have concluded that Westlake, Quiza, and Scapers, jointly and severally, had constructive knowledge of the existence of the black ice upon which she alleges she fell. She relies most heavily on paragraph 19 of Mr. Allin's affidavit, in which he proffers that:

> Ms. Avissar's fall occurred at the bottom of a slight grade where snow melt would naturally drain when the temperature rose above freezing and then re-froze when the temperature dropped shortly after sundown.

Each of the appellants counters that there was not only no evidence presented as to the source of the black ice on which Ms. Avissar allegedly fell but that there was also no evidence, were black ice present, regarding the duration of its existence.

In order to establish negligence in a slip-and-fall case, four elements must be proven: 1) that the tort-feasor was under a duty to protect the plaintiff from injury; 2) that the tort-feasor breached that duty; 3) that the party seeking damages suffered an actual injury; and 4) that the injury was the proximate result of the tort-feasor's breach. *Joseph v. Bozzuto Mgmt. Co.*, 173 Md. App. 305, 314 (2007).

In order to establish the second element of negligence, breach, the proponent in a slip-and-fall case must establish "not only that a dangerous condition existed but also that the [landowner or its agent] 'had actual or constructive knowledge of the dangerous condition and that the knowledge was gained in sufficient time to give [them] the opportunity to remove it or warn the [injured party]." *Id.* at 315 (quoting *Rehn v. Westfield Am.*, 153 Md. App. 586, 593 (2003).

Constructive knowledge of a hazard requires proof of conditions sufficient to give rise to the ability to have discovered the peril:

> It is not necessary that there be proof that the inviter had actual knowledge of the conditions creating the peril; it is enough if it appear that it could have discovered them by the exercise of ordinary care, so that, if it is shown that the conditions existed for a time sufficient to permit one, under a duty to know of them, to discover them, had he exercised reasonable care, his failure to discover them may in itself be evidence of negligence sufficient to charge him with knowledge of them.

Deering Woods Condo. Ass'n v. Spoon, 377 Md. 250, 264 (2003) (citation omitted).

All parties agree that the pivotal issue before us is whether Westlake, Quiza, and Scapers had constructive notice of the existence of black ice where Ms. Avissar fell. Our jurisprudence regarding constructive notice of black ice began with the Court of Appeals case, *Honolulu Ltd. v. Cain*, 244 Md. 590 (1966). In that case, Ms. Cain was injured when she slipped and fell on ice, which had formed in the parking lot of a shopping center, which was owned by Honolulu Limited. *Id.* at 594. A snow removal company, hired by the owner, had piled snow, which it had previously removed from the parking lot, along the northwestern end of the parking lot. *Id.* at 595. The only drains into which water could flow from the parking lot were located in the southeastern end of the parking lot, and "[t]he parking lot was gently graded so that water would run from the melting snow on the northwest corner of the parking area, across the lot, to these drains." *Id.* Prior to trial, the Circuit Court had ruled that, "there was sufficient evidence to go to the jury on the issue of the owner's primary negligence," and, following a jury trial, the owner of the shopping

center appealed to the Court of Appeals. *Id.* at 594.

Before the Court, Honolulu Limited argued that the ice on which Ms. Cain had slipped had not existed long enough before the accident for it to be discovered. *Id.* at 598. The Court rejected the owner's argument, adding that the jury could have concluded that reasonable care required salting of the area, as precautionary before the formation of the ice:

> Although the ice on which Ms. Cain slipped formed only 15 or 20 minutes before the accident, the defendant had knowledge that water would flow from melting snow across the lot. It knew also that it was likely on February evenings the water was apt to freeze. In these circumstances, it is immaterial that the ice formed only a short time before the plaintiff fell on it. The jury could have found that reasonable care demanded that the wet area be salted, as a precaution, before the ice had formed.

Id. The Court held that evidence of Honolulu Limited's knowledge of the topography of the site and the fact that water would flow in a certain direction, was sufficient to go to the jury on the issue of constructive knowledge of an ice hazard.

The next year, the Court of Appeals decided *Raff v. Acme Markets, Inc.*, 247 Md. 591 (1967). Ms. Raff had slipped and fallen on ice, which she had encountered on a ramp on leaving Acme Markets. In *Raff*, unlike in *Honolulu Limited*, neither Acme Markets nor the owner of the store's shopping center had removed the accumulated snow and ice from the parking lot or walkways prior to Ms. Raff's injury. At the time of the accident, the patch of ice on which Ms. Raff slipped had been obscured by a layer of snow. *Id.* at 594. At the close of Ms. Raff's case, the trial judge issued a directed verdict, finding that there was

insufficient evidence of negligence and that Ms. Raff was contributorily negligent. *Id.* at 594-95. Ms. Raff appealed.

Before the Court of Appeals, the owners of Acme Markets and the shopping center argued that there was "no evidence to support a finding that it knew or by the exercise of reasonable care could have known of the hazardous condition of the ramp." *Id.* at 595. Despite the fact that snow and ice had been present outside of the store for several days, the owners, who appeared to have emphasized the fact that the ice on which Ms. Raff fell was covered by a thin layer of snow, asserted that, "it would be pure speculation [that they] would have had an opportunity to observe and remedy the condition[.]" *Id.*

The Court of Appeals rejected the owners' arguments, noting that they had made no effort to clear snow that had fallen five days before Ms. Raff fell, as well as the fact that, during the trial, Ms. Raff had presented weather data, which revealed that freeze-thaw conditions had existed for several days prior to the accident. *Id.* at 597. The Court concluded that the hazard had existed for a sufficient time for Acme to have discovered it through the exercise of reasonable care: "Even a knowing glance through the front door would have resulted in the discovery of snow on the ramp. If there had been no snow then the ice would have been visible. A little sand or salt could have mitigated and perhaps eliminated the hazardous condition." *Id.*

We took up the black ice cudgel in *Reitzick v. Ellen Realty, Inc.*, 30 Md. App. 273 (1976), in which we considered whether a landlord had constructive notice of ice upon which a tenant had slipped and fallen. Two days prior to the incident, three inches of snow

had fallen outside of the apartment complex where Ms. Reitzick resided and the day before the accident, snow had been cleared from and piled alongside the sidewalk where she fell. *Id.* at 275. Ms. Reitzick testified that the sidewalks were clear when she left for work the morning before the accident, but that when she returned from work "in the early hours of November 14, she slipped and fell while stepping onto the sidewalk." *Id.* At the close of her case, the trial judge granted the owner's motion for a directed verdict, and Ms. Reitzick appealed. *Id.*

We affirmed the judgment of the trial court, having determined that the evidence that had been presented was insufficient to permit the jury to find that the landlord had constructive notice of the peril. *Id.* at 277. In so doing, we distinguished Ms. Reitzick's case from that of Ms. Cain in *Honolulu Limited*, in that "the case before us contains no evidence . . . of any peculiar grading or other physical attribute of the area which could suddenly engender a dangerous condition (as in [*Honolulu Limited*])." *Id.*

Almost thirty years later, in *Deering Woods Condominium Ass'n v. Spoon*, 377 Md. 250 (2003), another summary judgment case as this one, the Court of Appeals was asked to determine whether a landowner, Columbia Association, had constructive notice of icy conditions. In *Deering Woods*, Ms. Spoon had been injured after slipping on ice, which had formed from water that had originated within the condominium complex in which she resided and flowed across a path, which was located on land owned by Columbia Association, on which she had been walking. *Id.* at 255. Ms. Spoon had sued the owner of the condominium complex, its management company, and Columbia Association, which

owned and was responsible for maintaining pathways, including the removal of snow, on approximately 3,000 acres of open space. *Id.* at 254.

In its motion for summary judgment, Columbia Association had argued that it had no actual or constructive notice of the ice on which Ms. Spoon had slipped, because "it 'cannot be everywhere, all the time, to make sure that every drop of water doesn't become ice.'" *Id.* at 259. The trial court, following a hearing, granted summary judgment to Columbia Association, concluding that Ms. Spoon had failed to present evidence that Columbia Association had constructive notice of ice at the site of her fall. *Id.* at 260.

We reversed, finding that agents of Columbia Association "were aware, or should have been, of the possibility of water draining [across the accident site]," such that Columbia Association had constructive knowledge of the hazard and had a duty to "warn [Ms. Spoon] or to make the pathway safe." *Id.* at 261 (second alteration in original).

The Court of Appeals, however, reversed our decision, emphasizing that similar conditions were ubiquitous on Columbia Association property: "[t]here is neither lay testimony nor expert opinion that the Site was in any way unique in comparison to the 'literally thousands' of crossings in Columbia where surface water flows over [Columbia Association] open space to streams." *Id.* at 268. The Court also observed that since "the ice on which Ms. Spoon fell may have formed during the night preceding the accident, . . . only continuous inspections by [Columbia Association] would have discovered it." *Id.* at 270. Since Columbia Association did not have a duty to continuously inspect the pathways

on its land, the Court reasoned, it lacked constructive notice of the conditions at the location of Ms. Spoon's fall. *Id.*

In the present case, the grant of summary judgment measured against our jurisprudence yields the conclusion that it was entered in error. Paragraph 19 of Mr. Allin's affidavit queued up a triable dispute of material fact, because he opined about specific topographic and climatological conditions:

> Ms. Avissar's fall occurred at the bottom of a slight grade where snow melt would naturally drain when the temperature rose above freezing and then re-froze when the temperature dropped shortly after sundown.

Ms. Avissar, thus, unlike Ms. Reitzick, presented evidence of a "peculiar grading or other physical attribute of the area which could suddenly engender a dangerous condition." *Reitzick v. Ellen Realty Inc.*, 30 Md. App. at 277. Like the fact pattern in *Honolulu Limited*, "knowledge of this drainage pattern, and knowing that on [January] evenings water is likely to freeze," could lead a jury to conclude that snowmelt had collected and frozen at the site of Ms. Avissar's fall and that Westlake, Quiza, and/or Scapers, jointly and severally, were negligent. *Honolulu Ltd.*, 244 Md. at 596-97. *See also Raff v. Acme Mkts., Inc.*, 247 Md. at 597. The trial court's determination that Ms. Avissar had failed to present evidence that the location at which she alleged that she fell was an area "where water pools or drains[,]" was in error.

Deering Woods is inapposite to save the grant of summary judgment, because Columbia Association, as the owner of a vast amount of land, upon which an extensive

series of pathways existed, "had no duty continuously to inspect[.]" *Deering Woods*, 377 Md. at 270. The nature of the premises in *Deering Woods* was totally dissimilar from the instant site, so that the duty to inspect remains in issue in the present case.

As a result, we shall reverse the grant of summary judgment to Westlake, Quiza, and Scapers, because Ms. Avissar has presented a triable dispute of fact.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. COSTS TO BE PAID BY APPELLEES.